

**ARTICLES**

**DECLARATIONS OF UNCONSTITUTIONALITY IN INDIA AND THE U.K.: COMPARING THE SPACE FOR POLITICAL RESPONSE**

*Chintan Chandrachud\**

TABLE OF CONTENTS

I. INTRODUCTION ..... 311

II. CONSTITUTIONAL REMEDIES IN INDIA AND THE U.K. .... 314

    A. *India* ..... 314

        1. *The Presumption of Constitutionality and Its Impact on Statutory Interpretation* ..... 315

        2. *The Power to Make Declarations of Unconstitutionality* .... 317

        3. *The Relationship Between Statutory Interpretation and Declarations of Unconstitutionality*..... 318

    B. *The U.K.* ..... 318

        1. *The Interpretive Power under Section 3* ..... 319

        2. *Declarations of Unconstitutionality: HRA Section 4* ..... 321

        3. *The Relationship Between Sections 3 and 4* ..... 323

        4. *The Three Stage Process of Review* ..... 324

III. INDIA: POLITICAL RESPONSES TO DECLARATIONS OF UNCONSTITUTIONALITY ..... 326

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\* PhD Candidate in Law, University of Cambridge; BCL, MPhil, University of Oxford; BLS, LLB, Government Law College, Mumbai. Aileen Kavanagh offered guidance and suggestions throughout the process of writing this Article. I am grateful to Nicholas Bamforth, Mark Elliott, Tarunabh Khaitan and Dhvani Mehta for their suggestions on earlier drafts. Participants at the Conference on Legal Research Methods in April 2013 at the University of Oxford also offered useful comments. Courtney Broussard and the other editors of this journal provided excellent editorial assistance. But all errors remain mine. A modified version of Part IV of this Article appeared in PUBLIC LAW (2014).

A.	<i>Fundamental Rights Amendments</i> .....	327
1.	<i>The Nature of the Amending Power</i> .....	327
2.	<i>The Doctrine of Eclipse and Specific Savings Clauses</i> .....	329
3.	<i>Fundamental Rights Amendments as a Response Mechanism</i> .....	332
4.	<i>Scope and Limitations of the Amending Power</i> .....	337
B.	<i>Ninth Schedule Amendments</i> .....	341
1.	<i>Article 31B and the Ninth Schedule</i> .....	341
2.	<i>The Ninth Schedule as a Parliamentary Response Mechanism</i> .....	342
3.	<i>Reconciling the Conflict Between the Basic Structure Case and the Ninth Schedule</i> .....	344
C.	<i>Assessing the Space for Parliamentary Response After Coelho</i> .....	346
IV.	THE U.K.: POLITICAL RESPONSES TO DECLARATIONS OF UNCONSTITUTIONALITY .....	349
A.	<i>Two Connotations of Space</i> .....	349
B.	<i>Declarations of Unconstitutionality in Practice</i> .....	350
1.	<i>Section 4 of the HRA</i> .....	350
2.	<i>The Impact of Section 4 on the Legislative Process</i> .....	351
3.	<i>The Nexus Between Declarations of Unconstitutionality and Expected Responses</i> .....	356
C.	<i>Responses to Declarations of Unconstitutionality</i> .....	362
1.	<i>The Limited Decisional Space and Remedial Space of Parliament and Government</i> .....	362
2.	<i>The Strasbourg Court Dimension</i> .....	366
3.	<i>A Constitutional Convention or Atrophy of Constitutional Power</i> .....	368
V.	A COMPARISON OF THE SPACE AVAILABLE FOR POLITICAL RESPONSES .....	370
A.	<i>Comparing Decisional Space in India and the U.K.</i> .....	371
B.	<i>Remedial Space in India and the U.K.: The Room for Maneuver</i> .....	374
C.	<i>The Capacity to Respond: The Constitutional Convention Question</i> .....	377
VI.	CONCLUSION .....	380

## I. INTRODUCTION

Judicial review enables constitutional courts to test primary legislation for compliance with fundamental rights. The form in which judicial review manifests itself has been a subject of widespread academic scholarship for decades.<sup>1</sup> In recent years, this has been coupled with a proliferation of literature on political responses to judicial review.<sup>2</sup> Scholars have begun to ask whether, when, and how governments and legislatures should respond to judgments holding legislation unconstitutional.

This Article seeks to contribute to the scholarship in this upcoming sphere of political responses to judicial review. The focus will be on two jurisdictions, which lie on opposite ends of the “strong form-weak form” spectrum of judicial review—India and the United Kingdom. Indian courts, like their United States counterparts,<sup>3</sup> have the power to “strike down” any legislation that fails to comply with constitutional rights—a strong form power of judicial review which many perceive to place courts in the driving seat of constitutional politics. However, under the U.K. Human Rights Act 1998 (HRA), courts can only make a non-binding declaration of incompatibility when legislation passed by Parliament is incompliant with the rights under the European Convention on Human Rights (Convention).<sup>4</sup> This form of review is commonly considered weak, since it permits Westminster Parliament to decide what, if anything, to do about the incompatibility. Although there are vibrant streams of constitutional scholarship in both jurisdictions, no recent academic work has explicitly compared political responses to judicial review in India and the U.K.

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<sup>1</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006); Richard H. Fallon, Jr., *The Core of An Uneasy Case for Judicial Review*, 121 *HARV. L. REV.* 1693 (2008).

<sup>2</sup> MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008); ARUNA SATHANAPALLY, *BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION* (2012); Christine Bateup, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 *HASTINGS INT'L & COMP. L. REV.* 529 (2009); Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257 (2005).

<sup>3</sup> Note, however, that judicial review is far more decentralized in the United States. Leaving aside some administrative tribunals, only the Supreme Court and High Courts can strike down legislation in India. In the U.S., “any judge of any court, in any case, or at any time, at the behest of any litigating party” can strike down a law (Martin J. Shapiro & Alec Stone Sweet, *The New Constitutional Politics of Europe*, 26 *COMP. POL. STUD.* 397 (1994)).

<sup>4</sup> Human Rights Act, 1998, c. 42, §§ 3–4 (U.K.).

Throughout this Article, “declarations of unconstitutionality” will be employed as a jurisdiction-neutral expression to encompass two distinct constitutional remedies: the power to strike down legislation in India and to make declarations of incompatibility in the U.K. It is worth acknowledging that these remedies have different effects: one leads to the immediate disapplication of the statute while the other has no automatic legal consequence.<sup>5</sup> Having said that, in both India and the U.K., courts are empowered to *find* legislation unconstitutional, notwithstanding that the consequences of such findings vary. Courts in both jurisdictions perceive this as an accurate depiction of the judiciary’s role.<sup>6</sup>

Certain points of contrast in the constitutional systems of India and the U.K. make a comparison between the two interesting. The power to strike down legislation that is inconsistent with India’s Constitution of 1949 is considered an exposition of strong form “U.S.-style” judicial review. The constitutional context to this power is supplied by the increasing influence and legitimacy of Indian courts in recent decades, prompting scholars to christen India as a “juristocracy”<sup>7</sup> or a state characterized by judicial sovereignty<sup>8</sup> or supremacy,<sup>9</sup> and even “judicial dictatorship.”<sup>10</sup> On the other hand, declarations of incompatibility under the HRA, which were intentionally kept advisory in effect, are considered an exemplar of weak form judicial review. The HRA forms a cornerstone of U.K.’s multi-layered<sup>11</sup> uncodified<sup>12</sup> constitutional system and is ascribed different labels—

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<sup>5</sup> Nicholas Bamforth and Mark Elliott usefully put to me that “declarations of unconstitutionality” may not be an appropriate expression, given the different nature of the two constitutional remedies in India and the U.K. However, the expression focuses on the finding of unconstitutionality in both jurisdictions, regardless of their effects on legislation.

<sup>6</sup> For example, in *R (Chester) v. Secretary of State*, [2013] UKSC 63 [90], Baroness Hale observed that it was the U.K. Supreme Court’s task under the HRA to declare discriminatory legislation unconstitutional. See also *Philips Electronics India Ltd. v. State of Karnataka*, (2009) 20 S.T.T. 314, 42–43 (India); *Gov’t of Andhra Pradesh v. Laxmi Devi*, A.I.R. 2008 S.C. 1640, 33 (India); *T. Venkata Reddy v. State of Andhra Pradesh*, A.I.R. 1985 S.C. 724, 14 (India); *In re Delhi Laws Act, 1912*, A.I.R. 1951 S.C. 332, 250 (India).

<sup>7</sup> Pratap Bhanu Mehta, Lecture at Brown University, On the Construction of Judicial Authority: Courts and Public Reason in India (Oct. 5, 2009); Sanjay Ruparelia, *A Progressive Juristocracy? The Unexpected Social Activism of India’s Supreme Court* 33 (Helen Kellogg Institute for International Studies, Working Paper No. 391, 2013).

<sup>8</sup> Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70 (2007).

<sup>9</sup> Raju Ramachandran, *Judicial Supremacy and the Collegium*, 642 SEMINAR 64 (2013).

<sup>10</sup> Arundhati Roy, *Scandal in the Palace*, OUTLOOK INDIA (Oct. 1, 2007).

<sup>11</sup> Nicholas Bamforth & Peter Leyland, *Introduction to PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION* 1 (Nicholas Bamforth & Peter Leyland eds., 2003).

among them, the “new commonwealth model of constitutionalism,”<sup>13</sup> the “third wave bill of rights,”<sup>14</sup> the “democratic dialogue” model<sup>15</sup> and the “parliamentary bill of rights”<sup>16</sup> model. Parliamentary sovereignty, which has long remained one of the main planks of British constitutional discourse, continues to raise its head in discussions on the HRA in general, and section 4 in particular.<sup>17</sup> These two dichotomies, strong form review versus weak form review and judicial supremacy versus parliamentary sovereignty, provide a fascinating canvass for comparisons of political responses to declarations of unconstitutionality. The findings of this article tend to call into question, or at least undermine the force of, these dichotomies.

The notion of the space available for political responses to declarations of unconstitutionality is the dominant theme of this Article. “Space” is an open textured term susceptible to a range of different meanings. With the objective of sustaining a consistent focus, it will be ascribed two distinct connotations. The first connotation of “space,” which will be referred to as *decisional space*, asks the “whether” question—can political actors in both jurisdictions respond to declarations of unconstitutionality to begin with? The second connotation, *remedial space*, asks the “how” question—what are the different ways in which political actors can respond to declarations of unconstitutionality?

With this background, the Article will proceed as follows. Part II lays the foundation by briefly examining the toolkit of constitutional remedies available to Indian and U.K. courts when they find that primary legislation contravenes fundamental rights under the Indian Constitution and Convention rights respectively. Part III focuses on two mechanisms through which the Parliament of India has responded to declarations of unconstitutionality: fundamental rights amendments and Ninth Schedule

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<sup>12</sup> “Uncodified” is deliberately used instead of the word “unwritten,” since it better conveys the idea that the constitution, though written in several different places, is not written in any single canonical text.

<sup>13</sup> STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

<sup>14</sup> Francesca Klug, *The Human Rights Act – a “Third Way” or “Third Wave” Bill of Rights*, 4 *EURO. HUM. RTS. L. REV.* 361 (2001).

<sup>15</sup> ALISON YOUNG, *PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT*, at chs. 4–5 (2009).

<sup>16</sup> Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 *MOD. L. REV.* 7 (2006).

<sup>17</sup> Nicholas Bamforth, *Parliamentary Sovereignty and the Human Rights Act 1998*, [1998] *P.L.* 572; YOUNG, *supra* note 15; N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 *INT’L J. CONST. L.* 144 (2011).

amendments. Part IV briefly studies declarations of unconstitutionality in the U.K., before determining the space available to Parliament and government for responding to such declarations. Part V brings together the two preceding sections by analytically comparing the space for political actors to respond to declarations of unconstitutionality in India and the U.K. Concluding comments are made in the final section.

## II. CONSTITUTIONAL REMEDIES IN INDIA AND THE U.K.

A comparison of the space available for political responses to declarations of unconstitutionality in India and the U.K. cannot be meaningful without situating such declarations in their constitutional context. This Part seeks to supply that context by examining the toolkit of constitutional remedies available to courts in India and the U.K. for legislative transgressions of the fundamental rights embodied in Part III of the Indian Constitution and Convention rights respectively.

### A. India

This Part will focus on the judicial remedies available to Indian courts dealing with primary legislation that contravenes fundamental rights. Of course, addressing fundamental-rights-violating primary legislation is not within the exclusive domain of courts. Other forms of recourse (for example, the ballot box in a representative democracy<sup>18</sup> or the pressure of public opinion) may perform a similar task. Since this Article compares political responses to *judicial* declarations of unconstitutionality in India and the U.K., the discussion that follows will focus on the tools and remedial measures available to Indian courts when deciding constitutional challenges to primary legislation.<sup>19</sup>

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<sup>18</sup> Shripati mentions that the right to vote has been used by citizens on at least one notable occasion to defeat the incumbent government accused of committing widespread human rights violations. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)*, 14 AM. U. INT'L L. REV. 413, 452 (1998). Some of these human rights violations were committed through the powers conferred by the Maintenance of Internal Security Act, 1971, which was repealed after the national elections in 1977.

<sup>19</sup> This Part will eschew discussions of what Basu describes as “self-imposed limits” on judicial review of legislation, such as the rules of standing and *stare decisis*. DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 758 (8th ed. 2007). Basu considers the presumption in favor of constitutionality of legislation as a self-imposed limit on judicial

*1. The Presumption of Constitutionality and Its Impact on Statutory Interpretation*

As a starting point when deciding cases involving a constitutional challenge to legislation, courts presume that the impugned statute is constitutionally valid. This presumption takes different forms. The Supreme Court has repeatedly recognized that it must presume that the legislature, on account of its institutional position, understands and appreciates the needs of its people, that its laws are directed to problems made manifest by experience, and that even its discriminations and classifications are based on adequate grounds.<sup>20</sup> In order to avoid a “doctrinaire approach” which might “choke all beneficial legislation,”<sup>21</sup> courts have placed the burden of showing that there has been a clear transgression of fundamental rights on the litigant that challenges the statute.<sup>22</sup> The court can consider matters of common knowledge, common report, and socio-political context in order to sustain the presumption of constitutionality.<sup>23</sup> It may also assume every state of facts that can be considered to exist at the time of enactment of the statute.<sup>24</sup> The presumption of constitutionality holds greater influence in the review of economic and social legislation as against statutes affecting civil liberties.<sup>25</sup> According to the Supreme Court of India, there is much to learn from the *Lochner* era<sup>26</sup> in the U.S., and courts should be slow to interfere with legislative decisions of economic policy.<sup>27</sup>

The presumption of constitutionality also influences the interpretation of legislation under constitutional challenge. Where multiple interpretations of a statute are possible, courts have the functional flexibility to adopt the interpretation that complies with the constitutional mandate.<sup>28</sup> Where

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review of legislation. Being centrally relevant to the discussion, this issue will be considered in the Part nonetheless.

<sup>20</sup> See, e.g., *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490 (India); *Municipal Corporation of Ahmedabad v. Usmanbhai*, A.I.R. 1986 S.C. 1205 (India).

<sup>21</sup> *Harman Singh v. Reg'l Transp. Auth.*, A.I.R. 1954 S.C. 190 (India).

<sup>22</sup> *Chiranjit Lal Chowdhuri v. Union of India*, A.I.R. 1951 S.C. 41 (India).

<sup>23</sup> *Dalmia v. Justice Tendolkar*, A.I.R. 1958 S.C. 358 (India).

<sup>24</sup> *Id.*

<sup>25</sup> *Gov't of Andhra Pradesh v. Laxmi Devi*, (2008) 4 S.C.C. 720 ¶¶ 73, 88 (India).

<sup>26</sup> See generally MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY* (2001).

<sup>27</sup> *Gov't of Andhra Pradesh v. Laxmi Devi*, (2008) 4 S.C.C. 720. See also P.N. Tiwari v. *Union of India*, [2004] 265 I.T.R. 224 (All.).

<sup>28</sup> *Sunil Batra v. Delhi Admin.*, A.I.R. 1978 S.C. 1675; *Bhanu Athaiya v. Commander Kaushal*, 1980 (82) Bom. L.R. 12, 10 (India); *Chettiar v. Narsimhalu*, A.I.R. 1980 Mad. 305, 10 (India); *Githa Hariharan v. Reserve Bank of India*, A.I.R. 1999 S.C. 1149, 9 (India).

statutory language is capable of being read and interpreted restrictively or expansively so as to make it fall within constitutional limits, it should be so interpreted.<sup>29</sup>

The extent to which courts would be willing to stretch their interpretative powers in order to save statutes is not clear. In a frequently cited passage, the Supreme Court observed that where a statutory provision cannot be saved because its plain meaning is clear, courts should not hesitate to declare it unconstitutional.<sup>30</sup> Courts cannot protect legislation from constitutional challenge by twisting or distorting statutory language.<sup>31</sup> However, on other occasions, it has been held that an interpretive option that saves the statute from unconstitutionality may be preferred even if it requires straining the language of the statute.<sup>32</sup>

Thus, what is clear from the case law is that when two plausible interpretations of a statutory provision exist, the court may adopt the interpretation that protects the provision from unconstitutionality. It is also fairly clear that courts cannot protect a statutory provision from invalidation by construing it in a manner that is simply not justified by its plain meaning. Whether the court can strain (but not distort) statutory language bearing in mind the same objective is contentious. More importantly, where the dividing line between a “strain” and a “distortion” of language lies remains unanswered, and is left to the circumstances of each case.

The presumption of constitutionality can be rebutted with prima facie evidence that a statutory provision transgresses fundamental rights.<sup>33</sup> It is then left to the state to establish that the provision falls within constitutional limits. Moreover, the Supreme Court has on some occasions leaned in favor of negating the presumption of constitutionality and employing the “strict

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<sup>29</sup> *Kedar Nath v. State of Bihar*, (1962) 2 S.C.R. Supp. 769, 26–27 (India); *Comm’r of Sales Tax v. Radhakrishnan*, (1979) 2 S.C.C. 249, 15 (India); *B.R. Enterprises v. State of Uttar Pradesh*, A.I.R. 1999 S.C. 1867, 87 (India); *Indra Das v. State of Assam*, (2011) 3 S.C.C. 380, 24 (India).

<sup>30</sup> *Calcutta Gujarati Educ. Soc’y v. Calcutta Mun. Corp.*, A.I.R. 2003 S.C. 4278, 35 (India) (citing *B.R. Enters. v. State of Uttar Pradesh*, A.I.R. 1999 S.C. 1867, 87 (India)); *Union of India v. Ind-Swift Labs.*, (2011) 2 S.C.R. 1087, 18 (India).

<sup>31</sup> *Namit Sharma v. Union of India*, (2013) 1 S.C.C. 745 (India) is a notable exception. In this case, the Supreme Court distorted the language of Sections 12(6) and 15(6) of the Right to Information Act (2005) under the guise of “reading down” these provisions. See A.G. Noorani, *Judiciary’s Assault on Democracy*, THE HINDU, Jan. 12, 2013, available at <http://www.thehindu.com/opinion/lead/judiciarys-assault-on-democracy/article4299042.ece>. The Supreme Court has admitted a petition seeking a review of this judgment.

<sup>32</sup> *State of Kerala v. M.K. Krishnan Nair*, A.I.R. 1978 S.C. 747 (India).

<sup>33</sup> *Saghir Ahmad v. State of Uttar Pradesh*, A.I.R. 1954 S.C. 728, 27 (India).

scrutiny” standard to test the validity of legislation, although the circumstances in which this may be done are contested.<sup>34</sup>

## 2. *The Power to Make Declarations of Unconstitutionality*

It is beyond question that the Supreme Court and High Courts in India have the power to declare primary legislation unconstitutional.<sup>35</sup> There are four established grounds based on which primary legislation passed by Parliament or the state legislatures can be struck down or declared unconstitutional.<sup>36</sup> First, the legislature may not have had the power to enact the impugned statute, given the scheme of distribution of legislative powers between the Union and the states.<sup>37</sup> Second, the statute might be found to breach one or more fundamental rights embodied in Part III of the Constitution.<sup>38</sup> Third, the statute may contravene any other justiciable provision of the Constitution.<sup>39</sup> Fourth, the statute may be invalidated for having delegated an essential legislative function to the executive or another authority.<sup>40</sup> Since this part examines constitutional remedies available vis-à-

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<sup>34</sup> Raag Yadava, *Taking Rights Seriously – The Supreme Court on Strict Scrutiny*, 22 NAT’L L. SCH. INDIA REV. 147 (2010).

<sup>35</sup> However, the textual basis of the power to declare legislation unconstitutional is heavily contested. See Chintan Chandrachud, *Strike-Downs in India and Declarations of Incompatibility in the U.K.: Comparing the Space for Political Response* (2013) (thesis submitted to the Faculty of Law, University of Oxford).

<sup>36</sup> BASU, *supra* note 19, at 697. When a court declares legislation unconstitutional, its decision is legally binding and usually takes immediate effect. This results in the disapplication of the unconstitutional statute.

<sup>37</sup> The Seventh Schedule to the Constitution of India contains three lists outlining the distribution of legislative powers: the Union List (which includes matters on which Parliament has the exclusive power to legislate), the State List (which includes matters on which state legislatures have the exclusive power to legislate, except in certain circumstances) and the Concurrent List (which includes matters on which both Parliament and the state legislatures have the power to legislate).

<sup>38</sup> See, e.g., *R.C. Cooper v. Union of India*, A.I.R. 1970 S.C. 564 (India).

