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Redeeming the National in Constitutional Argument

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Abstract: In many countries beyond the traditional comparative constitutional law canon, the advocates of constitutionalism are increasingly appealing to a supra-national constitutional discourse frequently grounded in best practices for constitutionalism. This trend has helped to foster a nationalistic backlash in which constitutional advocates argue that constitutions should not reflect international constitutional norms but instead must reflect historically-grounded tradition or identity. How should advocates of constitutionalism understand and respond to this backlash? We argue that linking a critical interpretation of national history and the text of the national constitution to constitutionalism can help to counter this nationalist backlash, particularly in constitutional adjudication. Looking at Russia and Sri Lanka, we illustrate how this process of "redeeming the national" can provide new arguments for those interested in advancing the project of constitutionalism. We argue further that this kind of constitutional argument can also help to uncover ways of adapting constitutional principles to particular national contexts.

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Introduction

Constitutionalism is increasingly viewed as a supra-national phenomenon, with claims to universality underpinned by alliances between constitutional lawyers and international institutions embedded in a discourse of best practices and constitutional design (often focusing on rights discourse).[1] By supra-national, we mean forms of constitutional discourse

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1 The two regions in the world leading this are Europe (European Convention on Human Rights/ European Court on Human Rights) and Latin America (American Convention on Human Rights/ Inter-American Court of Human Rights). The United Nations (Committee on Human Rights) also plays an important role in this process.

that exist beyond national institutions or actors and which look to sources outside of national constitutions and history. Particularly in countries outside the traditional comparative law canon, advocates of constitutionalism are increasingly appealing to supra-national institutions in their efforts to defend their own constitutional systems. This approach can have beneficial effects; most notably, it can put pressure on national authorities to respect important constitutional commitments. But this practice can lead many constitutional advocates – when making constitutional arguments both inside and outside of court – to neglect the national elements of their constitutional system. This neglect can result in the universalization of influential national forms of constitutional practices and the 'measuring' of constitutionalism in varied contexts against particular institutional or value 'best practices.'[2] In fact, it can lead constitutionalism to be labelled a convergence project with a set of best national practices.[3]

This 'best-practices' form of constitutionalist discourse has helped to trigger a nationalist backlash in many countries.[4] In particular, this discourse claims that the supra-national project of constitutionalism is ill-suited to, or does not take sufficient account of, national context. Advocates of this approach argue, in constitutional adjudication and interpretation, that constitutions should not reflect supra-national constitutional norms but instead, should reflect essential, historically-grounded principles and values.[5]

This national backlash is underpinned by what we call the "pluralist critique": the view that different constitutional contexts must develop according to their own histories and traditions and therefore should not conform to a particular universal model or best practice. This itself is a valid critique; constitutionalism should *not* be seen as a project of convergence to a universal set of 'best practices.' We, therefore, agree with Vicki Jackson who argued that an "end-state of convergence" is "unachievable" for the development of constitutional law.[6] Nor is it desirable. Instead, constitutionalism is a project that involves and requires "engagement" with constitutional principles—such as the separation of powers, rule of law, and democracy—by adapting them to a particular national context.[7] These principles are only partial and should be implemented in different ways according to

2 Examples include the approach taken by the Venice Commission which promises (as part of its aims) to bring legal and institutional structures "in line with European standards."; see https://www.venice.coe.int/WebForms/pages/?p=01_Presentation (last accessed on 31 October 2021).

3 *Vicki C. Jackson*, Constitutional Engagement in a Transnational Era, Oxford 2010. We draw from Vicki Jackson's account of constitutional resistance, convergence and engagement in illustrating our claim.

4 Beyond Sri Lanka and Russia, we can see examples of this backlash in Hungary, Turkey, and Australia. See, e.g. *Adrienne Stone*, Proportionality and Its Alternatives, Federal Law Review 48 (1) (2020), p.123 (discussing the backlash to proportionality reasoning in Australia).

5 See Part C.

6 *Jackson,* note 3, p. 68.

7 *Nicholas Barber*, Principles of Constitutionalism, Oxford 2018, p. 15-17.

national context. [8] In this article, we concern ourselves with the idea of a 'nation' as found in constitutional text and national history.

This approach permits us to draw a distinction between 'constitutional principles' and 'constitutional practices.' Constitutional principles are universal and underpin any form of constitutionalism. They include commitments to the rule of law, the separation of powers, and democracy. Constitutional practices, by contrast, reflect the different ways that the general principles of constitutionalism can be implemented; a key source of this pluralism is the national context. Thus, we argue that constitutionalists must not lose sight of their own national contexts; this process of "redeeming" the national can therefore provide more robust support to general constitutional principles. In so doing, they will decouple the pluralist critique from the nationalist backlash.

Building on Gary Jacobsohn's concept of constitutional disharmony, we propose two modalities of constitutional argument that can help to "redeem" the national in constitutional discourse both in and beyond courts.[9] First is for constitutional advocates to ground —where possible—arguments that engage with the principles of constitutionalism in the text of the national constitution. Constitutions are frequently disharmonious legal texts. Thus, in many countries exhibiting a strong nationalist backlash, national constitutions still contain textual support for the principles of constitutionalism. Constitutional advocates should, therefore, use their legal training to determine the extent to which aspects of the text, structure, and values of the national constitution provide resources for critiquing the nationalist backlash and implementing the principles of constitutionalism. This form of textual argument will demonstrate how the nationalist backlash is problematic because it itself strays from the text, structure, or values of the constitution. This kind of argument will be particularly well-suited to arguments in court.