<sup>39</sup> See, e.g., *Atiabari Tea v. State of Assam*, A.I.R. 1961 S.C. 232 (India); *Sarbananda Sonowal v. Union of India*, (2005) 5 S.C.C. 665 (India). Part IV of the Constitution of India contains the Directive Principles of State Policy which, according to Article 37, are not enforceable in any court but are “nevertheless fundamental in the governance of the country.” Several Directive Principles have been indirectly enforced by being read into one or more fundamental rights under Part III.

<sup>40</sup> See, e.g., *In re Delhi Laws Act (1912)*, A.I.R. 1951 S.C. 332 (India). However, invalidation of a statute for excessive delegation is inextricably linked to a breach of the fundamental right to equality under Article 14 of the Constitution. *Trustees for the Improvement of Calcutta v. Chandra Sekhar*, A.I.R. 1977 S.C. 2034, 7 (India).

vis legislation that transgresses fundamental rights, the power to declare legislation unconstitutional on this ground alone will be considered.

*3. The Relationship Between Statutory Interpretation and Declarations of Unconstitutionality*

The nature of the relationship between the power to declare legislation unconstitutional and the interpretation of statutes has not been analyzed in sufficient detail in the existing scholarship and case law. As stated previously, when presented with two plausible interpretations of a statutory provision, the presumption of constitutionality makes the court lean in favor of the interpretation that preserves the provision. Problems begin to arise when the language of the provision does not comfortably permit an interpretation that complies with constitutional requirements. In such cases, it is left to the court to decide the extent to which it can permissibly interpret the statutory language at issue. However, where the statutory provision clearly breaches a fundamental right, courts will not be hesitant to declare it unconstitutional.

*B. The U.K.*

The HRA gave some rights in the Convention a special legal effect, with the aspiration of transforming them from rights available to British citizens to "British rights."<sup>41</sup> The objective of the HRA is to give further effect to the rights and freedoms embodied in Articles 2 through 12 and 14 of the Convention as well as Articles 1 through 3 of the First Protocol and Article 1 of the Thirteenth Protocol. Section 19 of the HRA provides for a preemptive measure to politically deter the enactment of legislation transgressing Convention rights. This section requires a Minister of the Crown to make a statement before the second reading of a bill to the effect that in his view, the provisions of the bill are compatible with the Convention rights, or that although he is unable to make a statement of compatibility, the government nevertheless wishes the House to proceed with the bill. This part seeks to describe and contextualize the remedial framework of the HRA with regard to breaches (or potential breaches) of Convention rights by enacted primary legislation.

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<sup>41</sup> Rights Brought Home: The Human Rights Bill, 1997, C.M. Bill 3782, cl. 1.14 (Gr. Brit.).

*1. The Interpretive Power under Section 3*

Section 3 of the HRA directs courts to read and give effect to primary and subordinate legislation in a manner compatible with Convention rights, “so far as it is possible to do so.”<sup>42</sup> It applies to legislation passed before and after the enforcement of the HRA.<sup>43</sup> Section 3 enhanced the influence of Convention rights in the process of interpretation. Rather than simply having to take them into account while interpreting ambiguous legislative provisions, courts would be required to interpret legislation so as to uphold Convention rights unless the legislation was so clearly incompatible that it would be impossible to do so.<sup>44</sup>

One of the most controversial aspects of the HRA is how Section 3 should itself be interpreted. Although most theorists agree that Section 3 involved a shift in the existing landscape of interpretation,<sup>45</sup> the full scope of the shift remains unclear. What does “so far as it is possible to do so” mean? Political and legislative history confirms that the word “possible” was not intended to be read as “reasonable.” An amendment, proposed by the opposition party, that courts should construe legislation in accordance with Convention rights so far as it was “reasonable” to do so was defeated, since the Labour government at the time wished for the declaration of unconstitutionality under Section 4<sup>46</sup> to be a remedy of last resort.<sup>47</sup>

In the early years of the HRA, Oliver argued that on a proper understanding Section 3 marked a shift in the focus of courts from upholding parliamentary intention to interpreting legislation in a Convention compliant manner, even if doing so was artificial and went beyond the intent of

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<sup>42</sup> However, settled case law indicates that Section 3 of the HRA comes into play only when the ordinary rules of interpretation, applied without reference to Section 3, render a statutory provision incompatible with Convention rights. *Poplar Hous. and Regeneration v. Donoghue*, 415 [2001] EWCA (Civ) 595.

<sup>43</sup> Section 3(2)(a) specifies that Section 3 of the HRA “applies to primary legislation and subordinate legislation whenever enacted.”

<sup>44</sup> *Rights Brought Home*, *supra* note 41, at cl. 2.7.

<sup>45</sup> Geoffrey Marshall, *Interpreting interpretation in the Human Rights Bill*, (1998) P.L. 167; Lord Steyn, *Incorporation and Devolution - A Few Reflections on the Changing Scene*, (1998) E.H.R.L.R. 153; AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 19 (2009)*.

<sup>46</sup> Section 4(2) of the HRA reads: “If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.”

<sup>47</sup> 313 PARL. DEB., H.C. (1998) 421–422 (U.K.).

lawmakers.<sup>48</sup> This argument requires qualification. As Kavanagh points out, there are two intentions at play in Section 3 cases: the intention of Parliament in enacting the impugned statute and the intention of Parliament in enacting Section 3 of the HRA.<sup>49</sup> Thus the shift in focus, if at all, is in the selection of the second intention over the first. Others also highlight that Section 3 is aimed at identifying the intention of Parliament with the rebuttable presumption that the legislature does not intend to breach Convention rights, given the “new constitutional setting” created by that provision.<sup>50</sup> According to Samuels, the judge must search for a “legitimate, justified, reasonable, and proportionate interpretation,” based on a broad rather than narrow legalistic approach.<sup>51</sup>

Courts have both “read down”<sup>52</sup> and read additional words<sup>53</sup> into legislation in order to save it from transgressing Convention rights.<sup>54</sup> As Lord Steyn observed in *R. v. A. (No 2)*,<sup>55</sup> Section 3 permitted courts to strain statutory language, read down express language, and implicate provisions to promote compliance with Convention rights. However, courts cannot depart from a fundamental feature of a statute<sup>56</sup> or radically alter its effect<sup>57</sup> as this breaches the boundary between interpretation and amendment. Nor can courts, through an act of “judicial vandalism,” squarely contradict parliamentary intent.<sup>58</sup> In the House of Lords’ seminal judgment in *Ghaidan v. Godin-Mendoza*,<sup>59</sup> it was emphasized by the majority, however, that the limits of the application of Section 3 extend up to the conceptual scheme of the legislation rather than the precise language used by parliamentary

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<sup>48</sup> DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UK 114 (2003).

<sup>49</sup> Aileen Kavanagh, *Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisited*, [2005] E.H.R.L.R. 259, 269.

<sup>50</sup> Philip Sales & Richard Ekins, *Rights-consistent Interpretation and the Human Rights Act 1998*, 127 L.Q.R. 217, 221 (Apr. 2011).

<sup>51</sup> Alec Samuels, *Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?*, 29(2) S.L.R. 130, 135 (2008).

<sup>52</sup> *R. v. Keogh*, [2007] EWCA (Crim) 528.

<sup>53</sup> *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30 (appeal taken from Eng.).

<sup>54</sup> OLIVER, *supra* note 48, at 114.

<sup>55</sup> [2002] 1 A.C. 45.

<sup>56</sup> *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, [2004] 2 A.C. 557 (appeal taken from Eng.); *In re S*, [2002] 2 A.C. 291 (H.L.).

<sup>57</sup> *Poplar Hous. & Regeneration v. Donoghue*, [2001] EWCA (Civ) 595 [76] (appeal taken from Eng.).

<sup>58</sup> *R (Anderson) v. S.S.H.D.*, [2003] 1 A.C. 837 (H.L.).

<sup>59</sup> *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, [2004] 2 A.C. 557 (appeal taken from Eng.).

draftsmen to give effect to that scheme.<sup>60</sup> Moreover, courts are not required to make decisions for which they are not institutionally equipped.<sup>61</sup>

What is discernible from the case law is that courts remain sensitive to context when determining the extent to which they are willing to mold statutory language and purpose.<sup>62</sup> This was made clear by Lord Hoffman's observation in *Wilkinson* that Section 3 was not intended to "have the effect of requiring the courts to give the language of statutes acontextual meanings."<sup>63</sup> Thus, developing a self-standing test independent of context would probably be a futile exercise.<sup>64</sup>

## 2. *Declarations of Unconstitutionality: HRA Section 4*

Section 4 of the HRA empowers courts<sup>65</sup> to issue a "declaration of incompatibility" (or a declaration of unconstitutionality, as I refer to it) when legislation<sup>66</sup> that cannot be interpreted in a Convention-compliant manner is inconsistent with a Convention right.<sup>67</sup> A declaration under Section 4 does not automatically result in the disapplication of the statute, but represents an important political and moral sanction.<sup>68</sup> According to the House of Lords, a declaration of unconstitutionality cannot be issued in abstraction or in the absence of victims whose rights have been compromised.<sup>69</sup>

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<sup>60</sup> KAVANAGH, *supra* note 45, at 52.

<sup>61</sup> Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [2004] 2 A.C. 557 (appeal taken from Eng.).

<sup>62</sup> Roger Masterman, *Interpretations, Declarations and Dialogue: Rights Protection Under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities*, [2009] P.L. 112.

<sup>63</sup> R (Wilkinson) v. Inland Revenue Commr's, [2005] UKHL 304 [17] (appeal taken from Eng.).

<sup>64</sup> T.R.S. Allan, *Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective*, 59 CLP 27 (2006).

<sup>65</sup> Human Rights Act, 1998, c. 42, § 4(5) (U.K.). Section 4(5) of the HRA specifies that only the following courts may issue declarations of unconstitutionality: the Supreme Court; the Judicial Committee of the Privy Council; the Court Martial Appeal Court; the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session (Scotland); the High Court or the Court of Appeal (England and Wales or Northern Ireland); the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.

<sup>66</sup> *Id.* § 4(1), (3). This encompasses primary legislation and subordinate legislation made in exercise of a power conferred by primary legislation, where such primary legislation prevents removal of the incompatibility. This section focuses on primary legislation.

<sup>67</sup> *Id.* § 4(2)–(3).

<sup>68</sup> *Id.* § 4(6).

<sup>69</sup> R (Rusbridger) v. AG, [2004] 1 A.C. 357 (H.L.) (appeal taken from Eng.).

The invocation of Section 4 statutorily activates a ministerial power to take fast-track remedial action.<sup>70</sup> Under Section 10 of the HRA, a Minister of the Crown may, if he finds compelling reasons to do so, make amendments to legislation as he considers necessary to remove an identified constitutional incompatibility.<sup>71</sup> Unless such an order is declared urgent, a remedial order can only be made when a draft of the order has been approved by a resolution of each House of Parliament.<sup>72</sup>

Declarations of unconstitutionality have been made in a diverse range of matters that include challenges to legislation that criminalized “attempted buggery” in Northern Ireland,<sup>73</sup> the statutory penalty regime for carriers who unknowingly transported clandestine entrants into the U.K.,<sup>74</sup> and the statutory detention of suspected international terrorists without charge or trial.<sup>75</sup>

There is a key difference between the judicial tools available under Section 3 and Section 4 of the HRA. Whereas a Section 3 Convention compliant interpretation operates retrospectively vis-à-vis the litigant and benefits her directly, a Section 4 declaration of unconstitutionality is not binding on the parties to the proceeding and “does not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given.”<sup>76</sup> But, it would be misleading to say that a litigant secures no benefit (whether political, legal, or otherwise) from a declaration of unconstitutionality. For instance, the government’s ensuing remedial measure may be applied retrospectively.<sup>77</sup> A narrower point is being made here: a declaration of unconstitutionality does not give rise to an *automatic* legal benefit for the litigant and has no *immediate* effect on her legal rights.<sup>78</sup> In this context, it is easy to understand the reason for which most litigants seek Section 3 remedies in preference to declarations of unconstitutionality.

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<sup>70</sup> See *id.* § 10(1).

<sup>71</sup> Human Rights Act, 1998, c. 42, § 10(2) (U.K.).

<sup>72</sup> *Id.* at sched. 2.

<sup>73</sup> *In re* Application by McR for Jud. Rev., [2002] NIQB 58 (N. Ir.).

<sup>74</sup> *Int'l Transp. Roth v. Sec'y of State*, [2002] EWCA (Civ) 158, [2003] Q.B. 728.

<sup>75</sup> *A v. Sec'y of State*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

<sup>76</sup> Human Rights Act, 1998, c. 42, § 4(6) (U.K.).

<sup>77</sup> See, for example, the remedial measures following the declarations of incompatibility issued in *Blood and Tarbuck v. Sec'y of State for Health* (unreported) and *R (Clift) v. S.S.H.D.*, [2006] UKHL 54, [2007] 1 A.C. 484 (appeal taken from Eng.).

<sup>78</sup> T.R.S. Allan, *Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism*, 9 INT'L J. CONST. L. 155 (2011).

This difference also plays an important role in the courts' decisions about which remedial measure to invoke.<sup>79</sup>

### 3. *The Relationship Between Sections 3 and 4*

The scope of Section 4 necessarily depends upon the breadth of Section 3. The broader and more pervasive the courts' power under Section 3, the narrower the room for their making declarations of unconstitutionality. Intuitively, Section 4 of the HRA seems to project the stronger judicial role in cases involving violations of Convention rights. However, this is misleading: the Section 3 power, if boldly construed, pushes the boundaries between interpretation and legislation.<sup>80</sup> The most that a court can do under Section 4 is to flag up the unconstitutionality, leaving it to the realm of political morality for it to be acted upon.

Loveland suggests that if Section 3 was to be construed as authorizing courts to interpret a statutory provision more expansively than its reasonable range of meanings would allow, then Section 4 would only become relevant vis-à-vis statutory provisions that are expressly intended to derogate from Convention rights.<sup>81</sup> According to this argument, Section 4 would be otiose as regards legislation passed before the HRA came into being. On the other hand, if Section 3 were to be interpreted as permitting the court to draw rights-compliant presumptions in gathering legislative intent, the boundary between Sections 3 and 4 would change.<sup>82</sup> So interpreted, the Section 4 power may be invoked when the scheme of the statute indicates legislative intent to defeat the presumption of rights-compliance and thus breach Convention rights.

Many others do not adopt the view that a statute or statutory provision needs to expressly override Convention rights in order for courts to invoke Section 4 instead of Section 3. Allan's view is that although Section 3 would be applicable in a "great majority of cases," when the *raison d'être* of the statutory provision violates the Convention, a declaration of unconstitutionality would be the apposite judicial response.<sup>83</sup> Theorists such

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<sup>79</sup> KAVANAGH, *supra* note 45, at 238.

<sup>80</sup> See HELEN FENWICK & RICHARD GLANCEY, CIVIL LIBERTIES AND HUMAN RIGHTS 173 (4th ed. 2007); Aileen Kavanagh, *The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998*, 24 O.J.L.S. 259 (2004).

<sup>81</sup> IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS 640 (6th ed. 2012).

<sup>82</sup> Sales & Ekins, *supra* note 50.

<sup>83</sup> Allan, *supra* note 64, at 41.

as Klug<sup>84</sup> and Nicol<sup>85</sup> advocate a broader role for declarations of unconstitutionality—one that promotes a healthy institutional dialogue rather than transform Section 4 into a leash on government. Kavanagh points out that it is unhelpful to pick sides between those who suggest that Section 4 should be employed as a remedy of last resort and others who argue that courts should be less hesitant in deploying Section 4 declarations.<sup>86</sup> A more meaningful inquiry would be to explore the factors that do or should influence the court's decision about which remedy to employ. These factors should include: which remedial course would better protect Convention Rights, whether the impugned statutory provision goes against the grain of the legislation, to what extent a Section 3 interpretation preserves legislative objectives, and whether legislative reform is imminent.<sup>87</sup>

#### 4. *The Three Stage Process of Review*

The discussion above sheds light on the similarities between Section 3 interpretation in the U.K. and the interpretation of statutes under constitutional challenge in India. In both jurisdictions, the starting point of analysis is the presumption that both parliaments intended to legislate in compliance with human rights. But, the analysis of the two countries then diverges. Indian courts are highly unlikely to resort to “reading in” by adding words to legislation.<sup>88</sup> As stated earlier, there are two kinds of intent at play here.<sup>89</sup> The first is the U.K. Parliament's intent in enacting Sections 3 and 4 of the HRA, and the Constituent Assembly of India's intent in conferring constitutional courts in India with the power to review legislation (constitutional intent). The second is the U.K. and Indian Parliaments' intent in enacting the impugned statute (statutory intent). Courts perceive an important difference between “reading down” and “reading in” legislation. With respect to the former, courts view their role as effectuating statutory

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<sup>84</sup> Francesca Klug, *Judicial Deference Under the Human Rights Act 1998*, 2 E.H.R.L.R. 125 (2003).

<sup>85</sup> Danny Nicol, *Statutory Interpretation and Human Rights after Anderson*, [2004] P.L. 274.

<sup>86</sup> KAVANAGH, *supra* note 45, at 123.

<sup>87</sup> *Id.* at 126, 142.

<sup>88</sup> *Union of India v. Deoki Aggarwal*, (1992) Supp. (1) S.C.C. 323, 14 (India); *B.R. Kapur v. State of Tamil Nadu & AMr.* (2001) 7 S.C.C. 231, 39 (India); *Calcutta Gujarati Educ. Soc'y v. Calcutta Mun. Corp.*, A.I.R. 2003 S.C. 4278, 35 (India); *Union of India v. Ind-Swift Labs.*, [2011] 2 S.C.R. 1087, 18 (India); *Tata Motors v. State of West Bengal*, (2010) 3 Cal. L.T. 1 (H.C.) [584].

<sup>89</sup> Kavanagh, *supra* note 49.

intent to the extent that it complies with constitutional intent.<sup>90</sup> In the latter, courts consider that they do something that extends beyond statutory intent, in order to preserve constitutional intent.<sup>91</sup> This could mean one of two things: when the court seeks to invoke “reading in” to broaden the application of a statute, either the legislature had applied its mind to the expansive application of a statute and decided not to do so, or it had not applied its mind to it at all. The overall effect of “reading in” and “reading down” does not appear to be very different. In both cases, constitutional intent is preserved and statutory intent is preserved to the greatest extent possible. But on the face of it, “reading in” words seems more radical as it involves extending statutory intent to undesired or unexpected areas, whereas “reading down” language involves limiting statutory intent to some desired and expected areas. This is one of the reasons why Indian courts are reluctant to read words into legislation in the absence of Section 3-type constitutional intent.

Courts in India and the U.K. adopt a three-staged approach in cases where the conformity of primary legislation with fundamental rights is in question. To begin with, they ask whether, according to ordinary principles of interpretation, the statute complies with fundamental rights or Convention rights. If it does, the enquiry would end here in both jurisdictions. If it does not, then courts would turn to interpretative techniques (such as “reading down,” and in the U.K., “reading in”) to protect the statute from transgressing fundamental rights or Convention rights. Finally, if interpretative techniques cannot be used to protect the statute, then the impugned statutory provisions would be declared unconstitutional.<sup>92</sup>

The critical difference between both jurisdictions in this three-stage process of review is the point at which courts proceed from the second stage to the third. The declaration of unconstitutionality is triggered earlier in India than in the U.K. Unlike courts in the U.K., Indian courts would not be hesitant to pronounce legislation unconstitutional when its plain meaning

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<sup>90</sup> For the difference between “reading down” and “reading in,” see Richard Edwards, *Reading Down Legislation under the Human Rights Act*, 20 L.S. 353, 367 (2000).

<sup>91</sup> As Hogg posits, “reading in” involves the insertion “of words that Parliament never enacted” and is therefore “a technique of judicial amendment.” PETER HOGG, *CONSTITUTIONAL LAW OF CANADA* (5th ed. 2007).

<sup>92</sup> Elsewhere, I have argued that at the cusp of stages two and three, Indian courts sometimes step back to stage one in order to avoid exercising the power to strike down legislation. Chintan Chandrachud, *Constitutional Adjudication in the Shadow of the Remedy: the Indian Constitution and the U.K. Human Rights Act Compared*, Lecture at the Harvard Law School (Oct. 7, 2014).

contravenes constitutional rights.<sup>93</sup> Case law suggests that this would not be enough in the U.K.; in fact, courts would be willing to derogate from the plain meaning of legislation so long as their interpretation does not disturb the fundamental features or conceptual scheme of the statute.<sup>94</sup> Further, judges have a wide variety of interpretive tools available to them in the U.K., some of which Indian judges would consciously avoid (reading words into a statute, for instance).

Judicial review of legislation is firmly entrenched under the Indian Constitution. In the U.K., it is grounded in Sections 3 and 4 of the HRA, although the interaction between those provisions is a subject of continuing academic and judicial discourse. Whereas both jurisdictions review legislation in three stages, case law suggests that the third stage in India is triggered sooner than in the U.K., *inter alia* on account of a larger range of interpretive tools and a keener willingness to depart from statutory language in the U.K.

### III. INDIA: POLITICAL RESPONSES TO DECLARATIONS OF UNCONSTITUTIONALITY

As stated in Part I, the Supreme Court and High Courts in India have the power to declare primary legislation unconstitutional. No special form of proceeding is necessary to enable primary legislation to be declared unconstitutional. Judicial review is fairly centralized—courts subordinate to the Supreme Court and High Courts cannot decide questions involving the constitutional validity of statutes.<sup>95</sup> There is a parallel to be drawn with the U.K.: Section 4(5) of the HRA stipulates that only certain courts in the judicial hierarchy may issue declarations of unconstitutionality.<sup>96</sup>

In the early years of constitutional experience, state and central legislation were frequently challenged before the Indian Supreme Court. Between January 1950 and April 1967, there were 487 cases in which the validity of

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<sup>93</sup> B.R. Enterprises v. State of Uttar Pradesh, A.I.R. 1999 S.C. 1867.