A second approach is to interpret history in ways that advance constitutionalism. History is not a numerical factor that determines the present. History is disharmonious, containing competing ideas and approaches.[10] Redeeming the national requires de-essentializing anti-constitutional arguments about national identity or tradition by exposing them as selective and politically-motivated versions of history. It also requires finding versions of history that can support the project of constitutionalism by demonstrating how the principles of constitutionalism respond to particular historical needs. This shows that, for

8 *Barber*, note 7, p. 14.

9 *Garry Jacobsohn* Constitutional Identity, Cambridge, Mass. 2010.

10 *H. Patrick Glenn*, Legal Traditions of the World: Sustainable Diversity in Law, Oxford 2000, p.1-55 (describing how history is disharmonic); *Geoffrey. R. Elton*, The Practice of History, Oxford 1991, p. 26-37 (criticizing the scientific search for scientific laws or causation in history); *Joan Tumblety* (ed), Memory and History: Understanding Memory as Source and Subject, London 2013 (describing how modern historiography rejects the positivist idea that history allows uncovering the objective truth about the laws that determine our contemporary social or political world). *William Partlett*, Constitutional Historiography, Melbourne 2020 (under review and on file with authors) (describing how selective versions of history grounded on general sources can be used to support constitutional principles).

instance, even in countries with traditions of valuing the strong state or of authoritarianism, national history need not undermine the project of constitutionalism. This argument can work both inside and outside of court and would be underpinned by an ethical and political commitment to advancing, where possible, an interpretation of history that advances principles of constitutionalism.

This brings us to the 'national' as a concept that is assumed and used in constitutional argumentation. We argue here that 'redeeming' the national is important because it facilitates the process of adapting the principles of constitutionalism to context. In so doing, it helps to uncover particular issues or questions that are in fact central to the project of implementing the principles of constitutionalism in that context. For instance, constitutionalism can express itself in different forms of state-building.[11] In some national contexts, it may be viewed as limiting the state; in others, it may be seen as placing obligations on the state and enabling the state.[12] Redeeming the national, therefore, encourages pluralism but within the framework of the broader (but partial) principles of constitutionalism. This pluralism means that there will be different ways of ensuring key principles of constitutionalism. For instance, in some national contexts, an elected president alongside an elected parliament is best at achieving checks and balances; in others, it will not be. This recognition of pluralism therefore seeks to ensure that constitutionalism is not a project of supra-national convergence. We propose that key sources of constitutionalist discourse—particularly knowledge institutions such as law schools—should seek to develop a national idea of constitutionalism in the realm of learning as well as in litigation and in the implementation of the constitution.[13]

This approach is animated by the view that constitutionalism relies on reasoned argument.[14] It is therefore supported by groups and governmental institutions that advance arguments that seek to subordinate the exercise of public power to the norms and values contained in the text of the constitution instead of to the exercise of public power based on arbitrary "will" (or political justifications of this political will). The institutions and groups involved in supporting this worldview include (but are not limited to) lawyers' associations, universities, and non-governmental organizations. These institutions may include a special-

11 As an example, constitutional design that focuses on non-judicial forms of constitutional review/supervision.

12 *Barber*, note 7.

13 *Vicki Jackson* has described knowledge institutions as including universities, a free press, government and non-governmental institutions that gather, evaluate and disseminate objective facts. See *Jackson,* Knowledge Institutions in Constitutional Democracies: of Objectivity and Decentralization (Harvard Law Review Blog August 29, 2019 available at https://blog.harvardlawreview.org/knowledge-institutions-in-constitutional-democracies-of-objectivity-and-decentralization/ (last accessed on 31 October 2021).

14 *Phillip Bobbit*, Constitutional Fate: A Theory of the Constitution, New York 1982 (describing different modalities of constitutional argument and how they give life to a constitutional system). *Martin Loughlin*, The Constitutional Imagination, The Modern Law Review 78(1) (2015), p. 1-25.

ized constitutional court but also many others such as fourth-branch integrity or regulatory institutions.

In this article we explore this approach in the context of Russia and Sri Lanka. These two countries are rarely compared yet share some key similarities. First, both countries have written constitutions that textually commit themselves to foundational constitutional principles such as the rule of law and the separation of powers. However, these basic commitments remain under-realised and are in some cases radically contradicted by other textual provisions in their constitutions; an important project for these countries is resolving this conflict and ultimately realizing these fundamental commitments. Second, these countries are simultaneously characterized by contested or disharmonic histories in which anti-constitutional arguments about the importance of executive centralism to a strong state compete with the principles of constitutionalism. Finally, both countries share distinct political and economic challenges that stem from their particular histories – in particular, the need for a stronger or more effective government – which are understudied in comparative constitutional law scholarship. In particular, they both face ongoing challenges of state and nation-building that are not as prevalent in the usual countries studied in comparative constitutional law. The comparison of these two countries will resonate with other countries beyond the traditional comparative constitutional law canon that have deep commitments to an effective state that can deliver key developmental goals particularly in Eastern Europe and Asia.[15]