<sup>94</sup> Ghaidan v. Godin-Mendoza, [2004] UKHL 30.

<sup>95</sup> See Code of Civil Procedure 1908, § 113; Code of Criminal Procedure 1973, § 395; Shreeshyla Crowns v. Union of India, A.I.R. 1983 Kar. 130 [22]. However, some administrative tribunals can adjudicate upon challenges to the constitutional validity of statutes. See L. Chandra kumar v. Union of India, A.I.R. 1997 S.C. 1125 (India).

<sup>96</sup> See *supra* note 65.

legislation was specifically challenged.<sup>97</sup> Remarkably, in 128 of these cases, one or more provisions of primary legislation was declared invalid.<sup>98</sup>

This Part considers two mechanisms employed by the Indian Parliament in responding to declarations of unconstitutionality—fundamental rights amendments and “Ninth Schedule” amendments. Both of these response mechanisms were conceptualized by the Constituent Assembly of India, but acting in different capacities. The power to amend the Constitution, including the chapter on fundamental rights, formed part of the original constitutional text enacted in 1949, and was a product of the debates of the Constituent Assembly.<sup>99</sup> “Ninth Schedule” amendments are a special species of constitutional amendment developed by the Constituent Assembly, in its capacity as Provisional Parliament of India,<sup>100</sup> after the Constitution entered into force.

This Part argues that, through the response mechanisms available to Parliament, declarations of unconstitutionality have not necessarily constituted a “final word” on the validity of primary legislation violating fundamental rights, but have instead left room for political responses. Two primary arguments will be made. The first is that on some occasions, declarations of unconstitutionality have triggered parliamentary response through fundamental rights amendments and Ninth Schedule amendments. The second argument is that in spite of assertions to the contrary, which have been made based on a misreading of Supreme Court jurisprudence, Parliament still retains the space to respond to declarations of unconstitutionality through these two response mechanisms.

#### *A. Fundamental Rights Amendments*

##### *1. The Nature of the Amending Power*

The power to amend the Constitution is set out in Article 368. The relevant portion of this provision reads as follows:

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<sup>97</sup> George H. Gadbois, Jr, *Indian Judicial Behaviour*, 5(3) EPW 149, 152 (1970).

<sup>98</sup> *Id.* There is no empirical data recording the number of statutes challenged and invalidated by the Supreme Court post-1967. Further, no comprehensive empirical analysis of this nature has been conducted vis-à-vis the High Courts.

<sup>99</sup> See Constituent Assembly of India Debates (Sept. 17, 1949).

<sup>100</sup> See Arudra Burra, *The Cobwebs of Imperial Rule*, 615 SEMINAR 79, 81 (2010).

368. (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in

(a) article 54, article 55, article 73, article 162 or article 241, or  
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

Article 368 thus provides for a “dual majority”<sup>101</sup> procedure for constitutional amendments. An amendment needs to be passed by a simple majority of the *total membership* in the Upper and Lower Houses of Parliament. It also needs to be passed by a majority of not less than two-thirds of the members of each House, *present and voting*. No explicit limitation on Parliament’s amending power was originally included in the Constitution.<sup>102</sup> The amendment of some constitutional provisions concerning federal matters requires ratification by the legislatures of at least

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<sup>101</sup> ARVIND DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA 2017 (2d ed. 2007).

<sup>102</sup> The Supreme Court imposed doctrinal limits on the power to amend the Constitution in the *Basic Structure Case*, see *infra* Part.III.A.4.

half the states in India. Fundamental rights can be amended without the ratification of state legislatures.

In the sixty-three years since it entered into force, the Constitution has been amended on numerous occasions. As of January 2012, Parliament had passed ninety-seven constitutional amendments, with several others still on the anvil. Some of these involved minor changes to the Constitution<sup>103</sup> while others, such as the Constitution (Forty-second Amendment Act) 1976, sought to transform the nature of the Constitution itself.<sup>104</sup> Whereas certain portions of the Constitution have remained intact as originally enacted,<sup>105</sup> others, including the part on fundamental rights, have been amended on several occasions. Although some people argue that these amendments have been motivated by “narrow political ends” and to pander to “vote-bank politics,”<sup>106</sup> it is unfair to paint all constitutional amendments with the same motivational brush.<sup>107</sup>

A common thread runs through some of these constitutional amendments; they have been passed with the objective of nullifying declarations of unconstitutionality. In other words, the substratum of judgments invalidating legislation held to breach fundamental rights has been removed through amendment of the higher law on which they were grounded. These will be referred to as “fundamental rights amendments.” At least four,<sup>108</sup> out of ninety-seven constitutional amendments studied can be identified as fundamental rights amendments.<sup>109</sup>

## 2. *The Doctrine of Eclipse and Specific Savings Clauses*

In order to analyze the manner in which fundamental rights amendments can be employed as a parliamentary response mechanism, it is useful to briefly introduce the doctrine of eclipse. The doctrine of eclipse is a judicially crafted doctrine that postulates that when a statute or parts of it are

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<sup>103</sup> See, e.g., the Constitution (Ninety-sixth Amendment) Act, 2011, which altered the name of one of the languages recognized in the Eighth Schedule of the Constitution.

<sup>104</sup> NANI A. PALKHIVALA, *WE THE PEOPLE* 201 (2007).

<sup>105</sup> See, e.g., INDIA CONST. Part XVII, chs. I, II.

<sup>106</sup> MADHAV GODBOLE, *THE JUDICIARY AND GOVERNANCE IN INDIA* 32 (2009).

<sup>107</sup> See M.C. SETALVAD, *THE INDIAN CONSTITUTION, 1950–1965* (1968) (defending the amendments made during the first fifteen years of constitutional experience in India).

<sup>108</sup> The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955; The Constitution (Seventeenth Amendment) Act, 1964; The Constitution (Twenty-fifth Amendment) Act, 1971.

<sup>109</sup> This comprises a little over 4% of the total number of constitutional amendments.

declared unconstitutional for violating a fundamental right, it is not treated as having been wiped off the statute book altogether.<sup>110</sup> A shadow descends over the statute or its invalid provisions, which is lifted when the constitutional bar ceases to operate. It also continues to remain in force with respect to persons who do not enjoy the fundamental right in question.<sup>111</sup> The statute thus remains in a “state of suspension”<sup>112</sup> and can be brought back into operation when the constitutional provision based on which the legislation was struck down is itself amended.<sup>113</sup> The constitutional barrier having been removed, the eclipse over the legislation would stand lifted.<sup>114</sup>

That the doctrine of eclipse can operate to resuscitate pre-constitutional legislation<sup>115</sup> is a matter of judicial consensus.<sup>116</sup> What remains contested is whether the doctrine applies to post-constitutional legislation.<sup>117</sup> In some cases, the Supreme Court<sup>118</sup> and High Courts<sup>119</sup> have held that the doctrine

<sup>110</sup> MAHENDRA PRASAD SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA 31 (10th ed. 2003). This reflects the difference between Parliament’s power to repeal a statute and courts’ powers to declare a statute invalid. Judge Deshpande describes the former as “express repeal” and the latter as “implied repeal.” P.L. Mehra v. D.R. Khanna, A.I.R. 1971 (Del.) 1, 28 (India). This terminology is, however, linguistically jarring, since courts do not repeal legislation in any sense of the term; they simply disapply legislation that violates fundamental rights. Further, implied repeal is an expression that is often used in the context of Parliament enacting legislation that is inconsistent with, but does not expressly supersede, existing legislation. *See also* Note, *What Is the Effect of a Court’s Declaring a Legislative Act Unconstitutional?*, 39 HARV. L. REV. 373 (1926); Earl Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645 (1951).

<sup>111</sup> For instance, in *State of Gujarat v. Shri Ambica Mills*, A.I.R. 1974 S.C. 1300, a law was struck down for contravening a fundamental right enjoyed by citizens. The Supreme Court held that the law would continue to apply to non-citizens.

<sup>112</sup> P.L. Mehra v. D.R. Khanna, A.I.R. 1971 Del. 1, 29 (India) (Deshpande, J.).

<sup>113</sup> Field describes amending the constitution as a “difficult but perfectly feasible method of removing constitutional obstacles from the path of statutes or of enlarging legislative powers” Oliver P. Field, *The Effect of an Unconstitutional Statute*, 1 IND. L.J. 1 (1935).

<sup>114</sup> Crawford, *supra* note 110.

<sup>115</sup> This refers to all laws in force (including colonial legislation enacted during the British rule) immediately before the commencement of the Constitution (i.e., before January 26, 1950).

<sup>116</sup> *Keshavan Madhava Menon v. State of Bombay*, A.I.R. 1951 S.C.R. 228 (India); *Bhikaji Narain Dhakras et al. v. State of Madhya Pradesh*, A.I.R. 1955 S.C.R. 589 (India); *Behram Khurshed Pesikaka v. State of Bombay*, A.I.R. 1955 S.C. 123 (India).

<sup>117</sup> This refers to all laws that come into force after the commencement of the Constitution (i.e., after January 26, 1950). This is peculiar and counter-intuitive, as it effectively places colonial legislation on a higher plane compared to legislation passed after the Indian Constitution was enacted.

<sup>118</sup> *See* *Sundaramier v. State of Andhra Pradesh*, A.I.R. 1958 S.C.R. 1422 (India); *State of Gujarat v. Shri Ambica Mills*, A.I.R. 1974 S.C.R. 760 (India); *K.K. Poonacha v. State of Karnataka*, (2010) 9 S.C.C. 671 (India) (in this case, however, the court observed that the

would apply equally to post-constitutional laws, saving Parliament from the costs of re-enactment of a statute declared unconstitutional. Other Supreme Court<sup>120</sup> and High Court<sup>121</sup> decisions suggest that the doctrine only applies to laws that came into being before the Constitution, and that post-constitutional legislation that contravenes fundamental rights is “still born” and would be considered a nullity.<sup>122</sup> Academic opinion on the issue is also divided.<sup>123</sup>

The operation of the doctrine of eclipse vis-à-vis post-constitutional laws that violate fundamental rights has important practical implications. The legislature that enacted a law that is resuscitated through the doctrine of eclipse does not have to take recourse to fresh parliamentary procedure and associated majorities. Constitutional amendments, on the other hand, need to be passed by a special majority in Parliament. Even so, the political relevance of the doctrine would be substantial in situations where the fresh enactment of a statute invalidated by a court may not secure a simple majority vote in Parliament, whereas a constitutional amendment *having the effect of* resuscitating the invalidated statute may find sufficient support to secure a two-thirds majority in Parliament. It is not difficult to imagine situations where consensus prevails over broad constitutional principles, but

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doctrine of eclipse operates vis-à-vis post-constitutional laws that fail to comply with procedural requirements laid down in Part III of the Constitution, not post-constitutional laws that take away substantive rights provided for in Part III).

<sup>119</sup> P.L. Mehara v. D.R. Khanna, A.I.R. 1971 Delhi 1 (India). The dissenting opinion of Judge Deshpande is one of the most elaborate defenses of the doctrine of eclipse from the bench. See also Minoos Framroze Balsara v. Union of India, A.I.R. 1992 Bom. 375 (India); Nataraj Chhabigrin v. State of Uttar Pradesh, A.I.R. 1996 (All.) 375 (India).

<sup>120</sup> See Deep Chand v. State of Uttar Pradesh, A.I.R. 1959 S.C.R. Supp. 8 (India); Mahendra Lal Jaini v. State of Uttar Pradesh, A.I.R. 1963 S.C.R. Supp. 912 (India); Rakesh Vij v. Raminder Sethi, A.I.R. 2005 S.C. 3593.

<sup>121</sup> See Bawa Singh v. Union of India, (1970) 6 D.L.T. 409; Ram Chand v. State of Haryana (1971) 73 P.L.R. 958; P.L. Mehra v. D.R. Khanna, 1971 A.I.R. 19th (Del.) 1 (India); Dharam Pal v. Kaushalya Devi, A.I.R. 1990 (Raj.) 135 (India).

<sup>122</sup> But see State of Maharashtra v. Kamal Durgule, (1985) 1985 S.C.R. 129 (India).

<sup>123</sup> The following commentators subscribe to the view that the doctrine of eclipse should apply to post-constitutional laws: S. Venkataran, *The Status of an Unconstitutional Statute*, 2 J.I.L.I. 401 (1960); H.M. SEERVAL, CONSTITUTIONAL LAW OF INDIA 420–21 (4th ed. 1996); SINGH, *supra* note 110, at 38–40. However, many others are in the opposite camp: DURGA DAS BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW 423–88 (1972); Sushila Rao, *The Doctrine of Eclipse in Constitutional Law: A Critical Reappraisal of Its Contemporary Scope and Relevance*, 18 STUDENT B. REV. 45 (2006); DATAR, *supra* note 101, at 53; CHAKRADHAR JHA, JUDICIAL REVIEW OF LEGISLATIVE ACTS 321 (2d ed. 2009).

not over the manner in which those principles should be given effect—the devil is often in the detail.

However, the specific terms in which a constitutional amendment is enacted may obviate the need to invoke the doctrine of eclipse. So where a constitutional amendment contains a specific savings clause reviving legislation that has been previously declared invalid,<sup>124</sup> it performs the same task as the doctrine of eclipse would in the circumstances.

### 3. *Fundamental Rights Amendments as a Response Mechanism*

Precisely how can the power to amend fundamental rights under the Constitution be employed by Parliament as a response mechanism to overcome judicial decisions striking down primary legislation? The possibilities crucially depend upon two factors: whether the doctrine of eclipse is applicable in the circumstance (alternatively, whether the amendment contains a specific savings clause of the kind just described) and whether the constitutional amendment applies prospectively or retrospectively. A hypothetical example brings out the alternatives. The Indian Constitution entered into force in 1950. In 1965, a statute, “UnconStat,” was enacted by Parliament. In 1966, the Supreme Court declares UnconStat unconstitutional on the basis that it violates a fundamental right.

Parliament would have the following options in 1970. If the doctrine of eclipse applied in the circumstances or if the amendment contains a specific savings clause, a *retrospective* constitutional amendment would resuscitate UnconStat, which would once again become operative without needing fresh enactment.<sup>125</sup> In this scenario, a *prospective* constitutional amendment would not lift UnconStat out of the shadow of invalidity, since the amendment would apply to statutes enacted post-1970. If the doctrine of eclipse does not apply and if the amendment does not contain a specific savings clause, even a *retrospective* constitutional amendment would not resuscitate UnconStat, since it cannot be revived from its state of

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<sup>124</sup> See, e.g., INDIA CONST. amend. 1 § 2 cl. 1 (“No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section should be deemed to be void, or ever to have become void, on the ground that, being law which takes away or abridges the right conferred by clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that articles as originally acted.” (emphasis added)).

<sup>125</sup> P.L. Mehra v. D.R. Khanna, A.I.R. 1971 (Dec.) 1 (India).

unconstitutionality. However, in this case, if a law identical to UnconStat is passed after 1965 (say, in 1968) and is not struck down as unconstitutional until 1970, the law would be protected by the amendment. Finally, if the doctrine of eclipse applies or if the amendment contains a specific savings clause and the constitutional amendment is *prospective*, the cause of unconstitutionality is treated as having been removed only in 1970.<sup>126</sup> Thus, the 1968 statute which is still to be struck down will, for all times to come, remain unprotected by the amendment. Only fresh statutes enacted after 1970 would be protected by it.

Of course, in all cases where UnconStat is not resuscitated automatically by the constitutional amendment, it can be re-enacted by Parliament in the same terms with the expectation that, the Constitution having been amended, it cannot be declared unconstitutional based on the same infirmity. The doctrine of eclipse or a specific savings clause therefore renders constitutional amendments more potent as response mechanisms than they would have been in its absence, since retrospective constitutional amendments coupled with the doctrine of eclipse or a specific savings clause automatically validate legislation that was declared unconstitutional.

To support this argument, I have selected some judgments of the Supreme Court and High Courts that have been nullified through constitutional amendments.<sup>127</sup> These judgments have been selected on the basis of two characteristics. First, only cases that involved a challenge to primary legislation have been considered, since this Article compares responses to judicial review of primary legislation in India and the U.K.<sup>128</sup> Second, I have only selected cases where legislation was declared unconstitutional for violating fundamental rights under Part III of the constitution, although this need not have been the court's only reason for declaring the statute unconstitutional.<sup>129</sup> This naturally means that no judgments striking down primary legislation for breaching constitutional rights outside of Part III of the constitution have been considered.<sup>130</sup>

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<sup>126</sup> BASU, *supra* note 19, at 939.

<sup>127</sup> The underlying rationale for this is to ensure a comparison between equals, since judicial review of primary legislation for breaching Convention rights (comprising of civil and political human rights) in the U.K. cannot be compared with judicial review in India based, for instance, on the federal distribution of powers or the freedom of inter-state trade.

<sup>128</sup> BASU, *supra* note 19.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

These judgments are worth examining in order to expound upon the manner in which Parliament has used fundamental rights amendments as a response mechanism.<sup>131</sup> Particularly in the early years of constitutional experience, a frequent governmental response to inconvenient judicial decisions was to veer towards a change in the Constitution.<sup>132</sup>

In *Shaila Bala Devi v Chief Secretary*, the petitioner sought a declaration from the Patna High Court that Section 4(1)(a) of the Indian Press (Emergency Powers) Act 1931, which penalized the publication of any documents which incited or encouraged the commission of murder or any cognizable offenses involving violence, breached the freedom of speech and expression protected by Article 19(1)(a) of the Constitution.<sup>133</sup> The majority declared the provision unconstitutional on the basis that it violated the freedom of speech and expression and did not fall under one of the permissible exceptions under Article 19(2).<sup>134</sup> At the time, the only permissible exception was law relating to libel, slander, defamation, contempt of court or “any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.”<sup>135</sup> Similarly, in *Romesh Thapar v State of Madras*,<sup>136</sup> the Supreme Court found Section 9(1A) of the Madras Maintenance of Public Order Act 1949 (which authorized a ban on the circulation of documents to secure “public safety” and “public order”) overbroad as it violated Article 19(1)(a) without falling within the scope of the exceptions laid down in Article 19(2).<sup>137</sup> By the Constitution (First Amendment) Act 1951, the exceptions provided for in Article 19(2) were expanded by Parliament so as to clearly encompass cases such as *Shaila Bala* and *Romesh Thapar*.<sup>138</sup> The amendment was

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<sup>131</sup> *Id.*

<sup>132</sup> Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty, in THE STATE OF INDIA'S DEMOCRACY* 111 (Sumit Ganguly et al. eds., 2007). Phioze Irani, *The Courts and the Legislature in India*, 14 INT'L & COMP. L.Q. 950, 952 (1965) (it was “common” for parliamentarians to demand constitutional amendments to nullify important judicial pronouncements that were not to their liking).

<sup>133</sup> *Shaila Bala Devi v. Chief Sec'y*, A.I.R. 1951 (Pat.) 12 (India).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594 (India).

<sup>138</sup> The constitutional amendment also nullified four other judgments, which declared statutes unconstitutional for violating the freedom of speech and expression: *Brij Bhushan v. State of Delhi*, (1950) S.C.R. 245; *Amar Nath Bali v. State*, (1950) 1951 CRIM. L.J. 261; *Srinivasa Bhat v. State of Madras*, A.I.R. 1951 (Mad.) 70; *Tara Singh v. State*, A.I.R. 1951 Punjab 27. See Aruda Burra, *Arguments from Colonial Continuity: The Constitution (First*

retrospective in operation and contained a specific savings clause protecting legislation that was declared void under the original version of Article 19.<sup>139</sup> Parliament thus effectively nullified the two judgments and revived the statutes by altering the constitutionally permissible restrictions on the freedom of expression. In fact, when *Shaila Bala* was appealed to the Supreme Court after the amendment was enacted, the Patna High Court's judgment was reversed on the basis that the constitutional amendment decisively concluded the matter.<sup>140</sup>

In *State of West Bengal v. Bella Banerjee*, the constitutionality of a provision of the West Bengal Land Development and Planning Act 1948 was at issue before the Supreme Court.<sup>141</sup> The statute was enacted primarily for the settlement of immigrants who had migrated into the province of West Bengal and provided for the acquisition and development of land. Persons whose land was acquired under the statute contended that Section 8, which restricted the amount of compensation payable on acquisition so as not to exceed the market value of the land on a fixed date, violated the right to compensation under the (erstwhile)<sup>142</sup> fundamental right to property laid down in Article 31(2) of the Constitution. The Court accepted the argument and declared the relevant section unconstitutional for failing to comply with the "letter and spirit" of Article 31(2).<sup>143</sup> Parliament promptly responded through a constitutional amendment that excluded the inquiry into the adequacy of compensation paid for acquisition of land from judicial

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*Amendment) Act, 1951* (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2052659](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052659).

<sup>139</sup> INDIA CONST. amend. 1 § 3 cl. 2 ("No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted."). This savings clause obviated the need to invoke the doctrine of eclipse in order to revive the statutory provision declared invalid.

<sup>140</sup> *State of Bihar v. Shailabala Devi*, (1952) S.C.R. 654 (India).

<sup>141</sup> *State of West Bengal v. Bella Banerjee*, (1953) 1954 S.C.R. 558 (India).

<sup>142</sup> The fundamental rights to Property under articles 19(1)(f) and 31 of the Constitution were deleted by the Constitution (Forty-fourth Amendment) Act, 1978. However, the amendment inserted Article 300A into the Constitution, which reads: "Persons not to be deprived of property save by authority of law—No person shall be deprived of his property save by authority of law." Thus, the right to property remains a (non-fundamental) constitutional right. INDIA CONST. art. 300A.

<sup>143</sup> *State of West Bengal v. Bella Banerjee*, A.I.R. 1954 S.C. 170, 11 (India).

consideration.<sup>144</sup> The judgment of the Supreme Court was therefore neutralized by amending the constitutional provision upon which it rested.

Similarly, the Constitution (Seventeenth Amendment) Act 1964 was employed by Parliament to nullify two judgments. In the first, the Supreme Court declared the Kerala Agrarian Relations Act 1961 unconstitutional in relation to its application to certain kinds of lands because it violated the right to equality under Article 14.<sup>145</sup> The Court rejected the government's argument that the statute fell within the protective umbrella of Article 31A, which saved laws providing for the acquisition of estates from scrutiny under Articles 14,<sup>146</sup> 19,<sup>147</sup> and 31<sup>148</sup> of the Constitution. In the second case, the same statute was found by the Kerala High Court to violate Articles 14, 19, and 31 of the Constitution.<sup>149</sup> The constitutional amendment passed by Parliament expanded the scope of Article 31A so as to include within its protective cloak the kind of legislation that was at issue in the two cases.<sup>150</sup> The Supreme Court upheld the validity of the constitutional amendment in two subsequent decisions.<sup>151</sup> Since the amendment did not contain a specific savings clause (and the doctrine of eclipse was not invoked), the state legislature enacted fresh legislation with similar objectives in place of the invalidated statute.<sup>152</sup>

*R.C. Cooper v. Union of India*, better known as the *Bank Nationalization Case*, provides yet another example of parliamentary response to declarations of unconstitutionality.<sup>153</sup> The petitioner, a shareholder and director of a bank, challenged primary legislation<sup>154</sup> seeking to nationalize

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<sup>144</sup> INDIA CONST. amend. 4. Parliament also inserted the West Bengal Land Development and Planning Act, 1948 into the Ninth Schedule of the Constitution, the significance of which will be discussed in Part III.B.

<sup>145</sup> *Kunhikoman v. State of Kerala*, A.I.R. 1962 S.C. 273 (India).

<sup>146</sup> The right to equality before the law and the equal protection of the laws.

<sup>147</sup> The right to certain freedoms, including the freedom of speech and the freedom of trade.

<sup>148</sup> The right to property. *See supra* note 142.

<sup>149</sup> *Sabkayogam v. State of Kerala*, A.I.R. 1963 (Ker.) 101 (India).

<sup>150</sup> Constitution (Seventeenth Amendment) Act, 1964.

<sup>151</sup> *Sajjan Singh v. State of Rajasthan*, (1965) 1 S.C.R. 933 (India); *Golaknath v. State of Punjab*, (1967) 2 S.C.R. 762 (India). In *Golaknath*, the constitutional amendment was upheld subject to the qualification that Parliament could no longer amend Part III of the Constitution after the date of the Court's decision. This view was later overruled in the *Basic Structure Case*.

<sup>152</sup> Kerala Land Reforms Act, 1963. This statute was also inserted into the Ninth Schedule, the relevance of which will be discussed below. *See* INDIA CONST. Ninth Sched., *amended by* The Constitution (Seventeenth Amendment) Act, 1964 (Entry 39).

<sup>153</sup> (1970) 3 S.C.R. 530 (India).

<sup>154</sup> Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969.

fourteen Indian banks.<sup>155</sup> An eleven judge bench of the Supreme Court declared the statute unconstitutional because it breached the right to equality under Article 14, the right to freedom of trade under Article 19(1)(g) and, the rights to property provided for by Articles 19(1)(f) and 31(2).<sup>156</sup> Looked upon by many within the government as a judgment which impeded the “building of a socialist economy,”<sup>157</sup> Parliament passed a constitutional amendment to roll back the effects of the decision.<sup>158</sup> Subsequently, the Supreme Court upheld the amendment (barring one portion of it).<sup>159</sup> Once again, since the amendment did not contain a specific savings clause, Parliament enacted another statute with the same objectives.<sup>160</sup> In light of the constitutional amendment the new statute was not open to constitutional challenge on the same basis.

It is interesting to note that for the large part, courts upheld fundamental rights amendments passed by successive Parliaments.<sup>161</sup> In the words of Chief Justice Patanjali Sastri, “to make a law which contravenes the constitution constitutionally valid is a matter . . . [which lies] within the exclusive power of Parliament.”<sup>162</sup> This statement provides a useful lead into the next section, which considers the scope of the amending power.

#### 4. *Scope and Limitations of the Amending Power*

Recurrent constitutional amendments have given rise to one of the most politically loaded questions of Indian constitutional law: are there any limitations on the amending power of Parliament? Article 13(2) of the Constitution prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution.<sup>163</sup> A significant issue that frequently arose in litigation was whether the term “law” in Article

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<sup>155</sup> R.C. Cooper v. Union of India, (1970) 3 S.C.R. 530 (India).

<sup>156</sup> *Id.*

<sup>157</sup> S. Mohan Kumaramangalam, *Slide-Back on Compensation: Bank Nationalism Judgment*, 5 ECON. & POL. WKLY., 356, 356 (1970).

<sup>158</sup> The Constitution (Twenty-fifth Amendment) Act, 1971.

<sup>159</sup> Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).

<sup>160</sup> Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. This statute applied retrospectively and predated the constitutional amendment.

<sup>161</sup> See Sankari Prasad v. Union of India, [1952] 1 S.C.R. 89 (India); Sajjan Singh v. State of Rajasthan, (1965) 1 S.C.R. 933 (India); Golaknath v. State of Punjab, (1967) 2 S.C.R. 762 (India); Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.

<sup>162</sup> Shankari Prasad v. Union of India, [1952] 1 S.C.R. 89.

<sup>163</sup> INDIAN CONST. art. 13, ¶ 2.

13 included constitutional amendments. If it did, that would mean that Parliament lacked the constitutional authority to amend fundamental rights.

When confronted with this question, a unanimous five-judge bench<sup>164</sup> of the Supreme Court initially decided that “law” did not include constitutional amendments, paving the way for Parliament to amend any part of the Constitution, including Part III.<sup>165</sup> Thirteen years later, the majority on a five-judge bench of the Supreme Court agreed.<sup>166</sup> However, two judges expressed skepticism about the accuracy of this conclusion.<sup>167</sup> Judge Hidayatullah wrote that “stronger reasons” were required in order to arrive at this decision.<sup>168</sup> Judge Mudholkar, on the other hand, articulated that the Constituent Assembly might have intended to give permanency to the “basic features of the Constitution.”<sup>169</sup> But, he chose not to develop what he meant by “basic features” of the Constitution were in any detail.

A few years later, the issue was referred to a bench of eleven judges of the Supreme Court in *Golaknath v. State of Punjab*.<sup>170</sup> Aggrieved by the impact of land reform legislation, several litigants filed writ petitions in the Supreme Court.<sup>171</sup> They claimed that such legislation, along with certain constitutional amendments that protected the legislation, should be declared unconstitutional for breaching their fundamental rights.<sup>172</sup> On this occasion, by a thin majority of six to five, the Supreme Court held that constitutional amendments constituted “law” within the purview of Article 13(2), rendering Part III of the Constitution inviolable.<sup>173</sup> However, the majority applied the doctrine of “prospective overruling” to avoid the chaos and confusion that

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<sup>164</sup> In the Supreme Court of India, only benches comprising the same or a larger number of judges can overrule precedent Chintan Chandrachud, *The Supreme Court of India's Practice of Referring Cases to Larger Benches: A Need for Review*, 1 SUP. CT. CASES J. 37 (2010).

<sup>165</sup> Shankari Prasad v. Union of India, [1952] 1 S.C.R. 89 (India).

<sup>166</sup> Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845 (India) (Gajendragadkar, C.J.).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 49 (Hidayatullah, J., dissenting).

<sup>169</sup> *Id.* at 61 (Mudholkar, J., concurring).

<sup>170</sup> *Golaknath v. State of Punjab*, (1967) 2 S.C.R. 762 (India).

<sup>171</sup> Article 32 of the Constitution guarantees the right to move the Supreme Court of India at first instance for the enforcement of fundamental rights under Part III. INDIA CONST. art. 32.

<sup>172</sup> *Golaknath v. State of Punjab*, (1967) 2 S.C.R. 762.

<sup>173</sup> Since Article 13(2) only prevents Parliament from making any law which “takes away or abridges” the rights conferred by Part III, *Golaknath* did not imply that the fundamental rights could not be enlarged or advanced through constitutional amendment. See R.S. GAE, THE BANK NATIONALISATION CASE AND THE CONSTITUTION 139 (1971).

would follow the invalidation of existing constitutional amendments and the statutes on which they were based.<sup>174</sup>

In 1973, *Golaknath* was reconsidered by an unprecedented thirteen-judge bench of the Supreme Court in *Kesavananda Bharati v State of Kerala* (*Basic Structure Case*).<sup>175</sup> This case arose out of six writ petitions challenging land redistribution legislation and the constitutional amendments that protected it.<sup>176</sup> Eleven separate opinions, comprising over 400,000 words, were delivered in one of the longest appellate decisions of the last century.<sup>177</sup> What complicates the judgments in the *Basic Structure Case* is the discord between what the judges said and what they were *understood to mean* by subsequent benches, who relied on a questionable “summary” of the majority’s decision signed by nine of the thirteen judges.<sup>178</sup> It is painstakingly difficult to find common ground between the reasoning of the seven judges that form the “majority” in the case.<sup>179</sup> However, subsequent judgments of the Supreme Court consider the *ratio decidendi* of the *Basic Structure Case* to be that although the term “law” in Article 13(2) does not include constitutional amendments, and thus Parliament could amend any part of the Constitution (including Part III), the power of amendment under Article 368 of the Constitution does not include the power to alter, abrogate, or destroy the basic structure of the Constitution.<sup>180</sup> Thus, the “basic structure” doctrine postulates that although Parliament may amend any part of the Constitution, a constitutional amendment that destroys, alters or abrogates its basic structure can be struck down as an “unconstitutional constitutional amendment.” What comprised the basic structure of the Constitution was left open, allowing judges to develop the concept jurisprudentially. The Supreme Court has identified a number of principles falling within the purview of the basic structure doctrine: the supremacy of

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<sup>174</sup> *Golaknath v. State of Punjab*, (1967) 2 S.C.R. 762.

<sup>175</sup> *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

<sup>176</sup> *Id.*

<sup>177</sup> Vivek Krishnamurthy, Note, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE J. INT'L L. 207, 255 (2009).

<sup>178</sup> SEERVAI, *supra* note 123, at 3114; T.R. ANDHYARUJINA, THE KESAVANANDA BHARATI CASE 63–67 (2011).

<sup>179</sup> GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 265 (2003); SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA 27 (2009); ANDHYARUJINA, *supra* note 178.

<sup>180</sup> *Indira Gandhi v. Raj Narain*, (1976) 2 S.C.R. 347 (India); *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206 (India) (Chandrachud, C.J.); *Waman Rao v. Union of India*, (1981) 2 S.C.R. 1 (India).

the Constitution,<sup>181</sup> secularism,<sup>182</sup> the sovereignty of India,<sup>183</sup> federalism,<sup>184</sup> judicial review,<sup>185</sup> the limited power to amend the Constitution<sup>186</sup> and free and fair elections.<sup>187</sup>

The key difference between *Golaknath* and the *Basic Structure Case*, for the purpose of my argument, is that whereas the former embodied a rigid restriction on the amendability of Part III, the latter incorporated functional flexibility, allowing Parliament to amend any part of the Constitution subject to the “basic structure” qualification.<sup>188</sup>

Thus, Parliament’s power to amend the Constitution has been attenuated by the *Basic Structure Case* and subsequent decisions. The existing position of law on Parliament’s ability to nullify judgments declaring legislation unconstitutional for violations of fundamental rights through constitutional amendments is as follows: not all fundamental rights form part of the basic structure of the Constitution—if they did, the *Basic Structure* decision’s relative flexibility in comparison with *Golaknath* would have been meaningless.<sup>189</sup> It would be impermissible for Parliament to amend a fundamental right to the extent that the basic structure of the Constitution would be abrogated. However, it is still open to Parliament to nullify a declaration of unconstitutionality by amending a fundamental right without altering the basic structure of the Constitution. The possibility of Parliament responding to declarations of unconstitutionality through fundamental rights amendments without having an impact on the basic structure of the Constitution is discussed in greater detail later.<sup>190</sup>

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<sup>181</sup> *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, 1171 (India) (Ray, J.), 302 (Sikri, J.), 599 (Shelat, J. and Grover, J.).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1171 (Ray, J.), 599 (Shelat, J. and Grover, J.), 682 (Hegde, J. and Mukherjea, J.).

<sup>184</sup> *Id.* at 302 (Sikri, J.), 599 (Shelat, J. and Grover, J.).

<sup>185</sup> *L. Chandra Kumar v. Union of India*, A.I.R. 1997 S.C. 1125 (India).

<sup>186</sup> *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789 (India).

<sup>187</sup> Special Reference No. 1 of 2002 A.I.R. 2003 S.C. 87 (India).

<sup>188</sup> M.P. Jain, *The Supreme Court and Fundamental Rights*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA 11–12 (2003).

<sup>189</sup> Initially, Judge Khanna’s judgment in the *Basic Structure Case* was understood by some to mean that no fundamental rights formed part of the basic structure of the Constitution. But Judge Khanna later issued a clarification stating that his opinion was not intended to suggest this. *Indira Gandhi v. Raj Narain*, (1976) 2 S.C.R. 347, 251–52 (India).

<sup>190</sup> See *infra* Part III.C.

*B. Ninth Schedule Amendments*

“[T]he Indian is the only constitution . . . providing for protection against itself.”<sup>191</sup>

*1. Article 31B and the Ninth Schedule*

The Ninth Schedule resembles an appendix to the Constitution and is associated with a special species of constitutional amendments. It is linked to Article 31B, which reads as follows:

Validation of certain Acts and Regulations. Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part [Part III of the Constitution], and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.<sup>192</sup>

Legislative override through Article 31B and the Ninth Schedule did not originally form part of the Constitution. It was included through constitutional amendment in 1951 in order to immunize agrarian reform legislation from judicial scrutiny for contravening one or more fundamental rights under Part III.<sup>193</sup> More than 280 statutes currently lie within the confines of the Ninth Schedule, some of which have little to do with land

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<sup>191</sup> Granville Austin citing what Chief Justice Gajendragadkar had, according to “judicial lore,” said about the Ninth Schedule. AUSTIN, *supra* note 179, at 85. For the record, this statement was putatively made well before the “notwithstanding” clause under Section 33 of the Canadian Charter of Rights and Freedoms and similar mechanisms (such as under Section 8 of the Israeli Basic Law: Freedom of Occupation) came into existence.

<sup>192</sup> INDIA CONST. art. 31B.

<sup>193</sup> The Constitution (First Amendment) Act, 1951. Austin describes the Schedule as a “constitutional vault” to which the judges were denied the key. AUSTIN, *supra* note 179, at 98.

reform.<sup>194</sup> Since the Ninth Schedule is a part of the Constitution, statutes can be added to it only through the special procedure for constitutional amendments specified in Article 368. Central or state legislation may be inserted into the Ninth Schedule, although only Parliament, which is entrusted with the power of amending the Constitution, can do so. Further, because Article 31B contains a specific savings clause protecting legislation notwithstanding any judgment it performs the same task that the doctrine of eclipse would have in the circumstances by automatically reviving laws declared to be unconstitutional inserted into the Ninth Schedule without fresh enactment. This explains why the doctrine of eclipse does not need to be invoked in cases where Parliament responds to a judgment by inserting legislation into the Ninth Schedule.<sup>195</sup>

## 2. *The Ninth Schedule as a Parliamentary Response Mechanism*

There are three possible stages at which Parliament may decide to insert legislation into the Ninth Schedule. First, it could choose to insert legislation into the Schedule to avoid an adverse judicial decision altogether.<sup>196</sup> Second, it could pre-empt a final decision by a court by inserting legislation into the Schedule in cases where a court has granted interim relief suspending its operation during the pendency of a case.<sup>197</sup> Third, it could insert legislation that has already been declared unconstitutional into the Ninth Schedule to lift it from the shadow of unconstitutionality, since the legislation would be treated as never having become void.<sup>198</sup> This part will focus on the third use of the Ninth Schedule as a response mechanism that takes the form of an attempt to immunize statutes (or statutory provisions) that have been finally adjudicated upon and declared unconstitutional by the Supreme Court and High Courts. Uses of the Ninth Schedule that bear this character will be

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<sup>194</sup> See, e.g., The Essential Commodities Act (1955) (entry 126), the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (1976) (entry 127) and the Levy Sugar Price Equalisation Fund Act (1976) (entry 131). Baldev Singh categorised the legislation inserted into the Ninth Schedule up to 1990 (Baldev Singh, *Ninth Schedule to Constitution of India: A Study*, 37(4) J.I.L.I. 457, 467 (1995)). His analysis shows that a little over 87% of statutes inserted into the Ninth Schedule dealt with agrarian/land reform.

<sup>195</sup> Jagannath v. Authorised Officer, A.I.R. 1972 S.C. 425 [33–34].

<sup>196</sup> The Constitution (Forty-seventh Amendment) Act, 1984; The Constitution (Sixty-sixth Amendment) Act, 1990.

<sup>197</sup> The Constitution (Fortieth Amendment) Act, 1976.

<sup>198</sup> INDIA CONST. art. 31B.

referred to as “Ninth Schedule amendments.” At least five<sup>199</sup> (or a little over five percent) of the ninety-seven constitutional amendments enacted as of January 2012 represent Ninth Schedule amendments of the nature just described.

A few examples shed light on how Parliament has responded to judgments declaring legislation unconstitutional for violating fundamental rights through the Ninth Schedule. In *Balmadies Plantations v. State of Tamil Nadu*,<sup>200</sup> a group of petitions challenged the constitutional validity of a statute<sup>201</sup> which sought to transfer private forest lands to the state government. The Madras High Court dismissed the petitions.<sup>202</sup> On appeal, the Supreme Court upheld the validity of the statute except in so far as it related to the transfer of forests in certain private estates to the government, which in its view violated Articles 14 (the right to equality), 19 (the right to freedom) and 31 (the right to property) of the Constitution.<sup>203</sup> In a little over two years, Parliament passed a constitutional amendment inserting the statute into the Ninth Schedule.<sup>204</sup> This *ipso facto* revived the portion of legislation that was struck down.

In another example, the state of Kerala enacted the Kerala Land Reforms Act 1963 as the primary land reform law for the state. The statute was inserted into the Ninth Schedule to protect it from constitutional challenge on the touchstone of violating fundamental rights.<sup>205</sup> In 1969, sweeping amendments were made to the law by an amending statute,<sup>206</sup> which was not itself inserted into the Ninth Schedule. The amended provisions of the Kerala Land Reforms Act were constitutionally challenged before the Kerala High Court.<sup>207</sup> The Court opined that since the amending statute was not inserted into the Ninth Schedule, the provisions of the act, as amended by the subsequent statute, could not receive the protection of Article 31B.<sup>208</sup> It

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<sup>199</sup> The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955; The Constitution (Twenty-ninth Amendment) Act, 1972; The Constitution (Thirty-fourth Amendment) Act, 1974; The Constitution (Sixty-sixth Amendment) Act, 1990.

<sup>200</sup> A.I.R. 1972 S.C. 2240 (India).

<sup>201</sup> Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969.

<sup>202</sup> Nilambur Kovilagam v. State of Tamil Nadu, (1971) 1 M.L.J. 255 (India).

<sup>203</sup> *Id.*

<sup>204</sup> The Constitution (Thirty-fourth Amendment) Act, 1974; INDIA CONST. Ninth Sched., Entry 80.

<sup>205</sup> The Constitution (Seventeenth Amendment) Act, 1964; INDIA CONST. Ninth Sched., Entry 39.

<sup>206</sup> Kerala Land Reforms (Amendment) Act, 1969.

<sup>207</sup> Narayanan Nair v. State of Kerala, A.I.R. 1971 Ker. 98 (India).

<sup>208</sup> *Id.*

declared some statutory provisions unconstitutional for violating the right to equality under Article 14 and the right to property under Article 19(1)(f) of the Constitution.<sup>209</sup> In appeal, the Supreme Court substantially confirmed the conclusions of the High Court.<sup>210</sup> In a separate group of petitions, the Supreme Court also struck down another discrete aspect of the statute as amended in 1969.<sup>211</sup> Within two months of the Supreme Court's judgments, Parliament inserted the amending act of 1969 into the Ninth Schedule with the avowed objective of nullifying the effects of this group of decisions.<sup>212</sup> The invalidated legislation was thus automatically revived without requiring fresh enactment.

In *Paschimanga v. State of West Bengal*,<sup>213</sup> the Calcutta High Court considered the validity of the West Bengal Land Holding Revenue Act 1979,<sup>214</sup> a statute which provided for the levy of revenue on land holdings in the state. Section 2(c) was declared invalid for granting excessive powers to the authority prescribed under the statute.<sup>215</sup> Since the Court considered that this provision was not severable from the rest of the statute, the entire statute was rendered unenforceable. About four years later, Parliament passed a constitutional amendment validating the West Bengal Land Holding Revenue Act of 1979 by inserting it into the Ninth Schedule.<sup>216</sup> Yet again, the Ninth Schedule was employed as a constitutional device to roll back the effects of a judicial decision striking down primary legislation for breaching fundamental rights.

### 3. *Reconciling the Conflict Between the Basic Structure Case and the Ninth Schedule*

There is a zone of conflict between the accepted dictum of the *Basic Structure Case* and the Ninth Schedule. Whereas Article 31B along with the

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<sup>209</sup> *Id.*

<sup>210</sup> *Kunjukutty Sahib v. State of Kerala*, A.I.R. 1972 S.C. 2097 (India).