Finally, some caveats. First, the textual form of argument that we propose may only apply in countries with existing textual commitments to key constitutional norms. For countries without these textual commitments, the project of constitutionalism cannot involve our textual strategy. Second, we are mindful that the comparison of Russia with Sri Lanka can only go so far. However, the similarities in the push for supra-national convergence by constitutional advocates on the one hand and the nationalist backlash by opponents of constitutionalism on the other, in these two very different jurisdictions, adds strength to our claim that this is a widespread problem. Third, we do not seek to advance a new or general theory of constitutional argument or to encourage advocates to abandon the supra-national. Instead, we are seeking to *remind* constitutional advocates not to give up on or neglect the national dimensions of constitutionalism – most notably, constitutional text and national history. We should clarify that we do not endorse or support the political impulse that drives

15 The insights of this article also extend to jurisdictions such as Hong Kong where executive centralism is increasingly being advanced as the best way to overcome the challenges facing economic and political development. This is being done against the prior commitment of the Court of Final Appeal to implementing the key principles of constitutionalism through the interpretation of the Hong Kong Basic Law. For the tension, see *Ahy Chen*, The Interpretation of the Basic Law-Common Law and Mainland Chinese Perspectives, Hong Kong LJ 30 (2000), p. 380. Other examples include India as well as many countries of the former Soviet Union (such as Kyrgyzstan, Kazakhstan, Belarus, Ukraine, Armenia). See *William Partlett*, Post-Soviet Constitution-Making, in David Landau / Hanna Lerner (eds.), Comparative Constitution-Making, Cheltenham/Northhampton 2019.

the nationalist backlash and resistance to constitutionalism. We recognise it as a problem and intend to remind constitutional advocates that national constitutional text and history can be used, at least in some instances, to resist the nationalist backlash.

The article is organised as follows. In Part A, we illustrate and discuss the problem. We highlight the ways in which constitutionalism is increasingly taking the form of a supra-national discourse. In Part B, we demonstrate how this supra-national discourse is operating in Russia and Sri Lanka. In Part C, we trace examples of a national backlash to this increasing supra-national form of the constitutionalist discourse. In Part D, we suggest two modalities of argument that will help to redeem constitutionalism as a national discourse. In Part E, we demonstrate how these modalities work by applying them to both Russia and Sri Lanka. In particular, we show how redeeming the national allows for new argumentative resources in critiquing the nationalist backlash.

A. Engagement with Constitutional Disharmony

Any given constitutional discourse is situated on a continuum between "national histories and cultures" and "international legal orders and the constitutional approaches of other nations."[16] Vicki Jackson explains that there are three positions that a discourse may occupy in this spectrum. First, it can occupy the position of convergence, 'a posture that might view domestic constitutional law as a site for the implementation of international legal norms, or, alternatively, as a participant in a decentralized but normatively progressive process of supra-national norm convergence.'[17] Second, it can be in a position of engagement, grounded 'on the idea that the concept of domestic constitutional law itself must now be understood in relation to supra-national norms.'[18] Third, a constitution can be in a position of "resistance" which involves 'differentiation or indifference…associated with a particular kind of nationalist expressive use of constitutionalism.'[19] Jackson points out that the position of resistance 'may be primarily oriented toward communicating outward about the status of the state as sovereign…within the state.'[20] This 'outward communication may take the form of resistance to outside interference, a kind of resistance to the supra-national.'[21]

In the 'new universe' of constitutions, constitutional discourse is increasingly associated with a supra-national discourse that advocates convergence and therefore frequently ignores, undermines or is seen as competing with national context.[22] This is underpinned by growing alliances between domestic advocates of constitutionalism and supra-national

16 *Jackson* note 3, p. 277.
17 *Jackson* note 3, p. 8.
18 *Jackson* note 3, p. 9.
19 *Jackson* note 3, p. 8.
20 *Jackson* note 3, p. 28.
21 *Jackson* note 3, p. 28.
22 *Jackson* note 3, p. 1.

courts and other bodies. For instance, in Latin America, the concept of the "constitutional block" reflects the strong influence of international human rights norms on domestic constitutional systems; this approach is driven by the activity of the OAS and Inter-American Court for Human Rights.[23] A similar argument can be made about the Council of Europe, to some extent about the African Court of Human and Peoples' Rights, the Venice Commission, Amnesty International etc and even of scholars of comparative law.[24]

We argue that this 'convergence' form of constitutional discourse carries particular dangers. In particular, it can itself trigger 'resistance' which can undermine the project of constitutionalism. This nationalist backlash and its anti-constitutional 'resistance' draws heavily on a perceived need to recapture sovereignty. In this mode, constitutions are understood as 'self-constituting' documents that are 'designed at least in part to differentiate' and resistance is viewed as seeming to naturally follow.[25] We, therefore, agree with Jackson that engagement is the best possible posture in 'the emerging cosmology of constitutionalism.'[26] In so doing, however, we are developing Jackson's ideas not just in relation to judges but also in relation to constitutional lawyers and advocates. Furthermore, we are extending her work by critiquing how an 'international law or transnational legal consensus' is formed, how it travels, and by examining some reactions to it.[27] In particular, we suggest a return to the national is a critical way to deepen the process of engagement with constitutional principles.

In returning to and redeeming the national, we draw on Gary Jacobsohn's work on constitutional identity and disharmony. Jacobsohn notes that constitutional theory frequently 'conceptualize[s] the Constitution at a level of abstraction that enables apparent tensions to disappear when theorizing is done the right way.'[28] He notes that 'disharmony' is a key feature of every constitutional culture and engaging with this tension is a powerful driver of constitutional identity.[29] Fundamentally, therefore, all constitutional histories "represent[] a mix of political aspirations and commitments" and this disharmony is present in both historical sources as well as the constitutional text.[30] Finding methods of engaging with – rather than resisting – constitutional principles in these disharmonic pasts and constitutional texts is an important skill for constitutional advocates to learn and apply. This will allow

23 See in this regard, *Jorge Contesse*, The final word? Constitutional dialogue and the Inter-American Court of Human Rights, International Journal of Constitutional Law 2(15) (2017), p. 414.

24 The original European academic justification for comparative constitutional law was to understand how law is converging. For a description and critique of this project, see *Pierre. Legrand*, European Legal Systems are not converging, The International and Comparative Law Quarterly 45 (1) (1996), p. 52.

25 *Jackson*, note 3, p. 19.

26 *Jackson*, note 3, p. 10.

27 *Jackson*, note 3, p. 42.

28 *Jacobsohn*, note 9, p. 4.

29 *Jacobsohn*, note 9, p. 4.

30 *Jacobsohn*, note 9, p. 7.

them to counter anti-constitutional arguments both inside and outside of court. It will also allow them to find ways of engaging – and therefore adapting – the principles of constitutionalism to national context.

B. Supra-national convergence as constitutional discourse in Russia and Sri Lanka

In this part, we provide examples of supra-national constitutional discourse in Russia and Sri Lanka. Although we criticize this trend, we acknowledge that it has had some positive benefits for the advancement of constitutionalism. Transnational litigation and advocacy has played a powerful role in vindicating individual rights and can have important symbolic value. It is increasingly, however, having problematic effects. First, it can lead constitutional advocates to downplay the national context. Second, and relatedly, this discourse risks viewing constitutionalism as a project of convergence with a particular set of best constitutional practices. In constitutional litigation, advocates of supra-national approaches argue that proportionality balancing is the most effective method of rights protection. For instance, Robert Alexy's work on proportionality claims to be a universal approach to the optimization of the protection of individual rights.[31]

Another problem with this supra-national convergence is that, on close scrutiny, the dichotomy between the national and transnational is artificial. The best practices of constitutionalism are instead themselves taken from a particular national context. For instance, the basic structure doctrine had its genesis in Indian constitutional law.[32] But it is not a doctrine that is well suited to all contexts; it therefore should not become a best practice that is prioritized at the transnational level. This reveals a key problem of 'the supra-national': it frequently itself reflects the particular nationally-rooted constitutional practices of highly influential constitutional jurisdictions. Convergence with these particular national approaches—seen as trans-national best practices—cannot and should not be the project of constitutionalism.

We identify and compare how this convergence works in Russia and Sri Lanka. We argue that the convergence dynamics are slightly different in both cases. In Russia, supra-national convergence involves active appeal to the highly developed and highly bureaucratized European transnational infrastructure. Most notably, this includes appeals to the Council of Europe, which Russia joined after the collapse of the Soviet Union in the 1990s. The transnational has an even deeper history in Sri Lanka due to its colonial history. Due to internal armed conflict and developmental assistance, the transnational—often including appeal to the United Nations—has had a strong legal, and institutional presence and influence in Sri Lanka.

31 *Robert Alexy*, A Theory of Constitutional Rights, Oxford 2002.

32 *Sudhir Krishnaswamy*, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, New Delhi 2011; see also in this regard *Yaniv Roznai*, Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea, The American Journal of Comparative Law 61 (3) (2013), p 657.

I. Russia

A recent example that demonstrates the problems of transnational best-practices discourse can be found in the domestic reaction to the 2020 amendments made to the Russian Constitution. These amendments make a number of changes to the Russian Constitution that further undermine its core textual constitutional commitments to the principles of constitutionalism in Chapters 1 and 2.[33] Among other things, these amendments further centralize power in the hands of the Russian president and withdraw Russia from its engagement with international law.