<sup>211</sup> *Malankara Rubber & Produce Co. v. State of Kerala*, (1973) 1 S.C.R. 399.

<sup>212</sup> INDIA CONST. art. 65, *amended by* The Constitution (Twenty-ninth Amendment) Act, 1972 (The Statement of Objects and Reasons accompanying the constitutional amendment make it clear that it was enacted in order to nullify the effects of these three judgments).

<sup>213</sup> *Paschimanga v. State of West Bengal*, (1996) 2 C.A.L.L.T. (Calcutta H.C.) 183.

<sup>214</sup> The West Bengal Land Holding Revenue Act, No. 44 of 1979.

<sup>215</sup> Invalidity on the basis of excessive delegation is inextricably linked to a breach of the right to equality under Article 14 of the Constitution. *Trs. for the Improvement of Calcutta v. Chandra Sekhar*, (1978) 1 S.C.R. 136 (1977).

<sup>216</sup> INDIA CONST. art. 250, *amended by* The Constitution (Sixty-sixth Amendment) Act, 1990.

Ninth Schedule sought to confer unlimited powers of constitutional amendment on Parliament so as to protect legislation from judicial review, the *Basic Structure Case* was an attempt to limit Parliament's amending power and subject it to judicial scrutiny.<sup>217</sup> The Supreme Court reconciled this conflict in *I.R. Coelho v State of Tamil Nadu*.<sup>218</sup> A unanimous nine-judge bench held that primary legislation inserted into the Ninth Schedule after the decision in the *Basic Structure Case* would be subjected to the "basic structure" test laid down in that decision.<sup>219</sup> In other words, the insertion of legislation into the Ninth Schedule would be invalidated if it altered, abrogated, or destroyed the basic structure of the Constitution. The Court also held that some fundamental rights<sup>220</sup> pertained to the basic structure of the Constitution. The insertion of legislation into the Ninth Schedule would also be invalidated if the statute abrogated these fundamental rights. The test that would be employed to determine whether a fundamental right pertaining to the basic structure was abrogated was the "rights test," according to which the impact and effect of the constitutional amendment on fundamental rights would be relevant.<sup>221</sup>

Thus, the status and level of protection accorded to statutes inserted into the Ninth Schedule has been circumscribed. However, after the decision in *Coelho*, the possibility of Parliament validly inserting legislation that has been struck down for violating fundamental rights into the Ninth Schedule remains open.<sup>222</sup>

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<sup>217</sup> Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP. L. REV. 55, 95 (2009).

<sup>218</sup> *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861 (this case reconsidered the Supreme Court's judgment in *Waman Rao v. Union of India* which adjudged the same question. (1981) 2 S.C.R. 1 (1980)).

<sup>219</sup> *Id.*

<sup>220</sup> These rights include Article 14 (the right to equality), Article 19 (which protects the freedom of speech and other rights) and Article 21 (the right to life and personal liberty). The jury is out on precisely which fundamental rights pertain or do not pertain to the basic structure of the Constitution, since judicial decisions on this issue have been nebulous. See Kamala Sankaran, *From Brooding Omnipresence to Concrete Textual Provisions: The I.R. Coelho Judgment and the Creation of a Hierarchy of Fundamental Rights*, 49(2) J.I.L.I. 240 (2007).

<sup>221</sup> *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861 [81].

<sup>222</sup> Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49 J.I.L.I. 365 (2007).

C. *Assessing the Space for Parliamentary Response After Coelho*

The important point to be made is that the operational space for legislative response remains available after *Coelho*, albeit in a more restricted form.<sup>223</sup> But Sorabjee argues that the decision in *Coelho* “in effect” renders fundamental rights under the Indian Constitution unamendable.<sup>224</sup> This argument thus questions the status of constitutional amendments to fundamental rights as a parliamentary response mechanism. Randhawa reads *Coelho* as indicating that the inclusion of a statute that violated fundamental rights in the Ninth Schedule would be invalidated through the basic structure doctrine.<sup>225</sup> Jaising makes a similar argument, stating that *Coelho* “virtually repeals” Article 31B of the Constitution and renders any violation of fundamental rights as an interference with the basic structure of the Constitution.<sup>226</sup> If one were to accept their arguments, the Ninth Schedule is effectively eliminated as a response mechanism and could not be employed by Parliament to respond to judgments striking down legislation. These arguments are now worth considering.

Sorabjee’s contention fails to consider that *Coelho* and subsequent judgments emphasize that different tests must be applied in determining the validity of constitutional amendments altering the substantive content of fundamental rights and those merely inserting legislation into the Ninth Schedule, seeking to protect it from judicial scrutiny. In the case of the former, the “essence of rights test” (as opposed to the “rights test”) is applied. Under this test the court focuses on the impact of the amendment on the overarching principles espoused by the Constitution rather than the specific rights amended. This means that fundamental rights could quite plausibly be amended to protect certain kinds of legislation that would otherwise be invalidated, without breaching the overarching principles

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<sup>223</sup> *Id.*

<sup>224</sup> Soli J. Sorabjee, Former Attorney Gen. for India, Lecture at Oslo University, Evolution of the Basic Structure Doctrine: Its Implications and Impact on Constitutional Amendments (Oct. 6, 2008), transcript available at [http://www.lawyersclubindia.com/articles/print\\_this\\_page.asp?article\\_id=429](http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=429).

<sup>225</sup> Jasdeep Randhawa, *Understanding Judicialization Of Mega-Politics: The Basic Structure Doctrine And Minimum Core*, JUS POLITICUM No. 6 (2011). She posits that the Supreme Court has exercised restraint in subsequent cases. The more satisfactory position is that *Coelho* itself exhibits elements of restraint, leaving a fair amount of space to the legislature.

<sup>226</sup> Indira Jaising, *Ninth Schedule: What the Supreme Court judgment means*, REDIFF (Jan. 11, 2007), <http://www.rediff.com/news/2007/jan/11indira.htm>.

forming part of the basic structure, for instance, secularism, federalism, judicial review, etc.

The Supreme Court's judgment in *Indian Medical Association v. Union of India*<sup>227</sup> confirms this claim. In 2005, Parliament inserted Article 15(5) into Part III of the Constitution through a constitutional amendment.<sup>228</sup> The amendment was directed at nullifying earlier decisions<sup>229</sup> of the Supreme Court holding that state sanctioned imposition of reservation policy on non-minority unaided educational institutions breached the freedom to carry on any occupation, trade or business under Article 19(1)(g). The state of Delhi passed primary legislation<sup>230</sup> that, in the absence of Article 15(5), would have been struck down as invalid. The constitutionality of the insertion of Article 15(5) into the Constitution was challenged on basic structure doctrine grounds. Rejecting the challenge, the Court observed that the question was not whether a fundamental right itself was amended, but whether, applying the "essence of rights" test, the overarching constitutional principles connecting fundamental rights were abrogated.<sup>231</sup> Thus, an amendment to a fundamental right effectively shielded legislation that would have been declared unconstitutional in its absence without failing the basic structure test.

The arguments of Randhawa and Jaising, which question the operational space available to Parliament after *Coelho*, are belied by the fact that in *Coelho* itself, the Court observed that *some* fundamental rights (including Articles 14,<sup>232</sup> 15,<sup>233</sup> 19,<sup>234</sup> and 21<sup>235</sup>) formed a part of the basic structure. Further, applying the "rights test," not every amendment which had some effect on fundamental rights *pertaining to the basic structure* would be considered invalid—only those which *abridged or abrogated* the

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<sup>227</sup> *India Med. Ass'n v. Union of India*, A.I.R. 2011 S.C. 2365.

<sup>228</sup> INDIA CONST. art. 15(5), *amended by* The Constitution (Ninety-third Amendment) Act, 2005.

<sup>229</sup> *T.M.A. Pai Found. v. State of Karnataka*, (2002) 8 S.C.C. 481; *P.A. Inamdar v. State of Maharashtra*, (2005) 6 S.C.C. 537.

<sup>230</sup> *The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence) Act, 2007*.

<sup>231</sup> *Indian Med. Ass'n v. Union of India*, A.I.R. 2011 S.C. 2365 [88].

<sup>232</sup> *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861, 48 (the right to equality before the law and equal protection of the laws).

<sup>233</sup> *Id.* at 57 (prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth).

<sup>234</sup> *Id.* at 59 (protection of certain freedoms including the freedom of speech).

<sup>235</sup> *Id.* at 60 (the right to life and personal liberty).

fundamental right, examined with reference to each individual case, would fail the basic structure test.<sup>236</sup> If this were not the case, then Article 31B of the Constitution would become an empty provision.<sup>237</sup>

Judges in *Coelho* and in previous cases have provided examples of legislation that might be declared unconstitutional for breaching Part III, but could be validly revived through the Ninth Schedule. For example, in *Coelho*, Chief Justice Sabharwal held that freedom might be interfered with (presumably, to a limited extent) in cases relating to terrorism without the basic structure doctrine being triggered.<sup>238</sup> In a previous decision, Chief Justice Chandrachud observed that “[i]f by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired.”<sup>239</sup> Justice Krishna Iyer expressed the argument as follows:

[W]hat is a betrayal of the basic feature [*sic*] is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. . . . the constitutional fascination for the basic structure doctrine [cannot] be made a Trojan horse to penetrate the entire legislative camp fighting for a new social order.<sup>240</sup>

These quotations comprise judicial confirmation of the space available to Parliament to employ the Ninth Schedule as a response mechanism to judgments declaring primary legislation unconstitutional for breaching fundamental rights.<sup>241</sup>

The exercise of the power to declare statutes unconstitutional for violating fundamental rights has not necessarily constituted the last word on the

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<sup>236</sup> *Id.* at [58]. See also *Indian Med. Ass’n v. Union of India*, A.I.R. 2011 S.C. 2365 [84].

<sup>237</sup> *Glanrock Estate v. State of Tamil Nadu*, (2010) 10 S.C.C. 96 [8].

<sup>238</sup> *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861 [78].

<sup>239</sup> *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789 [70].

<sup>240</sup> *Maharao Singhji v. Union of India*, A.I.R. 1981 S.C. 234 [21].

<sup>241</sup> Jasdeep Randhawa, *Understanding Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimums Core*, JUS POLITICUM (2011), <http://www.juspoliticum.com/IMG/pdf/JP6-Randhawa.pdf>. Randhawa herself acknowledges that cases after *Coelho* have exhibited judicial restraint and re-opened the parliamentary space under the Ninth Schedule. My argument is that this is a misreading of *Coelho*, as that case itself (along with decisions before it) recognised the space available to Parliament. The approach of the Supreme Court in subsequent cases has been consistent with *Coelho*.

validity of primary legislation. Two parliamentary response mechanisms have, individually or in conjunction, channeled the political responses to such exercises. As Pratap Bhanu Mehta puts it (albeit in a broader context), an “iterative game of action-response-rejoinder” is in motion.<sup>242</sup> The important point to take away from this section is that political actors in India retain the space to respond to declarations of unconstitutionality through fundamental rights amendments and Ninth Schedule amendments.

#### IV. THE U.K.: POLITICAL RESPONSES TO DECLARATIONS OF UNCONSTITUTIONALITY

This section focuses on the case law under Section 4 of the HRA and parliamentary and governmental responses to declarations of unconstitutionality in the U.K. Three central arguments will be developed. First, the space for political responses to declarations of unconstitutionality is much narrower than that which is assumed in the existing scholarship. Second, expected political reactions to declarations of unconstitutionality are an important element in courts’ process of choosing between the remedial routes offered by Sections 3 and 4 of the HRA. Third, given these and other relevant factors, it is unlikely that governments will ignore or reject declarations of unconstitutionality, although the argument that this power may atrophy or be politically neutralized through a constitutional convention over time warrants qualification.

##### *A. Two Connotations of Space*

Commentators often engage with arguments concerning the “space” available to Parliament and government in responding to declarations of unconstitutionality without defining that protean word. For the sake of clarity, the word “space” will be defined in two different senses. The first is *decisional* space, which raises the question about whether Parliament and government are obliged to accept declarations of unconstitutionality to begin with. In theory, when a declaration of unconstitutionality is made, the government has the following options in terms of its decisional space. It may announce that the declaration will be fully addressed. Conversely, it may announce that it will not be addressed at all. It could also announce that a declaration of unconstitutionality will be addressed to a certain extent, but

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<sup>242</sup> Mehta, *supra* note 132, at 112.

not fully. Finally, it can completely ignore the declaration of unconstitutionality.

The second is *remedial* space, which focuses on the legal mode and the substantive means by which a declaration of unconstitutionality will be addressed. In terms of the legal mode of addressing declarations, primary legislation passed by Parliament and remedial executive orders under Section 10 of the HRA comprise the alternatives.<sup>243</sup> The substantive means by which a declaration of unconstitutionality may be addressed concern the options available to Parliament and government in addressing such declarations. For instance, introducing a fresh statutory regime, making changes to the existing system, introducing legislative safeguards, or redrawing lines of institutional authority are all possible mechanisms for addressing an incompatibility.

The argument that is developed in this section is that the remedial space available to Parliament and government is narrower than which is often assumed. Further, the decisional space is limited not only because it is politically difficult to reject declarations of unconstitutionality, but also because in practice, courts are mindful of expected political reactions to declarations of unconstitutionality.

## *B. Declarations of Unconstitutionality in Practice*

### *1. Section 4 of the HRA*

Section 4(2) of the HRA reads: “If the court is satisfied that [a provision of primary legislation] . . . is incompatible with a Convention right, it may make a declaration of that incompatibility.”<sup>244</sup> As stated in Part II, this provision empowers certain courts, when satisfied that a provision of primary legislation is incompatible with a Convention right, to make a declaration of incompatibility (or, as I refer to it, a declaration of unconstitutionality). The decision to make a declaration of unconstitutionality is at the discretion of the court,<sup>245</sup> and the government is entitled to notice and hearing when the court considers making such a declaration.<sup>246</sup> A declaration under Section 4 does not affect the “validity, continuing operation or enforcement” of the

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<sup>243</sup> Human Rights Act, 1998, c. 42, § 10 (U.K.).

<sup>244</sup> *Id.* § 4.

<sup>245</sup> This discretion is narrow, and courts have rarely found an incompatibility without declaring it. FENWICK, *supra* note 80, at 200.

<sup>246</sup> Human Rights Act, 1998, c. 42, § 5 (U.K.).

provision in respect of which it is given.<sup>247</sup> It is also not binding on the parties to the proceedings in which it is made.<sup>248</sup> Sathanapally usefully describes it as an “open remedy”—one which leaves it formally open to the other branches of government to decide what remedial action to take, if any.<sup>249</sup>

An examination of the declarations of unconstitutionality that have been made thus far reveals many interesting features. Twenty declarations of unconstitutionality were final declarations that were not overturned on appeal.<sup>250</sup> Eight declarations were overturned at an appellate stage. Remarkably, almost all the cases in which declarations of unconstitutionality were issued concerned marginalized groups at the fringes of society, including patients with mental disorders, illegal immigrants and international terrorist suspects.<sup>251</sup>

## 2. *The Impact of Section 4 on the Legislative Process*

It emerges from the case law that two kinds of Section 4 declarations have been made by courts. The first is a declaration that particular statutory provisions are incompatible with one or more Convention rights (“specific declarations”). So for example, in what is most commonly known as the *Belmarsh Prison Case*, the House of Lords declared Section 23 of the Anti-Terrorism, Crime and Security Act, 2001<sup>252</sup> incompatible with Articles 5<sup>253</sup> and 14<sup>254</sup> of the Convention, insofar as it permitted detention of suspected international terrorists in a way that was disproportionate and discriminatory on the grounds of nationality and immigration status.<sup>255</sup> The second category

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<sup>247</sup> *Id.* § 4(6)(a).

<sup>248</sup> *Id.* § 4(6)(b).

<sup>249</sup> SATHANAPALLY, *supra* note 2, at 15–16.

<sup>250</sup> The Report of the Ministry of Justice to the Joint Committee on Human Rights contains a mistaken figure. This is attributable to the fact that the decision in *R (Hooper and Others) v. Sec’y of State for Work and Pensions*, [2002] EWHC 191 (Admin.); [2003] 1 W.L.R. 2623; [2005] 1 W.L.R. 1681 is treated as a case in which the declaration of unconstitutionality became final. UK MINISTRY OF JUSTICE, REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT’S RESPONSE TO HUMAN RIGHTS JUDGMENTS 49 (2012). As a matter of fact, the House of Lords saw “no point” in issuing a declaration of unconstitutionality in that case, since the impugned statutory provisions had already been repealed.

<sup>251</sup> SATHANAPALLY, *supra* note 2, at 133.

<sup>252</sup> Anti-terrorism Crime and Security Act, 2001, c. 24.

<sup>253</sup> The right to liberty and security.

<sup>254</sup> The prohibition of discrimination.

<sup>255</sup> *A v. Secretary of State*, [2004] UKHL 56.

includes declarations that consider a statutory scheme or regime incompatible with Convention rights (“general declarations”). In *International Transport Roth*, the Court of Appeal declared the penalty regime under Part II of the Immigration and Asylum Act, 1999 (which penalized unknowing carriers of illegal entrants into the U.K.) incompatible with Article 6<sup>256</sup> and Article 1 of the First Protocol<sup>257</sup> to the Convention.<sup>258</sup> Lord Justice Brown observed that the “troubling features of the scheme” were “all inter-linked.”<sup>259</sup>

Sathanapally argues that in some cases, declarations of incompatibility have been made (in preference over an application of Section 3) in conditions where a complex scheme needs to be developed or difficult policy-based choices need to be made.<sup>260</sup> This, according to her, has been done in order to avoid “pre-empting changes to the law through the legislative process”<sup>261</sup> by identifying standards by which the incompatibility may be remedied. The first part of her argument is correct, and is discernible in the case of specific declarations and general declarations. In fact, both of the cases discussed above were followed by comprehensive changes to legislative policy. The detention scheme for suspected international terrorists under the Anti-Terrorism, Crime and Security Act, 2001, which was at issue in the *Belmarsh Prison Case*,<sup>262</sup> was replaced by the “control order” regime under the Prevention of Terrorism Act, 2005.<sup>263</sup> The penalty scheme under the Immigration and Asylum Act, 1999, which was declared incompatible in *International Transport Roth*,<sup>264</sup> was replaced by a new regime for carriers’ liability under the Nationality, Immigration and Asylum Act, 2002.

The second part of Sathanapally’s argument—that declarations of unconstitutionality in such cases avoid pre-empting changes to the law—is on tenuous footing. In many cases where declarations of unconstitutionality are issued, courts nonetheless make *obiter dicta* suggestions about how remedial law on the subject in question might be framed and which legal vehicle could be used to bring about that change. These will be referred to as

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<sup>256</sup> Int’l Transp. Roth GmbH v. Sec’y of State for the Home Dep’t, [2002] EWCA (Civ) 158.

<sup>257</sup> *Id.* The right to peaceful enjoyment of property.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at [66].

<sup>260</sup> SATHANAPALLY, *supra* note 2, at 98.

<sup>261</sup> *Id.*

<sup>262</sup> A v. Sec’y of State, [2004] UKHL 56.

<sup>263</sup> Prevention of Terrorism Act, 2005.

<sup>264</sup> Int’l Transp. Roth GmbH v. Sec’y of State for the Home Dep’t, [2003] Q.B. 728.

“soft suggestions.” In *Clift*, the House of Lords was faced with determining the compatibility of certain provisions of the Criminal Justice Act, 1991, under which the Home Secretary retained the power to determine the release on parole of prisoners serving determinate terms of fifteen years or more.<sup>265</sup> Since the parties agreed that a Convention-compatible interpretation would not be possible, the Court made a declaration that Sections 46(1) and 50(1) of the statute were incompatible with Article 14<sup>266</sup> (read with Article 5<sup>267</sup>). Lord Brown observed that, given the Court’s decision, the Home Secretary needed to consider whether “the time [had] . . . not now come to leave all future decisions as to release on license exclusively to the Parole Board.”<sup>268</sup>

Similarly, in *T v. Chief Constable*, the primary question before the Court of Appeal was whether the statutory scheme under the Police Act, 1997, which required enhanced criminal record certificates to be issued by the Criminal Records Bureau to those working with people under eighteen, was compliant with Convention rights.<sup>269</sup> The Court found the scheme disproportionate and declared it incompatible with Article 8<sup>270</sup> of the Convention. The Court’s observations accompanying the declaration of unconstitutionality are of particular interest. It first stated that a proportionate scheme that Parliament may seek to introduce would not require the individual consideration of every case.<sup>271</sup> It then endorsed some of the recommendations made by an expert in a recent Criminal Records Review on the manner in which offences should be filtered for the purposes of disclosure.<sup>272</sup> However, the Court stated thereafter that it would not “prescribe the solution that should be adopted”<sup>273</sup> and that it would be left to Parliament to decide “what amendments to make.”<sup>274</sup> This disclaimer merely reiterates an obvious fundamental principle: if courts prescribed the specific remedial course that Parliament should pursue, that would overstep their role under the HRA and comprise a usurpation of parliamentary authority.

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<sup>265</sup> *R (Clift) v. Sec’y of State for the Home Dep’t*, [2007] 1 A.C. 484.

<sup>266</sup> *Id.* at 492. The prohibition of discrimination.

<sup>267</sup> *Id.* at 491. The right to liberty and security.

<sup>268</sup> *Id.* at [50].

<sup>269</sup> *T v. Chief Constable*, [2013] EWCA (Civ) 25.

<sup>270</sup> *Id.* (Article 8 of the Convention guarantees a right to privacy).