A key response by advocates of the project of constitutionalism within Russia has been to heavily focus on the supra-national level. A strategy that generated significant interest in response to the amendments was a petition on Change.org calling for the Council of Europe to review the amendments.[34] A group of 120 leading "Russian human rights defenders, leading lawyers, authoritative representatives of the expert community and politicians" have "prepared and signed an open appeal from Russian citizens to the Council of Europe calling for an urgent legal review of amendments to the Russian Constitution and the procedure for their adoption."[35] The petition, in part, argues that these changes fundamentally undermine "European constitutional values and democratic norms" as well as "Russia's Council of Europe obligations." One of the initiators of the change argued that opinion was important because the Venice Commission was "one of the most authoritative international bodies on issues of constitutional law" and "so that Russian citizens could formulate their opinion on the amendments taking into account European norms and obligations of Russia as a member of the Council of Europe."[36]

This appeal to the international is driven in part by the fact that many Russian constitutional advocates (who initiated the petition) are part of internationally-affiliated, non-governmental organizations or are academics outside of the country. For instance, one

33 *William Partlett*, Russia's 2020 Constitutional Amendments: A Comparative Perspective, Cambridge Yearbook of European Legal Studies (forthcoming 2021).

34 Petition to Russian Citizens on Change.org, "Совет Европы, проведите срочную правовую экспертизу изменений в Конституцию России!" [Council of Europe, Please Immediately Provide Your Legal Expertise on the Changes to the Russian Constitution] https://www.change.org/p/%D1%81%D0%BE%D0%B2%D0%B5%D1%82-%D0%B5%D0%B2%D1%80%D0%BE%D0%BF%D1%8B-%D0%BF%D1%80%D0%BE%D0%B2%D0%B5%D0%B4%D0%B8%D1%82%D0%B5-%D1%81%D1%80%D0%BE%D1%87%D0%BD%D1%83%D1%8E-%D0%BF%D1%80%D0%B0%D0%B2%D0%BE%D0%B2%D1%83%D1%8E-%D1%8D%D0%BA%D1%81%D0%BF%D0%B5%D1%80%D1%82%D0%B8%D0%B7%D1%83-%D0%B8%D0%B7%D0%BC%D0%B5%D0%BD%D0%B5%D0%BD%D0%B8%D0%B9-%D0%B2-%D0%BA%D0%BE%D0%BD%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%86%D0%B8%D1%8E-%D1%80%D0%BE%D1%81%D1%81%D0%B8%D0%B8 (last accessed on 31 October 2021).

35 Petition, note 34.

36 Press Release by Golos (Voice), Human Rights Defenders Appeal to the Council of Europe (14 April 2020), available at https://echo.msk.ru/blog/golosinfo/2624966-echo/ (in Russian) (last accessed on 31 October 2021).

of the key initiators is the Coordinator of the Advocacy Group EU-Russia Civil Society Forum. Other key initiators are overseas academics in Europe and the United States as well as members of the Moscow Helsinki Group, Amnesty International, and Memorial.[37]

The supranational nature of the opposition to the amendments has also directed attention narrowly to particular parts of the amendments that affect the relationship between Russia and international law. For instance, a report on the changes by the International Commission of Jurists focuses heavily on the amendments that ultimately alter the status of international law in Russian domestic law.[38] This approach has led to blind spots in the review of the 2020 constitutional reform, including the effect of the reforms on the further centralization of power and the organization of power between the federal centre and the regions within the Russian state.

II. Sri Lanka

In contrast with Russia, transnational institutions have long been involved in overseeing Sri Lanka. In particular, the United Nations and other transitional actors such as international human rights organizations have and continue to be engaged in developments in Sri Lanka. For instance, in 1987, the constitutional devolution of power, through the 13th Amendment to the Constitution, was introduced due to strong political pressure (including the threat of military intervention) on Sri Lanka by India.[39] Moreover, faced by resistance at the domestic level, advocates for the rights of Tamil and Muslim ethnic minorities have turned to the transnational to seek support for their demands for constitutional reforms and for accountability for violations of fundamental rights guarantees.

The review of Sri Lankan human rights in the context of transitional justice and reconciliation by the Human Rights Council 2009 onwards and related developments illustrate recent dynamics of this trend. Elected representatives of the largest minority, the Tamils, and representatives of civil society have frequently lobbied the members of the UN Human Rights Council in relation to constitutional issues.[40] Since 2009, the UN HRC has

37 For instance, one of the organizers, Stanislav Stanskhih, is currently an academic in the United States. He is a former Fellow at the Center for Slavic, Eurasian, and East European Studies at the University of North Carolina Chapel Hill and now is based at the University of Wisconsin School of Law. https://cseees.unc.edu/current-fellows-2/stanskikh-stanislav/ (last accessed on 31 October 2021).

38 International Commission of Jurists, Analysis of the Amendments to the Russian Constitution, (2020), https://www.icj.org/wp-content/uploads/2020/03/Russia-constitution-changes-Advocacy-Analysis-Brief-2020-RUS.pdf (last accessed on 31 October 2021).

39 See *Austin Pu*lle and *Suri Ratnapala*, Sri Lanka's Quest for a Reformed Constitution: Lessons from a Lost Opportunity, The Chinese Journal of Comparative Law 7(2) (2019), p. 291.

40 See for instance, 'UNHRC meet: Tamil National Alliance raises issue of Tamil activist's arrest' *The Economic Times* (15 Mar 2014) available at https://economictimes.indiatimes.com/news/politics-and-nation/unhrc-meet-tamil-national-alliance-raises-issue-of-tamil-activists-arrest/articleshow/32068089.cms ; *Reuters*, Sri Lanka's Tamil party asks for UN pressure over alleged war crimes

monitored Sri Lanka by way of issuing resolutions and by commissioning the OHCHR to submit reports on Sri Lanka's progress including in relation to constitutional reform.[41]

In its latest resolution on Sri Lanka, the Council notes the twentieth amendment to the Constitution and calls on the Government 'to fulfil its commitments on the devolution of political authority…in accordance with the thirteenth amendment to the Constitution of Sri Lanka.'[42] In the debates on this issue the national and supra-national dynamic of constitutional discourse becomes clear.[43] These demands are frequently phrased in a universalist language by constitutionalist advocates in national and international fora. For instance, on the question of power-sharing and devolution, political parties representing Tamils have often lobbied diplomats and the United Nations to seek political support for domestic demands for constitutional reform.

In sum, both Sri Lanka and Russia demonstrate the influence of the transnational and convergence discourse in constitutional discussions. The next section describes how this kind of convergence discourse is fostering a nationalist backlash grounded on a pluralist critique.

C. The Nationalist Backlash

The nationalist backlash goes further than advancing the pluralist critique and instead adopts a position of resistance to the principles of constitutionalism. Here, we trace these kinds of arguments in Russia and Sri Lanka. We demonstrate that this backlash has taken the form of arguments grounded in historical tradition or identity that frequently appeal

(March 2 2017), https://www.reuters.com/article/us-sri-lanka-un-rights-idUSKBN16858U (last accessed on 31 October 2021).

41 See for instance, Promoting reconciliation, accountability and human rights in Sri Lanka', report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/37/23 25 January 2018). For instance, the HRC noted in 2012 the recommendations made by the Lessons Learnt and Reconciliation Commission (Presidential Commission) and welcomed its recommendations, including the recommendation to 'reach a political settlement on the devolution of power to the provinces, promote and protect the right of freedom of expression for all and enact rule of law reforms.' 'Promoting reconciliation and accountability in Sri Lanka', 3 April 2012, A/HRC/RES/19/2. In 2015, the HRC welcomed 'the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures, encourages the Government's efforts to fulfil its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population; and also encourages the Government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka.' Para 16, 'Promoting reconciliation and accountability in Sri Lanka,' 14 October 2015, A/HRC/RES/30/1.

42 Resolution adopted at the 46th Session of the Human Rights Council on 23 March 2021. See 'How it came tumbling down at the UNHRC in Geneva' *The Sunday Times* 28 March 2021.

43 See for instance the statement issued by the International Commission of Jurists on the 20th Amendment (2020) 'Sri Lanka: newly adopted 20th Amendment to the Constitution is a blow to the rule of law (October 27 2020) available at https://www.icj.org/sri-lanka-newly-adopted-20th-amendment-to-the-constitution-is-blow-to-the-rule-of-law/ (last accessed on 31 October 2021).

to emotions. We also demonstrate how these arguments have assumed an anti-constitutional posture of resistance to the principles of constitutionalism such as individual rights, religious pluralism, and the separation of powers.

I. Russia

In Russia, a nationalist backlash resisting the principles of constitutionalism has been grounded on the need to protect the uniqueness of Russian constitutional identity and history from external influence. This campaign has been discussed by the Chairman of the Russian Constitutional Court, Valery Zorkin, as a response to the fact that the "world is becoming dangerously uniform."[44] In April 2019, the Russian Constitutional Court held a large conference in St Petersburg on "Constitutional Identity and Universal Values: The Art of Proportionality." This dichotomy argues that Russia's unique constitutional identity should not be subordinated to a supra-national model or set of best practices but instead should be grounded on its own unique historical identity. These arguments are clearly an example of the pluralist critique and they need not be problematic. In fact, they could be calling on the Constitutional Court and Russian lawyers to reclaim the national by engaging with the universal principles of constitutionalism.

But a closer look shows that this discourse instead adopts a resistance position, deliberately attempting to position Russian constitutional identity and history in opposition to key principles of constitutionalism. Zorkin argues that Russia's constitutional identity comes from "a non-textual understanding" of the Constitution.[45] One of the most common components advanced as critical to this constitutional identity is the preference of the interests of a centralized state over the rights of the individual. Zorkin argues that this is drawn from Russia's unique and historically-grounded "societal agreement" on human rights.[46] Russia's innate constitutional identity has long been tied with a strong and centralized state that ensures "security" which is "the most fundamental human freedom and an absolute imperative."[47] This strong state tradition places significant limits on individual rights (described as Western).[48]

44 *Valery Zorkin*, 23 January 2009, Presentation, World Conference on Constitutional Justice.

45 *Valery Zorkin*, Constitutional Identity: Doctrine and Practice, 17 May 2016, available at: http://www.ksrf.ru/ru/news/speech/pages/ViewItem.aspx?ParamId=82 (last accessed on 31 October 2021). Gadis Gadzhiev says exactly the same thing in a 2016 article.

46 *Valery Zorkin*, The Letter and Spirit of the Constitution, Rossiiskaya Gazeta (9 October 2018), available at: https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniiami.html (last accessed on 31 October 2021).

47 *Zorkin*, Law versus Chaos, Rossiskaya Gazeta (2015), available at: https://rg.ru/2015/11/24/khaos.html.