<sup>271</sup> *Id.* at [43].

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at [69].

<sup>274</sup> *Id.* at [75].

On comparable lines, in *Baiai*,<sup>275</sup> Lord Justice Buxton in the Court of Appeal issued guidance of what a Convention-compatible regime for controlling sham marriages might look like, after declaring the existing regime unconstitutional.<sup>276</sup> He observed that:

[t]o be proportionate, a scheme . . . must either properly investigate individual cases, or at least show that it has come close to isolating cases that very likely fall into the target category. It must also show that the marriages targeted do indeed make substantial inroads into the enforcement of immigration control.<sup>277</sup>

The soft suggestions made by courts in these cases have performed one of two distinct functions. In *Clift*,<sup>278</sup> Lord Brown's statement had the effect of acting as a guiding influence on Parliament and government, indirectly indicating that any role for the Home Secretary in decisions for release on license might face compatibility issues. In *T* and *Baiai* the Court's suggestions operated as assurances that not much needed to be done in order to remedy the incompatibility, clarifying the minimum and creating an incentive, of sorts, to do so. In *T*, it was suggested that an appropriate system of filtering could be introduced in the criminal record certificates regime, without having to establish a system of individual consideration of every case. In *Baiai*, the Court of Appeal said that in order to be proportionate, the scheme for controlling sham marriages should “*at least show* that it has come close to isolating cases that are very likely to fall into the target category.”<sup>279</sup>

In another case before the Court of Appeal, the question was whether Sections 72 and 73 of the Mental Health Act, 1983, which impose a “reverse burden of proof” on patients applying for discharge from detention in hospital, were compatible with the Convention.<sup>280</sup> The Court declared Sections 72(1) and 73(1) incompatible with Articles 5(1) and 5(4)<sup>281</sup> of the Convention.<sup>282</sup> However, Lord Phillips said that only rarely would “sections

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<sup>275</sup> R (*Baiai*) v. Sec’y of State for the Home Dep’t, [2008] Q.B. 143.

<sup>276</sup> *Id.* at [58].

<sup>277</sup> *Id.* at [170].

<sup>278</sup> R (*Clift*) v. S.S.H.D., [2007] 1 A.C. 484.

<sup>279</sup> *Id.* at [170].

<sup>280</sup> R (*H*) v. London North and East Region Mental Health Review Tribunal, [2002] Q.B. 1.

<sup>281</sup> *Id.* at 7. Provisions concerning the right to liberty and security.

<sup>282</sup> *Id.* at 12.

72 and 73 constrain a Mental Health Review Tribunal to refuse an order of discharge where the continued detention of the patient infringes article 5.<sup>283</sup> It was a matter which, in the opinion of the Court, the Secretary of State had to bear in mind while determining whether to take remedial action under Section 10 of the HRA.<sup>284</sup> Thus, in this decision, the Court made a subtle suggestion about the means that could be employed, in the form of a Section 10 remedial order, in responding to the declaration of unconstitutionality. The unconstitutionality was later removed through a remedial order under Section 10 of the HRA.<sup>285</sup> Thus, whereas in *Clift* the Court exerted guiding influence on how the unconstitutionality might be addressed, in *H*, it focused on the means by which this might be done.

A challenge to the argument that has been developed thus far is likely to swiftly point to the opinion of Baroness Hale in *Wright v. Secretary of State for Health*.<sup>286</sup> Part VII of the Care Standards Act, 2000 established a scheme for the creation and maintenance of a statutory list of persons who were unsuitable to work with vulnerable adults.<sup>287</sup> The relevant question before the Court was whether the provisions of Part VII were compatible with the Convention rights of care workers.<sup>288</sup> After declaring Section 82(4) of the Care Standards Act incompatible with Articles 6<sup>289</sup> and 8<sup>290</sup> of the Convention, Baroness Hale observed that she “would not make any attempt to suggest ways in which the scheme could be made compatible.”<sup>291</sup> She provided two reasons for her assertion. First, the issue involved striking a delicate balance between the rights of care workers and the rights of the vulnerable people with whom they work and the legislature was in a better position to strike this balance.<sup>292</sup> Second, the statute in question was likely to be replaced by a fresh statutory regime and she did not want her judgment to cast light on the incompatibility of that regime.<sup>293</sup> Her reasoning does not constitute a rejection, *in principle*, of courts providing subtle suggestions of how an incompatibility might be remedied. Baroness Hale’s decision was

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> Mental Health Act 1983 (Remedial) Order, 2001.

<sup>286</sup> *R (Wright) v. Sec’y of State for Health*, [2009] 1 A.C. 739.

<sup>287</sup> *Id.* at 744.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 749. The right to a fair trial.

<sup>290</sup> *Id.* at 752. The right to respect for private and family life.

<sup>291</sup> *Id.* at 754.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

grounded in the specific circumstances of the case. In fact, her decision to provide two pointed case-specific reasons for not making such suggestions in *Wright* reflects that she may not have exercised the restraint that she did in the absence of those reasons.

### 3. *The Nexus Between Declarations of Unconstitutionality and Expected Responses*

In a relatively early decision under the HRA, Lord Nicholls confirmed that extrinsic evidence extending beyond the statute might need to be relied upon in deciding the compatibility of a statutory provision.<sup>294</sup> Evidence of this kind includes ministerial statements in Parliament, explanatory notes published with a statute, and government white papers.<sup>295</sup> But extrinsic evidence has performed two different functions in the case law.<sup>296</sup> The first is to decide whether a statutory provision may be incompatible to begin with, given its “practical effect” and with regard to the “complete picture” of rights protection.<sup>297</sup> This would precede the inquiry as to whether the provision may be read to be compatible with Section 3 of the HRA.<sup>298</sup> The second use of extrinsic evidence, which is more interesting in the context of this section, is in the choice between the remedial courses under Sections 3 and 4 after an incompatibility has been found.<sup>299</sup>

Extrinsic evidence from the existing political arena and judgments of the European Court of Human Rights at Strasbourg (the Strasbourg Court) have influenced courts’ decisions about whether or not to issue a declaration of unconstitutionality. In *Bellinger v. Bellinger*, the failure of the Matrimonial Causes Act, 1973 to recognize the marriage of a post-operative male to female transsexual with a man was at issue before the House of Lords.<sup>300</sup> Given that the Court found the relevant statutory provision incompatible with Convention rights,<sup>301</sup> it could have either stretched the meanings of the words “male” and “female” under the statute so as to include persons who were born with one sex but later became or were regarded as persons of the

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<sup>294</sup> *Wilson v. First County Trust (No. 2)*, [2004] 1 A.C. 816, [62–67]. See also *R (Morris) v. Westminster City Council (No. 3)*, [2006] 1 W.L.R. 505 [39].

<sup>295</sup> *Wilson v. First County Trust (No. 2)*, [2004], 1 A.C. 816, 842–43.

<sup>296</sup> *Id.* at 831–32, 842–43.

<sup>297</sup> *Id.* at 816 [61].

<sup>298</sup> *Id.* at 842.

<sup>299</sup> *Id.* at 831–32.

<sup>300</sup> [2003] 2 A.C. 467, 469.

<sup>301</sup> *Bellinger v. Bellinger*, [2003] 2 A.C. 467, 482.

opposite sex, or issued a declaration of unconstitutionality. In his judgment, Lord Nicholls (with whom all the other judges agreed) took account of a number of factors in choosing to make a declaration of unconstitutionality.<sup>302</sup> The Strasbourg Court had already determined that the barring of transsexuals from marrying in the U.K. was unjustified.<sup>303</sup> The Interdepartmental Working Group on Transsexual People had been reconvened in the U.K. with a mandate to examine the implications of granting full legal status to transsexual people.<sup>304</sup> The Labour Government had expressed a commitment to enact primary legislation allowing transsexuals to marry in such situations.<sup>305</sup> Finally, a draft outline bill on the issue was to be published in due course.<sup>306</sup> Lord Nicholls avoided the Section 3 route and made a declaration of unconstitutionality using Section 4, on the premise that these matters were for Parliament to determine, “especially when the government, in unequivocal terms . . . already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.”<sup>307</sup> Thus, the Court kept a close eye on the government’s expected response while deciding which remedial course to pursue.

Phillipson criticized the Court’s reliance on the expected legislative response when determining whether to issue a declaration of unconstitutionality in *Bellinger*.<sup>308</sup> His critique makes three arguments. First, that the issue should not have been treated as one to be considered either by the Court or by Parliament: both institutions could have played a valuable role in the circumstances. The Court could have re-interpreted the section to the benefit of Mrs. Bellinger, and Parliament could have introduced a comprehensive legislative scheme thereafter. Hickman makes a similar point, positing that invoking Section 3 would not have precluded legislative intervention.<sup>309</sup> Second, the Court could not be certain that the relevant legislation would in fact be passed. The proposed legislation could, amongst other things, be outweighed by “more pressing business” and the

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<sup>302</sup> *Id.*

<sup>303</sup> *Goodwin v. United Kingdom*, [2002] 35 EHRR 18.

<sup>304</sup> *Id.* at 476.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 477.

<sup>307</sup> *Bellinger v. Bellinger*, [2003] 2 A.C. 467 [37].

<sup>308</sup> Gavin Phillipson, *Deference, Discretion, and Democracy in the Human Rights Act Era*, 60 C.L.P. 40, 66–67 (2007).

<sup>309</sup> TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 92 (2010).

government could always change its mind.<sup>310</sup> Third, the new legislation may not be retrospective, leaving the litigant in the same position as before.

These arguments are problematic. The House of Lords could have chosen to re-interpret the relevant statutory provisions in *Bellinger*. But exercising this option could itself easily have invoked Phillipson's second concern, as immediate judicial redress could have led to the issue being placed on the political backburner. The Court would justifiably have been concerned that intervention through Section 3, as opposed to a "headline grabbing"<sup>311</sup> declaration of unconstitutionality, would risk pushing the matter lower down on the government's priority list, as opposed to inviting "prompt parliamentary action."<sup>312</sup> This also explains the reason for which the Court may have consciously eschewed granting immediate redress to Mrs. Bellinger, in the apprehension that this might alleviate the pressure for systemic change in the law. Further, as Kavanagh argues, the decisional space available to the government for changing its mind was limited, since the government's intention to bring about legal reform was not a purely voluntary decision, but was considered an international law obligation in the light of the judgment from Strasbourg.<sup>313</sup>

A similar justification partially grounded the House of Lords' decision to make a declaration of unconstitutionality in *Anderson*.<sup>314</sup> The only question in that case was whether the Home Secretary's power to set the tariff for mandatory life sentence prisoners was compatible with Article 6<sup>315</sup> of the Convention. Mindful of the two recent Strasbourg Court decisions declaring the power incompatible<sup>316</sup> and evidence from parliamentary debates that these decisions would be acted upon,<sup>317</sup> the House chose to issue a declaration of unconstitutionality.

*R (M) v. Secretary of State for Health*,<sup>318</sup> illustrates a similar point. The relevant question was whether Sections 26 and 29 of the Mental Health Act,

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<sup>310</sup> Phillipson, *supra* note 308, at 67. Hickman articulates this concern as well. HICKMAN, *supra* note 309.

<sup>311</sup> Danny Nicol, *The Human Rights Act and the Politicians*, 24 LEGAL STUD. 451, 469 (2004); see also KENT ROACH, THE SUPREME COURT ON TRIAL 288 (2001).

<sup>312</sup> HICKMAN, *supra* note 309, at 93.

<sup>313</sup> KAVANAGH, *supra* note 45, at 142.

<sup>314</sup> *R (Anderson) v. Sec'y of State for the Home Dep't*, [2002] 1 A.C. 837; *id.* at 133-4 (U.K.).

<sup>315</sup> The right to a fair trial.

<sup>316</sup> *Stafford v. United Kingdom*, 35 Eur. Ct. H.R. 1121 (2002); *Benjamin & Wilson v. United Kingdom*, 36 Eur. Ct. H.R. 1 (2002).

<sup>317</sup> *R (Anderson) v. Sec'y of State for the Home Dep't*, [2002] 1 A.C. 837 [45].

<sup>318</sup> [2003] EWHC 1094 (Admin.).

1983, under which a patient could not seek review of the person who was appointed as his/her “nearest relative” under the statute, were incompatible with Article 8<sup>319</sup> of the Convention.<sup>320</sup> According to the statutory definition, the claimant patient’s allegedly abusive father would have been her nearest relative. The government accepted the incompatibility and through reliance upon a number of factors<sup>321</sup> seeking to establish its intention to change the law, argued that a declaration of unconstitutionality was unnecessary. Highlighting that immediate change was not forthcoming and that it would be difficult to “predict with accuracy when or how” the incompatibility would be rectified, Lord Justice Kay made a declaration of unconstitutionality.<sup>322</sup> It is instructive to notice from the tenor of the judgment of the Administrative Court that the fact that the unconstitutionality would, in principle, be remedied was beyond question. What motivated the Court to act under Section 4 was, *inter alia*, that the remedy was not immediately forthcoming. In other words, the Court looked upon its declaration as a further catalyst for a remedy that was already in the pipeline.

The argument developed thus far does not necessarily imply that courts will issue a declaration of unconstitutionality whenever the government seeks one in preference to a Convention-compatible interpretation under Section 3 of the HRA. *Secretary of State for the Home Department v. MB*,<sup>323</sup> provides a good example. The case concerned the compatibility of the “non-derogating control order” regime<sup>324</sup> under the Prevention of Terrorism Act, 2005 with Article 6<sup>325</sup> of the Convention. Finding the regime incompatible, the majority chose to interpret the relevant statutory provisions in a Convention-compliant manner in spite of the plea of the Secretary of State that Section 4 be invoked in preference to Section 3. As Baroness Hale’s

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<sup>319</sup> The right to respect for private and family life.

<sup>320</sup> R (M) v. Sec’y State for Health, [2003] EWHC 1094 [Admin.].

<sup>321</sup> These factors included a draft bill to amend the law, statements of members of Parliament, a statement by a minister in the Department of Health and a friendly settlement entered into by the government in a case that was pending in the Strasbourg Court (*JT v United Kingdom*, (2000) Eur. Ct. H.R. 133), in which it committed to amending the law.

<sup>322</sup> R (M) v. Sec’y of State for Health, [2003] EWHC 1094 (Admin.) [19].

<sup>323</sup> [2008] 1 A.C. 440.

<sup>324</sup> *Id.* These orders impose obligations on persons which the Home Secretary considers necessary “for purposes connected with protecting members of the public from a risk of terrorism.” Unlike in the case of “derogating control orders,” the statute requires them to be compatible with the right to liberty and security under Article 5 of the Convention.

<sup>325</sup> The right to a fair trial.

opinion demonstrates, the Court was clearly concerned that a declaration of unconstitutionality would not be acted upon.<sup>326</sup> It was likely that a finding that the regime was non-compliant with Article 6 would prompt the government to derogate from that provision of the Convention, thereby permitting it to conduct the proceedings in a way that it “knew to be incompatible.”<sup>327</sup> Thus, the majority chose Section 3 over Section 4 in the belief that the government’s remedial preference was not backed by a commitment to address the incompatibility with Convention rights.

Some commentators are troubled by courts’ application of this kind of consequentialist reasoning. According to Jowell, judges should not be influenced by the fact that Parliament may disregard their pronouncements.<sup>328</sup> But this plea is far removed from reality. Judicial consciousness about the aftermath of decisions is so intrinsic to the judicial process that if judges are to take criticism for doing so seriously they would likely continue to take political reactions into account without actually saying that they do so. As Justice Hogan of the High Court of Ireland argues extra-judicially, judges consider it important to be able to have some control on the aftermath of their decisions, so as to avoid “social and political chaos” and arrive at a consensus fostering a solution that avoids controversy.<sup>329</sup> Judges’ willingness to make findings of unconstitutionality is hampered by the possibility that uncontrolled or devastating consequences would follow their decisions. Some prominent theories of judicial decision-making also posit that judges take into account the extent to which political actors are willing and able to overcome judicial decisions.<sup>330</sup>

In the context of the HRA, explanations for making declarations of unconstitutionality whose consequences are predictable extend beyond the

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<sup>326</sup> Aileen Kavanagh, *Special Advocates, Control Orders and the Right to a Fair Trial*, 73 MOD. L. REV. 851 (2010).

<sup>327</sup> Sec’y of State for the Home Dep’t v. MB, [2008] 1 A.C. 440 [73].

<sup>328</sup> Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?*, [2003] PUB. L. 592.

<sup>329</sup> Justice Gerard Hogan, Lecture at the University of Oxford, *Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath* (Feb. 1, 2013). See also KAVANAGH, *supra* note 45, at 135.

<sup>330</sup> Bateup, *supra* note 2. Bateup argues that judges “adjust their rulings” in anticipation of the responses of political actors. Friedman also discusses the literature on the influence of anticipated political reactions on judicial decision-making. Friedman, *supra* note 2. Adrian Vermeule describes this as the “law of anticipated reactions.” Adrian Vermeule, *The Atrophy of Constitutional Powers*, 3 O.J.L.S. 421 (2012). See also LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* 82 (1998); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 14, 175 (2005).

avoidance of chaos and promotion of consensus building. Judges could well be deeply conscious of preserving the legitimacy and authoritative nature of the declaration of unconstitutionality.<sup>331</sup> This argument rests on the fear that ignorance or rejection of a few declarations of unconstitutionality would establish a constitutional precedent. Another explanation could be that judges are anxious for justice to be served to individual litigants in cases under the HRA. Therefore, when a remedy through government is not imminent, they would be inclined to invoke Section 3. However, this explanation bears limited application, since legislation addressing declarations of unconstitutionality may not be retrospective and does not necessarily benefit the litigants in the case.<sup>332</sup> In any event, it is discernible that courts in the U.K. have made decisions on whether to issue Section 4 declarations with an eye on expected remedial consequences.

This argument should not be taken to mean that Parliament is unable to reject a judicial invocation of the interpretive obligation under Section 3 of the HRA.<sup>333</sup> It may do so, for example, by re-enacting the statute in the same terms or amending the statutory provision to clarify its meaning. The difference between Section 3 and Section 4 in this regard is that in the case of the former, the burden of legislative inertia is on Parliament.<sup>334</sup> In other words, the government needs to provide the impetus for change through Parliament and would have to bear the additional social and political costs associated with doing so. But when a declaration of unconstitutionality is made, simply doing nothing is enough to retain the incompatibility on the books.<sup>335</sup> Other things being equal, it is easier to ignore, or at the least, delay responses to, declarations of unconstitutionality than override Convention-

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<sup>331</sup> Bateup, *supra* note 2; KAVANAGH, *supra* note 45, at 136.

<sup>332</sup> Phillipson, *supra* note 308.

<sup>333</sup> IAN LEIGH & ROGER MASTERMAN, MAKING RIGHTS REAL 116 (2008); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8(2) INT'L J. CONST. L. 167 (2010); TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 83 (2d ed. 2011).

<sup>334</sup> Bateup, *supra* note 2. Phillipson fails to consider this point in his criticism of courts' consideration of expected political responses to declarations of unconstitutionality. Phillipson, *supra* note 308. Gardbaum makes the same point in different language, stating that Section 3 "places the default position in favour of the courts." Gardbaum, *supra* note 333.

<sup>335</sup> ROACH, *supra* note 311, at 63; Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221 (2002); Michael Perry, *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE FOREST L. REV. 635, 669-70 (2003); David Feldman, *Standards of Review and Human Rights in English Law*, in ENGLISH PUBLIC LAW (David Feldman ed., 2009).

compatible interpretations under Section 3.<sup>336</sup> In both situations, the government would need to pay the political price (including the loss of public confidence, a breach of international obligations under the Convention and the possibility of an adverse ruling from Strasbourg)<sup>337</sup> for rejecting the court's understanding of Convention rights. However, in the case of the latter it would need to bear the additional costs accompanying the introduction of fresh legislation. As Perry posits, there is a presumption (in the form of the burden of legislative inertia) carrying institutional force in favor of the status quo of the law.<sup>338</sup> Those seeking to change the law would be tasked with overcoming that presumption.

Further, the parties contending that statutory provisions should be read in a Convention compatible manner are certain to benefit from the re-interpretation of a statutory provision under Section 3, and this benefit is unlikely to be withdrawn by subsequent legislation.<sup>339</sup> Thus, courts can invoke Section 3 in the knowledge that Parliament is virtually powerless, even through the enactment of fresh legislation, to deprive benefits conferred upon specific parties by the court.

### *C. Responses to Declarations of Unconstitutionality*

#### *1. The Limited Decisional Space and Remedial Space of Parliament and Government*

Judges have been quite conscious in asserting that the consequences of declarations of unconstitutionality are political rather than legal. As Lord Scott put it in the *Belmarsh Prison Case*, the court only draws attention to the incompatibility and provides ammunition to people to agitate for change through the democratic process.<sup>340</sup> In another case, Lord Justice Kay

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<sup>336</sup> The only reason for which overriding a Section 3 interpretation could be easier for the government is because declarations of unconstitutionality usually receive wider and more prominent coverage in the media and thus, funnel public pressure more effectively. However, the more modest press coverage of Section 3 interpretations could arguably make them less likely to be high on the political agenda in the first place.

<sup>337</sup> TUSHNET, *supra* note 2, at 30–31.

<sup>338</sup> MICHAEL PERRY, *MORALITY, POLITICS AND LAW* 176, 304 (1988).

<sup>339</sup> Paul Gewirtz, *International Symposium on Judicial Fairness and Supervision: Legislative Supervision of Court Cases* (Jan. 2004).