48 Ibid.

Underlying this conception of Russia's legal tradition is what one of us (William Partlett) has described elsewhere as the "centralized state discourse."[49] This commonly used selective history views Russian history as a progression from chaotic tribalism to a strong state (*sil'noe gosudarstvo*) that centralizes power in the hands of a strong, executive leader.[50] In this historical narrative, constitutions – and their implementation through the statutes and judicial opinions of the region – should strive to centralize power in the executive order to build a strong state and advance collective goals.[51]

This prioritization of executive centralism, of course, places Russia's constitutional and historical identity in opposition to constitutional principles such as individual rights, the rule of law, and the separation of powers. In fact, arguments from this uniquely Russian identity/tradition of collectivism or solidarity are now increasingly being used as a method for resisting individual rights claims at both the domestic and international level.

First, arguments are increasingly emerging that Russia's constitutional identity and history justifies the Russian Constitutional Court's deference to the state in its proportionality review of laws that limit individual rights. One of the best examples of this can be found in the work of Sergei Belov, the Dean of St. Petersburg State Law School and one of the members of the Working Group that drafted Russia's 2020 constitutional amendments. In a recent 2019 article, he argues that the Russian Constitutional Court's (RCC) deference to the state in rights cases – what he calls "reverse proportionality" – is a natural product of Russian constitutional tradition and identity.[52]

Second, a similar set of arguments about Russian constitutional identity and tradition has been advanced to resist supra-national tribunal decisions. Underlying these claims is the view that legal positions taken at the transnational level (particularly the European Court of Human Rights) are being imposed on Russia. In a landmark 2015 judgment, the Russian Constitutional Court stated that "the interaction of European and constitutional legal orders is impossible in conditions of subordination, because only dialogue between different legal systems is the basis of a proper balance."[53] The Russian legislature then gave the RCC

49 *Partlett*, note 15.

50 *Joseph L Black*, The "State School" of Russian History: A Re-Appraisal of its Genetic Origins, Jahrbücher für Geschichte Osteuropas 21 (4) (1973), p. 509. For more on the distinctiveness of the Russian legal tradition, see *Tatiana Borisova*, Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-Century Russia, Review of Central and East Law 33 (3) (2008), p. 295.

51 Andrei Tsygankov, The Strong State in Russia: Development and Crisis, New York 2014, p.8–9 (describing how Russia needs a type of strong state 'that suits the country's economic and social needs'); *Richard Wortman*, Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864, Kritika: Explorations in Russian and Eurasian History 6 (2005), p.150; see also *Hiroshi Oda*, The Emergence of Pravovoe Gosudarstvo (Rechstaat) in Russia, Rev Cent & E Eur L 25 (1999), p. 381–404.

52 Sergei Belov, Tsennosti Rossiiskoi Konstitutsii v Tekste i v praktike ee tolkovanie [Values of the Russian Constitution in the Text and Practice of Constitutional Interpretation] Sravnitel'noe konstitutsionnoe parvo [Comparative Constitutional Law] Vol 131(4) (2019) 79-83.

53 http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

the legal power to render the decisions of international human rights organs "impossible to implement" when they conflict with the Russian constitution.This is potentially significant because it gives the Court the power to develop a constitutional identity doctrine to block individuals from an additional layer of rights protection under international law.[54] A 2016 speech by a Russian Constitutional Court justice (Gadis Gadzhiev) suggested that the inevitable conflict between supra-national decisions and Russia's (non-textual) constitutional "tradition" requires a "compromise".[55]

II. Sri Lanka

Appeals to the transnational by advocates for rights of Tamil minorities, in particular, have fostered a strong anti-constitutional, nationalist backlash in Sri Lanka as well. The demand for self-determination by political representatives of Sri Lankan Tamils has been viewed by Sinhala-Buddhist nationalists as a threat to Sri Lanka's unitary state and majoritarian identity. In dominant political discourse at the national level, complaints to the United Nations are frequently criticized as amounting to a betrayal of the nation.[56] The Sri Lankan President was reported to have commented, 'We will face the Geneva challenge without fear. We will never succumb to pressures. We are a free nation. We will not be a victim of big power rivalry in the Indian Ocean.'[57] Attempts by such supra-national institutions to respond to these appeals have also been met with resistance. For instance, the Human Rights Committee had recommended that the Sri Lankan government repeal the 18th Amendment of 2010.[58] The Government was critical of this recommendation and claimed that the Human Rights Committee was encroaching on its sovereignty.[59] This nationalist backlash is made mostly in local fora but increasingly is made before international fora too. For instance, in 2019, in withdrawing from the co-sponsored resolution of 2015, the present Minister of Foreign Affairs noted that 'Constitutionally, the resolution seeks to cast upon

54 *Alexandra Troitskaya /Tatyana Khramova*, Основы основ: экспрессивный и функциональный потенциал конституционных устремлений [The Bases of the Basis: Expresive and Functional of Constitutional Aspirations] // Сравнительное конституционное обозрение [Comparative Constitutioanl Review] 2018. №1(122). Pp. 54–79. *José Luis Martí*, Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People, in: Alejandro Sáiz Arnáiz / Carina Alcoberro (eds), National Constitutional Identity and European Integration, Antwerp 2013, p. 17-36.