<sup>340</sup> *A v. Secretary of State*, [2004] UKHL 56 [145]; *see id.* at [220] (opinion of Baroness Hale).

observed that it was for the “the Government to decide what, if anything, to do” about a declaration of unconstitutionality.<sup>341</sup>

But in practice, Section 4 declarations have been responded to either through remedial orders or legislation in almost all cases. Amongst the eighteen declarations that attained finality, twelve were remedied through primary legislation. Amendments were largely made either by introducing special legislation or by inserting provisions into a bill that was already before Parliament at the time.<sup>342</sup> The fast track remedial power under Section 10 of the HRA was invoked on three occasions.<sup>343</sup> In two cases, the impugned provisions had already been amended by primary legislation before the filing of the claim.<sup>344</sup> One final declaration of unconstitutionality, concerning the restrictions on the voting rights of prisoners, is still under consideration.<sup>345</sup> Even in that case, the government introduced a draft bill for pre-legislative scrutiny, in which two out of three options laid out by the government seek to purge the incompatibility, while the third restates the existing ban.<sup>346</sup> Governments have focused more on the imperative question of *how* to act, rather than whether to take any remedial action to begin with.<sup>347</sup>

Considerable academic debate has developed about whether the government has any remedial space in responding to declarations of unconstitutionality. Sathanapally claims that in elongating the response-time for legislative response to a declaration and through the strategic technique of making minor alterations without fully addressing the declaration, the legislature has considerable remedial space in engaging with such declarations.<sup>348</sup> While conceding that “judicial reasoning leading to a finding of incompatibility” will imply that “certain legislative options are

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<sup>341</sup> R (M) v. Sec’y of State for Health, [2003] EWHC (Admin) 1094 [17].

<sup>342</sup> VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 61 (2009).

<sup>343</sup> R (H) v. Mental Health Review Tribunal, North and East London Region, [2001] EWCA (Civ) 415, [2002] Q.B. 1; R (Baiai) v. Sec’y of State for the Home Dep’t, [2008] UKHL 53, [2009] 1 A.C. 287; R (F) v. Sec’y of State for the Home Dep’t, [2010] UKSC 17, [2011] 1 A.C. 331.

<sup>344</sup> R (Wilkinson) v. Inland Revenue Comm’rs, [2005] UKHL 30; R (Wright) v. Sec’y of State for Health, [2009] UKHL 3.

<sup>345</sup> Smith v. Scott, [2007] C.S.I.H. 9. In *R (Chester) v. Sec’y of State for Justice*, [2010] EWCA (Civ) 1439, the Court of Appeal declined to make another declaration of unconstitutionality on the same issue, highlighting that the Court had no role to “sanction government” for delays in responding to declarations of unconstitutionality.

<sup>346</sup> Ministry of Justice, Voting Eligibility (Prisoners) Draft Bill, 2012, Cm. 8499 (U.K.).

<sup>347</sup> SATHANAPALLY, *supra* note 2, at 131.

<sup>348</sup> *Id.* at 149–52.

precluded,” Kavanagh contends that Parliament will have “room for legislative maneuver[ing]” in deciding how to remedy an incompatibility.<sup>349</sup> Neither has considered the extent to which the judicial process does in fact narrow the options of Parliament and government.

Scholars have failed to factor in other important elements that limit the remedial space available to the government in responding to declarations of unconstitutionality. To begin with, such declarations are sometimes made in respect of a narrow, transitional group of cases where the law has already been changed prospectively. This is what happened in *Clift*,<sup>350</sup> which has been discussed above.<sup>351</sup> In these situations, the government is deprived of the discretion of deciding whether a remedy should be retrospective, since the failure to adopt a retrospective remedy would constitute ignorance of the declaration and bear attendant political costs.<sup>352</sup>

Further, declarations of unconstitutionality are accompanied by soft suggestions of how the unconstitutionality might be remedied. These suggestions, as already expounded upon, may perform three distinct functions. First, they may exercise a guiding influence on the government by narrowing the government’s substantive options in deciding how to remedy the unconstitutionality, limiting its remedial space. The House of Lords’ judgment in *Clift*<sup>353</sup> demonstrated this.

Second, they may constitute an incentive to remedy the unconstitutional provisions, by indicating that only limited change is required to remove the unconstitutionality. Such declarations operate as soft assurances to Parliament that an amendment providing a certain floor of rights protection is all that is required to comply with the court’s decision. Here, Parliament is not prevented from providing for a higher level of rights protection, but would not be *required* to do so in order to fix the unconstitutionality. Thus,

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<sup>349</sup> KAVANAGH, *supra* note 45, at 281. Similarly, Feldman argues that Parliament retains “political freedom” to fashion a response to declarations of unconstitutionality. David Feldman, Lecture at BIICL, London, The Impact of the Human Rights Act 1998 on English Public Law, Keynote address at British Institute of International and Comparative Law Conference: European Influence on Public Law: 5 Years of the Human Rights Act 1998 in English Law and Recent Developments in France (Oct. 7, 2005), *available at* <http://www.law.cam.ac.uk/faculty-resources/summary/the-impact-of-the-human-rights-act-1998-on-english-public-law/2681>.

<sup>350</sup> R (Clift) v. Sec’y of State for the Home Dep’t, [2006] UKHL 54, [2007] 1 A.C. 484.

<sup>351</sup> See *supra* Part IV.B.2.

<sup>352</sup> It should be noted, however, that the associated political costs in such cases might be slightly lower than in cases where laws in force are declared unconstitutional, since in these situations, the existing law is not incompatible with Convention rights.

<sup>353</sup> R (Clift) v. Sec’y of State for the Home Dep’t, [2006] UKHL 54, [2007] 1 A.C. 484.

remedial space for deciding the level of rights protection that should be accorded in order to eliminate the unconstitutionality is attenuated. This claim remains politically untested in one case. A suggestion of this kind accompanied Lord Justice Buxton's declaration of unconstitutionality in the Court of Appeal in *Baiai*.<sup>354</sup> However, the declaration of unconstitutionality was varied in appeal to the House of Lords.<sup>355</sup> But, it was confirmed by developments following the Court of Appeal's judgment in *T v Chief Constable*.<sup>356</sup> The Secretary of State amended the statutory provisions declared incompatible by an executive instrument,<sup>357</sup> based on the suggestions of the Court of Appeal that an appropriate filtering mechanism, which would not require the individual consideration of every case, could be introduced.<sup>358</sup>

Third, courts may on some occasions even go to the extent of suggesting the means by which a declaration of unconstitutionality may be addressed. *R (H) v. London North and East Region Mental Health Review Tribunal*<sup>359</sup> provides a good example of this. The Court of Appeal's subtle suggestion of making a remedial order was acted upon by the Secretary of State.

These arguments indicate that the remedial space available to the Parliament and government varies, both in terms of content and form, and is often more limited than one might expect. It would be going much too far to say that Parliament, in Masterman's words, has "unfettered discretion"<sup>360</sup> to determine the manner of its response. These soft suggestions should not be mistaken as exerting an insuperable normative force on the government. They are *obiter dicta* statements, but function as conduits through which

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<sup>354</sup> *R (Baiai) v. Sec'y of State for the Home Dep't*, [2007] EWCA (Civ) 478, [2008] Q.B. 143.

<sup>355</sup> *R (Baiai) v. Sec'y of State for the Home Dep't*, [2008] UKHL 53, [2009] 1 A.C. 287.

<sup>356</sup> [2013] EWCA (Civ) 25.

<sup>357</sup> The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013. This instrument was made in spite of the fact that an appeal against the Court of Appeal's judgment was pending in the Supreme Court. The Supreme Court later confirmed the declaration of incompatibility. *R (T) v. Chief Constable of Greater Manchester Police* [2014] 3 W.L.R. 96.

<sup>358</sup> The Court's suggestions were based on a Criminal Records Review. See SUTA MASON, A COMMON SENSE APPROACH: A REVIEW OF THE CRIMINAL RECORDS REGIME IN ENGLAND AND WALES—REPORT ON PHASE 1, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97894/common-sense-approach.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97894/common-sense-approach.pdf) (last visited Nov. 11, 2014).

<sup>359</sup> *R (H) v. London North and East Region Mental Health Review Tribunal*, [2001] EWCA (Civ) 415, [2002] Q.B. 1.

<sup>360</sup> Masterman, *supra* note 62.

broader messages are conveyed from the judiciary to Parliament.<sup>361</sup> The suggestions and a failure to adhere to them, like (but to a lesser extent than) the declaration of unconstitutionality, form an important part of the political discourse. In systems of weak-form judicial review, legislative deliberations are “informed but not controlled” by what courts have said, since legislatures recognize that courts have some advantages over them in constitutional interpretation.<sup>362</sup> If an adequate proportion of parliamentarians sufficiently disagree with the court’s suggestions, they could ignore them *in spite of these pressures*.

The argument is consistent with the “court-centric” approach to ministerial statements of compatibility under Section 19 of the HRA, which tend to focus on whether proposed legislation will withstand challenge in domestic courts and the Strasbourg Court as opposed to whether such legislation is, in the government’s view, compatible with Convention rights.<sup>363</sup> The Cabinet Office’s “Guide to Making Legislation” also requires the relevant government departments to “consider any risk of legal challenge and ensure that the way the bill is drafted reduces the risk as far as possible.”<sup>364</sup> Further, a memorandum setting out the impact of a bill on Convention rights, containing a “frank assessment by the department of the vulnerability to challenge in legal and policy terms,” is required to be provided to the Parliamentary Business and Legislation Committee before the bill can be approved for introduction or publication in draft.<sup>365</sup>

## 2. *The Strasbourg Court Dimension*

One important aspect influencing political responses to declarations of unconstitutionality remains to be discussed. The U.K. was a founding member of the Council of Europe, a pan-European organization of forty-seven member states, and ratified the Convention in 1951. The Convention established the Strasbourg Court, which considers applications concerning breaches of provisions of the Convention.<sup>366</sup> The U.K. accepted the right of

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<sup>361</sup> Danny Nicol, *Law and politics after the Human Rights Act*, [2006] P.L. 722.

<sup>362</sup> Mark Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 10 (2006); see also HICKMAN, *supra* note 309, at 345 (analyzing the political response following the judgment in *A v. Sec’y of State*, [2004] UKHL 56, in which the political debate “took place within” the parameters of principle set out in the judges’ speeches).

<sup>363</sup> Hiebert, *supra* note 16.

<sup>364</sup> UK CABINET OFFICE, *GUIDE TO MAKING LEGISLATION* 98 (2012).

<sup>365</sup> *Id.* at 92.

<sup>366</sup> European Convention on Human Rights § II, Nov. 4, 1950, 213 U.N.T.S. 221.

individual petition to the Strasbourg Court in 1966.<sup>367</sup> Judgments of the Court are binding on the states that are parties to the case.<sup>368</sup>

Section 2(1) of the HRA states that courts in the U.K. must take Strasbourg Court jurisprudence into account. Domestic courts in the U.K. have adopted the “mirror” principle when considering case law of the Strasbourg Court. According to this principle, which was first articulated in *Alconbury*<sup>369</sup> and has been cited in several cases thereafter,<sup>370</sup> a strong presumption that clear and constant Strasbourg jurisprudence will be followed operates. This presumption can be displaced only for very good reasons;<sup>371</sup> for instance, if the Strasbourg decision is “fundamentally at odds with the distribution of powers under the British constitution”<sup>372</sup> or misunderstands some aspect of English law.<sup>373</sup>

The transformation of Convention rights into domestic law is meant to function as a floor rather than a ceiling. Although domestic courts can provide augmented rights protection, they cannot fall below the minimum standard set by Strasbourg.<sup>374</sup> As Lord Bingham famously put it, the national courts would “keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”<sup>375</sup>

The failure to address a domestic declaration of unconstitutionality could result in a case being taken to the Strasbourg Court, with a high probability that the court would find a breach of Convention rights.<sup>376</sup> This because Strasbourg Court accords a margin of appreciation to decisions of national authorities, including courts. Thus, the political sanction underlying a

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<sup>367</sup> Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 37 (Helen Keller & Alec Stone-Sweet ed., 2008).

<sup>368</sup> European Convention on Human Rights, *supra* note 262, art. 46.

<sup>369</sup> *R (Alconbury Developments) v. Sec’y of State*, [2001] UKHL 23, [2003] 2 A.C. (H.L.) 295 (appeal taken from Eng.).

<sup>370</sup> *R (Al Skeini) v. Sec’y of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. (H.L.) 153 (appeal taken from Eng.); *Pinnock v. Manchester City Council*, [2011] UKSC 6, [2011] 2 A.C. (S.C.) 104 (appeal taken from Eng.).

<sup>371</sup> Phillip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, [2012] P.L. 253.

<sup>372</sup> *R v. Sec’y of State*, [2001] UKHL 23, [2003] 2 A.C. (H.L.) 295 [76] (appeal taken from Eng.).

<sup>373</sup> *R v. Lyons*, [2002] KHL 44, [2003] 1 A.C. (H.L.) 976 (appeal taken from Eng.).

<sup>374</sup> Feldman, *supra* note 349.

<sup>375</sup> *R (Ullah) v. Special Adjudicator*, [2004] UKHL 26 [20].

<sup>376</sup> Anthony Lester QC & Kate Beattie, *Human Rights and the British Constitution*, in *THE CHANGING CONSTITUTION* (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

declaration of unconstitutionality transforms into a legal sanction through the Strasbourg Court.<sup>377</sup> The U.K. then falls under an international obligation to amend its domestic law.

### 3. *A Constitutional Convention or Atrophy of Constitutional Power*

Jennings provided a now familiar three-part test for establishing that a practice had transformed into a constitutional convention. There are three necessary conditions for a constitutional convention to develop: The existence of a precedent, belief on the part of political actors that they are bound by the precedent, and a reason for the rule.<sup>378</sup> Jaconelli added a self-evident, but sometimes overlooked, fourth condition: that the rule must be constitutional in character (i.e., it must “regulate the manner in which the business of government is to be conducted”).<sup>379</sup> Has the expectation that the Parliament or government of the day will address declarations of unconstitutionality transformed into a constitutional convention? Many people believe that a convention to this effect is emerging, but has not yet fully crystallized.<sup>380</sup> The Strasbourg Court adopted a similar position in *Burden v. United Kingdom*.<sup>381</sup> Although there is no legal obligation to address declarations of unconstitutionality, the Court observed that it was possible that in the future, evidence of a “long-standing and established practice” of giving effect to declarations of unconstitutionality “might be sufficient to persuade [it] . . . of the effectiveness of the procedure.”<sup>382</sup> The implication is that while the practice has a constitutional character and is supported by underlying reasons (varying from the special status of courts in determining the meaning of Convention rights to the protection of minorities), sufficient precedent is not yet available, and the beliefs of political actors on the binding nature of this expectation are not firmly developed.

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<sup>377</sup> Nicol, *supra* note 361.

<sup>378</sup> IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 134–36 (5th ed. 1959).

<sup>379</sup> Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 *LEGAL STUD.* 24 (1999).

<sup>380</sup> See Feldman, *supra* note 349; K.D. Ewing, *The Continuing Futility of the Human Rights Act*, [2008] P.L. 668; see also KAVANAGH, *supra* note 45, at 289; Vermeule, *supra* note 330; Gardbaum, *supra* note 333 (arguing that it was too early to say that because Parliament had not ignored a declaration of unconstitutionality meant that Section 4 of the HRA was “practically irrelevant”).

<sup>381</sup> 44 Eur. H.R. Rep. 51 (2007).

<sup>382</sup> *Id.* at [39].

Vermeule argues that some constitutional powers tend to “atrophy” over time.<sup>383</sup> Powers that remain unexercised for long periods gradually become un-exercisable, as their exercise would seem to run contrary to the rules of the political game. Another way of looking at this argument is that on account of political precedent heuristics, a constitutional convention against the use of such powers develops as the power falls into desuetude. In the context of the declaration of unconstitutionality, Vermeule argues that Parliament’s compliance may “unintentionally be preparing the ground for a day in which Parliament will be thought to violate a constitutional convention if it refuses to comply.”<sup>384</sup>

Vermeule provides the following examples to demonstrate his argument: the royal veto in the U.K., the “notwithstanding” clause under Section 33 of the Canadian Charter, the “disallowance” power (also of Canadian heritage), the power to “pack” the Supreme Court and the Congressional power to impeach executive officers (both from the United States).<sup>385</sup> It is not merely coincidental that all his examples of atrophy refer to powers where the burden of legislative inertia is on the body that seeks to exercise its constitutional power. For instance, in order to invoke the “notwithstanding” clause under Section 33 of the Canadian Charter, the relevant legislature needs to do so expressly through statute. Similarly, to pursue a “court-packing” agenda, the U.S. Congress would have to assemble the political capital to pass appropriate legislation. In these examples, the position after the power has atrophied is the default case. As explored previously, the declaration of unconstitutionality is subtly different. Under the HRA, the default case is that primary legislation remains valid *unless* the government or Parliament addresses the declaration that it is incompatible with Convention rights.<sup>386</sup>

Evaluating the atrophy of powers where the burden of legislative inertia is on the legislature or government is fairly straightforward and can be expressed in terms of a binary. In the case of the notwithstanding clause and the court-packing power, we can say that required legislation has either been enacted or it hasn’t. The prisoner voting rights story following the declaration of unconstitutionality in *Smith v. Scott*<sup>387</sup> demonstrates that this is

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<sup>383</sup> Vermeule, *supra* note 330 (the author benefited from attending the Oxford-Harvard teleconference in April 2012, at which a previous draft of this paper was discussed).

<sup>384</sup> *Id.* at 443.

<sup>385</sup> *Id.*

<sup>386</sup> See *supra* Part IV.B.3.

<sup>387</sup> *Smith v. Scott*, [2007] CSIH 9.

not quite as easy to discern with the declaration of unconstitutionality. Six years after the Scottish Registration Appellate Court declared Section 3 of the Representation of People Act, 1983 incompatible with Article 3 of the First Protocol to the Convention<sup>388</sup> (providing for “free and fair elections and the right to free expression of the people in the choice of the legislature”), this incompatibility remains legal authority. In some official statements, governments have expressed an intention to remove the incompatibility.<sup>389</sup> But individuals in government, including the Prime Minister,<sup>390</sup> have expressed strong disagreement with the decision. How is such a case to be considered in the context of a constitutional convention or atrophy analysis? If we were to argue that only express rejection of a declaration of unconstitutionality constitutes a refusal to comply, then this would be treated as compliance. On the other hand, the incompatible law still remains the law of the land. The evaluation of compliance with declarations of unconstitutionality is not conducive to a binary analysis, but fits more comfortably with the idea of a gradient, requiring a nuanced approach.

It may, of course, be possible for such strong constitutional practice to develop that the government or Parliament will be expected to address all declarations of unconstitutionality. The important point is that by virtue of the structural design of the HRA, the crystallization of a constitutional convention that declarations under Section 4 will be addressed is likely to be a slower and more arduous process than it would be for powers where the burden of legislative inertia is on the body possessing the power.

#### V. A COMPARISON OF THE SPACE AVAILABLE FOR POLITICAL RESPONSES

This section seeks to construct an overview drawing upon the arguments made in preceding sections. It will integrate Part III, which focused on responses to declarations of unconstitutionality in India, with Part IV, which engaged with arguments concerning the space available to political actors in responding to declarations of unconstitutionality in the U.K. Part IV demonstrated the distinction between two kinds of space available in responding to declarations of unconstitutionality—decisional space and

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<sup>388</sup> European Convention on Human Rights, *supra* note 366, Protocol I.

<sup>389</sup> C.R.G. Murray, *We Need to Talk: “Democratic Dialogue” and the Ongoing Saga of Prisoner Disenfranchisement*, 62 N.I.L.Q. 57 (2011).

<sup>390</sup> Patrick Wintour & Andrew Sparrow, *I Won't Give Prisoners the Vote, Says David Cameron*, THE GUARDIAN, Oct. 24, 2012.

remedial space. This section will draw upon the two concepts of space in the context of both India and the U.K.

*A. Comparing Decisional Space in India and the U.K.*

What is the difference between the U.K. Parliament and government's capacity to reject declarations of unconstitutionality compared with that of the Indian Parliament and government? At the outset, it is worth flagging up the distinction between the structural design of the HRA and the Indian Constitution. The former, as examined in Part IV, places the burden of inertia on the person seeking to remove the unconstitutionality. In other words, a declaration of unconstitutionality does not automatically result in a change of the law—it still requires remedial action (in the form of a remedial order or legislative change) in order for the application of the law to be affected in any way. As long as Parliament and the government choose not to act, the expectation is that the law will continue to be enforced as it was before the declaration of unconstitutionality was made. In India, the burden of inertia is on Parliament and the government, since a declaration of unconstitutionality automatically results in the disapplication and non-enforcement of the law. Political capital in the form of a two-thirds majority in Parliament needs to be assembled before fundamental rights amendments or Ninth Schedule amendments can be made in order to nullify an Indian court's judgment.

The decisional space available in the U.K. is less than that assumed in the existing literature. This is for a number of reasons. First, the government's record of consistently addressing declarations of unconstitutionality is not simply about "inductive reliance on a given pattern of behavior,"<sup>391</sup> it is often the result of calculated attempts by the court to issue such declarations in conditions favorable to change. In many cases, courts issue declarations of unconstitutionality knowing that there is either an intention to amend the law in any event, or a strong likelihood that the law will be amended if the declaration of unconstitutionality is issued. This makes the "decisional space" question hollow, since the Parliament or government do not harbor a desire to reject the declaration of unconstitutionality to begin with. Further, the failure to address a declaration of unconstitutionality (even when Parliament wishes to reject it) is likely to result in an adverse ruling from the Strasbourg Court, placing the government in breach of its international

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<sup>391</sup> Phillipson, *supra* note 308, at 68.

obligations. Finally, soft suggestions made by courts indicating that only minimal change is required in order to address the unconstitutionality influence the decisional space available to Parliament and government.

Conversely, the decisional space available to the Indian Parliament and government when primary legislation is declared unconstitutional for violating fundamental rights is wider than that which is ascribed to them by the existing scholarship. Parliament has two methods of responding to declarations of unconstitutionality: fundamental rights amendments and Ninth Schedule amendments. Whether the judgments in the *Basic Structure Case* and *Coelho* have circumscribed these response mechanisms to such an extent that they are rendered un-exercisable or virtually un-exercisable has remained controversial. In Part III, I argued, based on an analysis of these two judgments as well as other decisions of the Supreme Court, that Parliament still retains some amount of space to respond to judgments through these two response mechanisms.

Whereas the U.K. Parliament and government has less space for response than that often assumed, its Indian counterparts have greater space for response than that attributed by scholars after the *Basic Structure* and *Coelho* judgments. The decisional space for responding to judgments in both jurisdictions is difficult to match with surgical precision. But the argument that I am making is that the decisional space available in India and the U.K. is comparable, and provides for a much closer similarity than a bare juxtaposition of the literature in both jurisdictions seems to suggest. What becomes lucid from an analysis of both jurisdictions is that in India and the U.K. pronounced disagreement by some (or even a majority of) political representatives with a judgment striking down legislation or invoking Section 4 of the HRA has not proven sufficient to reject the judgment. The political fallout from the *Belmarsh Prison* judgment exemplifies this. That judgment<sup>392</sup> declared a part of the U.K.'s erstwhile anti-terrorism law unconstitutional and was initially opposed by sections of the government and parliament; but nevertheless the decision eventually led to a repeal of the law and its replacement by a fresh anti-terrorism regime.<sup>393</sup>

In India and the U.K., extraordinary impetus is required in order to reject declarations of unconstitutionality. The hurdles that need to be overcome by this impetus are distinct in both jurisdictions. In the U.K., these hurdles

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<sup>392</sup> *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

<sup>393</sup> Anti-terrorism, Crime and Security Act, 2001, c. 24; Prevention of Terrorism Act, 2005, c. 2; SATHANAPALLY, *supra* note 2, at 189–93.

include public and political pressure when a declaration of unconstitutionality is made and the risk of a finding from the Strasbourg Court that the government is in breach of its international obligations. In India, the biggest hurdle is the fact that these response mechanisms can only be invoked through a two-thirds majority vote in Parliament. Unless the ruling government has a particularly strong parliamentary mandate, this would necessitate considerable support cutting across political party lines. The other hurdle that governments in India would be tasked with overcoming is the pressure of public opinion, particularly given the surge in the institutional legitimacy of the Supreme Court and High Courts in the last three decades.<sup>394</sup>

But these arguments should not be taken so far as to say that parliament and government in India and the U.K. have virtually no decisional space. It is not inconceivable to think of situations where parliaments in both jurisdictions gather the impetus to reject a judgment declaring that primary legislation which is a political “hot potato” or high on the political agenda is unconstitutional. There is ample evidence in support of this claim with regard to the property cases in India. Since agrarian reform was a cornerstone of the political agenda post-independence, several judgments (many of which were discussed in Part III) declaring land redistribution legislation unconstitutional were nullified through fundamental rights amendments and Ninth Schedule amendments. In the U.K., the developments surrounding the declaration of unconstitutionality issued in *Smith v. Scott*<sup>395</sup> concerning the restrictions on prisoners’ right to vote (considered in Part IV) provides a good example. The draft bill<sup>396</sup> introduced by the government for pre-legislative scrutiny contemplates rejecting the declaration outright, since one of the three options set out in the bill presents this possibility. It waits to be seen whether and how the government chooses to address the incompatibility. But the side to which the scales eventually tip does not significantly affect my argument. Even if Parliament chooses to address the unconstitutionality, the aftermath of the case would demonstrate that the impetus for rejecting the declaration, although considerable, was not

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<sup>394</sup> Jayanth K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 9 J. APP. PRAC. & PROCESS 235 (2007) (explaining that the Supreme Court’s exalted reputation may be more a matter of scholarly belief rather than public opinion).

<sup>395</sup> [2007] CSIH 9.

<sup>396</sup> Voting Eligibility (Prisoners) Draft Bill, 2012, Cm 8499, cl. 39–40.

eventually sufficient to overcome the hurdles faced by Parliament and government.

*B. Remedial Space in India and the U.K.: The Room for Maneuver*

A comparison of the remedial space available in India and the U.K. is slightly more complicated. Once again, an important difference between the HRA and the Indian Constitution bears on the manner in which remedial space should be understood in these jurisdictions. In the U.K., remedial space has been referred to as the legal mode (a remedial order under Section 10 of the HRA or fresh primary legislation) and substantive means (the replacement of an entire regime, minor changes to the existing legislation, etc.) available for addressing declarations of unconstitutionality. In other words, it refers to the room for legislative maneuver after Parliament or the government has *decided to address the declaration of unconstitutionality in some way* (rather than to simply ignore it or reject it outright). In the Indian context, I will refer to remedial space as the legal mode (fundamental rights amendments and Ninth Schedule amendments), and substantive means available to Parliament and government in responding to declarations of unconstitutionality. This refers to the room for maneuver available to the Indian Parliament and government *once they have decided to respond to a declaration of unconstitutionality*.

At first glance, this seems a comparison between unequals in the sense that it is implausible to compare responses to declarations of unconstitutionality that seek to *comply* with human rights decisions of courts in the U.K. with responses to declarations of unconstitutionality in India, which *detract* from (rather than advance) judicial decisions striking down legislation. But such criticism fails to appreciate the nuances of what actually takes place when a declaration of unconstitutionality is made. In the U.K., although the remedial order or legislation for addressing a declaration of unconstitutionality seeks to put the court's judgment into effect, it may also provide the opportunity for Parliament and the government to calibrate its response to the court's judgment by addressing the unconstitutionality in a way that doesn't fully give effect to the judgment or does so in a limited way.<sup>397</sup> Westminster Parliament's response to the declarations of

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<sup>397</sup> See SATHANAPALLY, *supra* note 2, at 149–52.

unconstitutionality made in *Morris and Gabaj*,<sup>398</sup> which declared Section 185(4) of the Housing Act, 1996 incompatible with the anti-discrimination provision under Article 14 of the Convention, provides an example. In spite of the remedial law amending the incompatible statutory provision, by retaining elements of discrimination in the social housing regime, the government was seen as not fully complying with the two judgments.<sup>399</sup> Thus, in practice, remedial orders or legislation act both as a way of complying with and as a mode of sidestepping or detracting from the court's judgment.

In India, Parliament has employed two response mechanisms to respond to declarations of unconstitutionality: fundamental rights amendments and Ninth Schedule amendments. As expounded in Part III, both of these response mechanisms can be subjected to judicial review, but the test for reviewing them varies. While fundamental rights amendments are subjected to the "essence of rights test," Ninth Schedule amendments are subjected to the "rights test."<sup>400</sup> In being able to select which of these response mechanisms to invoke when a judgment declares primary legislation unconstitutional, Parliament is also in a position to decide which test for review should be applicable to its response. It would, of course, be likely to choose the test that is expected to withstand subsequent challenge in court. Parliament may also, as it has done in the past,<sup>401</sup> invoke both response mechanisms in conjunction.

Another important factor strategically influences the Indian Parliament's choice between these two response mechanisms. By definition, the Ninth Schedule insulates statutes from judicial review and thus has an impact exclusively vis-à-vis the law that is protected through a Ninth Schedule amendment.<sup>402</sup> Fundamental rights amendments, on the other hand, have broader implications on the constitutional landscape. In the process of nullifying judgments through a fundamental rights amendment, Parliament also risks having an impact on other statutes and transactions affected by the amendment.<sup>403</sup> In this sense, Ninth Schedule amendments are more narrowly

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<sup>398</sup> Appendix 3: DCA Table of Declarations of Incompatibility made under section 4 of the Human Rights Act 1998, JOINT COMMITTEE ON HUMAN RIGHTS TWENTY-THIRD REPORT, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23909.htm>.

<sup>399</sup> See SATHANAPALLY, *supra* note 2, at 149–52.

<sup>400</sup> I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 [74].

<sup>401</sup> See The Constitution (Fourth Amendment) Act, 1955.

<sup>402</sup> I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861.

<sup>403</sup> *Id.*

targeted and their consequences are more foreseeable than fundamental rights amendments.

Thus, Parliament has room for maneuver in choosing between these two response mechanisms, particularly bearing in mind the different tests of judicial review that apply to them and the differences in the influence of the response mechanisms on the constitutional system as a whole.

But the substantive options before the Indian Parliament in responding to declarations of unconstitutionality are limited. Ninth Schedule amendments are not particularly conducive to making measured responses to judgments declaring legislation unconstitutional. This is on account of the fact that Article 31B of the Indian Constitution is not based on any underlying legal logic<sup>404</sup> applicable to the nullified judgment: it simply removes the substratum of the judgment by reviving a previously invalidated statute from judicial review for violating fundamental rights. In practice, it has represented an “all or nothing” tool, presenting the government with the binary choice of either accepting a judicial decision striking down legislation or rejecting it altogether by inserting the whole statute into the Ninth Schedule (that is, if it has the political capability of securing the passage of a constitutional amendment in Parliament). This is what happened, for example, in *Balmadies Plantations v. State of Tamil Nadu*<sup>405</sup> (discussed in Part II), where the Supreme Court’s invalidation of a few provisions of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 led to the insertion of the statute *in toto* into the Ninth Schedule. This nullified the effect of the Supreme Court judgment in its entirety. The second response mechanism, fundamental rights amendments, has represented a similarly blunt tool. Since such amendments pull the rug from under the court’s judgment by altering the fundamental right on which it was based, they have also tended to assume the form of absolute reversals of declarations of unconstitutionality.<sup>406</sup> The First Amendment to the

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<sup>404</sup> There are of course shades of political logic that, it may be argued, apply to Article 31B. For example, when Article 31B and the Ninth Schedule were being debated in the Provisional Parliament, Jawaharlal Nehru argued that it was a safety valve against the colonial mindset of courts which distrusted the capacity of Indians to govern themselves. Arudra Burra, *Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951*, 5–6, 8 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2052659](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052659).

<sup>405</sup> The Constitution (Thirty-fourth Amendment) Act, 1974.

<sup>406</sup> In theory, it would sometimes be possible for Parliament to meet courts halfway using the two response mechanisms described. For instance, Parliament may only insert some (and not all) of the statutory provisions declared unconstitutional into the Ninth Schedule. Similarly, if different provisions of a statute are struck down for violating different

Constitution, through which the constitutionally permissible restrictions on the freedom of speech were expanded in order to revive a statutory provision<sup>407</sup> invalidated by the Patna High Court in *Shaila Bala Devi v. Chief Secretary*,<sup>408</sup> is an example.<sup>409</sup>

Thus, governments in both the U.K. and India have remedial space in deciding how to respond to declarations of unconstitutionality (whether through remedial orders or legislation in the U.K. and fundamental rights amendments or Ninth Schedule amendments in India). In the U.K., this remedial space may be subject to the guiding influence of the court's opinion about which remedial measure should be employed to address the unconstitutionality. With regard to the substantive options available to the Parliament and government, the menu of possibilities available to respond to a declaration of unconstitutionality in the U.K. is wide but may be partly narrowed by the soft suggestions made by the court in its decision. In India, on the other hand, the options for responding to a declaration of unconstitutionality are more limited in the sense that both fundamental rights amendments and Ninth Schedule amendments tend to eliminate the substratum of judgments altogether, either restoring the statute in question to the state that it was in before the court's judgment or paving the way for the fresh enactment of an identical or substantially similar statute.

### *C. The Capacity to Respond: The Constitutional Convention Question*

The question about whether the ability to reject declarations of unconstitutionality has atrophied or has been politically neutralized through a constitutional convention arises in both jurisdictions. In the U.K., this claim is based on the fact that no declaration of unconstitutionality has been rejected outright in the fourteen years since the HRA came into effect. In Part IV, I cautioned against concluding that a constitutional convention against the power to reject declarations of unconstitutionality has developed based on two reasons. First, the declaration of unconstitutionality is subtly different from many other constitutional remedies in that it places the burden

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fundamental rights, only one of the fundamental rights may be amended so as to preserve the specific statutory provisions which violated it. But calibrated responses of this kind have not been seen in practice and, as these hypothetical examples bear out, are contingent on several factors.

<sup>407</sup> The Indian Press (Emergency Powers) Act, 1931, § 4(1)(a).

<sup>408</sup> A.I.R. 1951 (Pat.) 12.

<sup>409</sup> The Constitution (First Amendment) Act, 1951.

of inertia on the person seeking to remove the unconstitutionality. Second, evaluating the atrophy of power is more complex in a structure where the burden of inertia is not on the Parliament or government. Thus, a much longer timeframe is required in order to establish that the power to reject a declaration of unconstitutionality has atrophied.

In India, the atrophy analysis may be premised on the basis that the last fundamental right amendment and Ninth Schedule amendment entered into force in 1972<sup>410</sup> and 1990<sup>411</sup> respectively.<sup>412</sup> Does the non-use of these powers for over two decades imply that they have been rendered extinct by constitutional convention? It would be a misconception to arrive at this conclusion. As expounded upon in Part III, as recently as 2007, Sabharwal CJ, speaking for a unanimous Supreme Court in *Coelho*, was awake to the possibility of the Ninth Schedule being employed as a response mechanism to nullify declarations of unconstitutionality.<sup>413</sup>

There is a complex web of reasons explaining why the Indian Parliament has not employed fundamental rights amendments and Ninth Schedule amendments in recent years. These include the following. First, a large amount of controversial government policy has been implemented through delegated legislation.<sup>414</sup> This has sometimes resulted in judgments striking down such delegated legislation and subsequent constitutional amendments to nullify the effects of these judgments.<sup>415</sup> Second, no single political party secured an absolute majority in the Lower House of Parliament between 1989 and 2014, necessitating rule by coalition governments composed of a

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<sup>410</sup> The Constitution (Twenty-fifth Amendment) Act, 1971.

<sup>411</sup> The Constitution (Sixty-sixth Amendment) Act, 1990.

<sup>412</sup> This should not be confused with the invocation of the Ninth Schedule and the power to amend the Constitution in general. These two powers have been invoked thereafter as well, so the question of their atrophy does not arise. The plausible atrophy argument relates to the distinctive use of these powers to nullify declarations holding legislation unconstitutional for violating fundamental rights. My response is to this discrete argument.

<sup>413</sup> I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 [78].

<sup>414</sup> This has been partially caused by the increase in the plenary bottlenecks in Parliament (which I have addressed below). P. Rajeev, *Parliamentary Supremacy Under Attack*, THE HINDU, Aug. 7, 2013, <http://www.thehindu.com/opinion/lead/parliamentary-supremacy-under-attack/article4996588.ece>.

<sup>415</sup> See, for example, the Constitution (Eighty-fifth Amendment) Act, 2001 (which nullified the effects of *Union of India v. Virpal Singh Chauhan*, A.I.R. 1996 S.C. 448 and *Ajit Singh v. State of Punjab*, A.I.R. 1996 S.C. 1189). The Constitution (Seventy-sixth Amendment) Act, 1994, the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000 and the Constitution (Eighty-second Amendment) Act, 2000 nullified some of the effects of *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477.

number of political parties.<sup>416</sup> In many cases, more than eight political parties have formed part of a ruling coalition government.<sup>417</sup> This has made mobilizing the two-thirds majority required in order to pass fundamental rights amendments and Ninth Schedule amendments politically difficult (but not impossible, since other constitutional amendments have been passed between 1989 and 2014). There is no reason to believe that responses to judgments striking down legislation for violating fundamental rights through these mechanisms would not see resurgence if a single party gains ascendancy in Parliament,<sup>418</sup> as the Bhartiya Janata Party has in the general elections of 2014. Third, the increase in the Supreme Court's perceived institutional legitimacy has made it more difficult for governments to justify nullifying courts' decisions. As Baxi famously put it, by relaxing rules of standing and opening its doors to the destitute and oppressed, the Supreme Court began to transform itself from the "Supreme Court of India" to the "Supreme Court for Indians" in the 1980s.<sup>419</sup> Almost simultaneously, Parliament's reputation saw a general decline.<sup>420</sup> Fourth, recent years have seen an increase in plenary bottlenecks due to obstructionism in Parliament.<sup>421</sup> This has resulted in an overall decrease in Parliament's plenary time and legislative output,<sup>422</sup> giving it a smaller window of opportunity to consider matters beyond its most pressing business.

Thus, the argument that the power to reject declarations of unconstitutionality has atrophied in both jurisdictions is mistaken.

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<sup>416</sup> Since the Lower House of Parliament follows the "first past the post" electoral system, an absolute majority of seats in the House does not necessarily translate into a majority of the total number of votes cast.

<sup>417</sup> The United Front government under H.D. Deve Gowda (1996–1997), the United Front government under I.K. Gujral (1997) and the National Democratic Alliance government under A. B. Vajpayee (1999–2004) are examples.

<sup>418</sup> Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, in *THE SUPREME COURT VERSUS THE CONSTITUTION* 163 (Pran Chopra ed., 2006).

<sup>419</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 *THIRD WORLD LEGAL STUD.* 107 (1985).

<sup>420</sup> Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability*, UNRISD Democracy, Governance and Human Rights Programme Paper No. 23, 16 (2006).

<sup>421</sup> Tarunabh Khaitan, *The Real Price of Parliamentary Obstruction*, 642 *SEMINAR* 37 (2013).

<sup>422</sup> The statistics published by PRS Legislative Research reflecting the amount of time lost due to obstruction in Parliament can be accessed here: *Vital Stats: Participation of Lok Sabha MPs in Budget Session 2014*, PRS LEGISLATIVE RESEARCH (July 30, 2013, 9:30 AM), <http://www.prsindia.org/parliamenttrack/vital-stats/>; see also Kapur & Mehta, *supra* note 420, at 16.

Responding to such judgments in India and the U.K. remains a political option, albeit one which is difficult to exercise.

#### VI. CONCLUSION

This Article has compared the space for political responses to declarations of unconstitutionality in India and the U.K. Part II provided the constitutional context to declarations of unconstitutionality in these jurisdictions. I argued that the declaration of unconstitutionality is, formally speaking, triggered earlier in India than in the U.K. In other words, *ceteris paribus*, there would (hypothetically speaking) be identical cases in which a declaration of unconstitutionality is made in India, but in which Section 3 of the HRA is invoked in the U.K. in preference to Section 4.

In both jurisdictions, after the declaration of unconstitutionality is made comes the question of what, if anything, the parliament and government should do about it. The possibility of an atrophy of the power to reject a declaration of unconstitutionality arises in both nations because of the infrequency of such rejections. But the atrophy argument is misguided in the context of the Indian and U.K. constitutions, although the reasons for which it is so misguided vary.

The decisional space available to parliament and government in both jurisdictions is similar. The academic literature in the U.K. fails to account for some factors that operate as limits on decisional space. In India, the decisional space is underestimated largely owing to a misreading of constitutional jurisprudence of the Supreme Court. After making these adjustments to the decisional space in India and the U.K., the positions in both jurisdictions are not as divergent as they might have appeared initially.

Moving to remedial space, India and the U.K. also share a similar level of flexibility in the form of their responses to declarations of unconstitutionality. In India, Parliament can select whether to respond through fundamental rights amendments or Ninth Schedule amendments (or both). In making this choice, it also makes an implicit selection of the test of review its response would be subjected to in a potential challenge in court. Its choice may also be influenced by the difference in the nature and scope of these response mechanisms. In the U.K., Parliament and government's choice lies in deciding between a fast track remedial order and primary legislation. *Obiter dictum* judicial statements about the means that should be employed to address an incompatibility may influence their choice.

The only area in which the two nations drift away from one another concerns the second part of remedial space—the substantive options available in responding to a declaration of unconstitutionality. Parliament and government in the U.K. have the flexibility to make nuanced responses to declarations under Section 4 of the HRA. This flexibility is restricted to some extent by the scope of the declaration itself and the guiding influence of the judgment that makes it. In India, on the other hand, fundamental rights amendments and Ninth Schedule amendments have resembled blunt tools to respond to declarations of unconstitutionality, since their invocation normally results in the complete nullification of the judgment striking down legislation through the revival of statutes *in toto*.

This Article has sought to answer many questions—but it has wider implications that give rise to further constitutional questions. Parliamentary sovereignty remains an omnipresent influence under the HRA, whereas to many, the Indian system is characterized by judicial supremacy. The default position after a declaration of unconstitutionality is made differs in both jurisdictions. In the U.K., the law stands until Parliament does something about it; in India, the law does not stand unless Parliament does something about it. The Indian landscape resembles what many people have in mind when they describe a strong form system of judicial review. Conversely, the HRA is frequently cited as the exemplar of weak form judicial review. In spite of these differences, the space for political actors to respond to declarations of unconstitutionality in the two jurisdictions is not dissimilar. What does this tell us about the nature of the two constitutions? Could it be that variations in constitutional framework and design do not significantly impact political behavior, or are the variations themselves more a matter of perception rather than substance?<sup>423</sup> These questions deserve exploration on a separate occasion. For the time being, suffice it to say that in spite of the differences in the constitutional structure and culture of the two jurisdictions, political actors in India and the U.K. enjoy substantially similar elbow room in responding to declarations of unconstitutionality.

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<sup>423</sup> This Article leans towards the view that the dichotomies between strong form and weak form judicial review, and parliamentary sovereignty and judicial supremacy, demand dilution, if not reconsideration. The extent to which my argument supports this hypothesis, however, undoubtedly requires deeper consideration.