55 *Gadis Gadzhiev*, КОНСТИТУЦИОННАЯ ИДЕНТИЧНОСТЬ И ПРАВА ЧЕЛОВЕКА В РОССИИ [Constitutional Identity and Human Rights in Russia], 2016, available at: http://www.ksrf.ru/ru/News/Documents/report_%D0%93%D0%B0%D0%B4%D0%B6%D0%B8%D0%B5%D0%B2%20_2016.pdf (last accessed on 31 October 2021).

56 See for instance, 'Eight myths about Sri Lanka at the UN Human Rights Council' *Daily FT* 9 March 2021.

57 'Will not allow other countries to push for 'separatism in the guise of power devolution' says Gotabaya Rajapaksa *The Hindu* 29 March 2021.

58 Review of Sri Lanka's Fifth Periodic Report by the Human Rights Committee.

59 'Putting the 18th Amendment at the Core of the Debate' Sri Lanka Brief 2 November 2014.

Sri Lanka obligations that cannot be carried out within its constitutional framework and it infringes the sovereignty of people of Sri Lanka and violates the basic structure of the Constitution. This is another factor that has prompted Sri Lanka to reconsider its position on co-sponsorship.'[60]

In Sri Lanka, this national backlash is '[i]nformed by a widely resonant but highly manipulated nationalist historiography of the island as the exclusive domain of the Sinhalese as protectors of Theravada Buddhism.'[61] In Sri Lanka, a particular version of Sinhalese Buddhist identity has emerged as the dominant basis of Sri Lanka's constitutional identity.[62] This ethno-religious identity of the majority community, Sinhala-Buddhists, gained dominance in constitutional discourse alongside the return to self-rule by 1948 and has contributed to the armed conflict in Sri Lanka.[63] This 'Sinhala-Buddhist hegemony' was read into the constitution, affirming Sri Lanka to be 'the land of a "chosen" people, the Sinhala, who had pledged to preserve and protect the 'chosen' faith, Buddhism'.[64]

The legitimisation of the Sinhala-Buddhist ideology through the Republican Constitutions, is captured to some extent in the special recognition afforded to Buddhism and the establishment of Sinhala as the official language (Tamil was added as an official language later).[65] It also has manifested itself in a conception of national unity that requires institutional instantiation. The responses of the other ethnic groups to this dominance has been to articulate their own group identity in exclusive terms; and political representatives of Tamils and Muslims have extended that to themselves making nationalist claims. We use the example of review of Sri Lanka's respect for human rights through the United Nations to illustrate how this majoritarian version of constitutional identity has underpinned an anti-constitutional, nationalist backlash.

The majoritarian concept of the sovereignty of the (majority) people in the Sri Lankan Constitution has been used as another basis for the nationalist backlash in Sri Lanka. The case of *Singarasa v Attorney General* – in which Sri Lanka has been described as 'anti-internationalist' – illustrates this point.[66] This case involved an application for revision of a decision by the Supreme Court, where leave to proceed had been refused in an appeal against a conviction under the Prevention of Terrorism Act.[67] In making that

60 Colombo Telegraph, Foreign Minister Dinesh Gunawardena´s Speech At UNHRC – Full Text, https://www.colombotelegraph.com/index.php/foreign-minister-dinesh-gunawardenas-speech-at-unhrc-full-text/ (last accessed on 31 October 2021).

61 *Asanga Welikala*, Constitutional Form and Reform in Postwar Sri Lanka, in: Mark Tushnet / Madhav Khosla (eds), Unstable Constitutionalism, Cambridge 2015, p. 326.

62 *Kumari Jayawardena*, 'Ethnicity and Sinhala Consciousness' in (April to September 2003) 6(1&2) Nethra 47, p. 83.

63 *Welikala,* note 61, p. 327.

64 *Jayawardena,* note 62, p. 69.

65 *Jayawardena,* note 62, p. 72.

66 *Singarasa v AG* SC Spl LA No 182/199, SC Minutes 15 September 2006.

67 Prevention of Terrorism Act No 48 of 1979 as amended.

application, the applicant argued that the recommendation of the Human Rights Committee should be considered by the Court.[68] The Human Rights Committee, among other things, recommended that the petitioner be acquitted and re-charged due to the violations of human rights that had taken place during the pre-trial detention and the trial.

The Sri Lankan SC, however, refused to revise its earlier decision and went on to hold that the ratification of the Optional Protocol to the ICCPR by the then President of the country was unconstitutional and has no legal effect. The Court arrived at this conclusion by reviving the monist-dualist distinction and reasoned that the judicial power of the People has been vested only in the Sri Lankan Courts and that the exercise of judicial power by the Human Rights Committee in relation to Sri Lanka was unconstitutional. Arguably, however, the characterisation of the Human Rights Committee as a judicial body by the SC was misconceived since the Committee only makes recommendations to states that are party to its jurisdiction.[69]The Court's arguments were couched in the language of protecting the 'sovereignty of the People' from transnational values and decisions. For instance, the Court noted that: '[The] Petitioner has been convicted with having conspired with others to overthrow the lawfully elected Government of Sri Lanka…The offences are directly linked to the Sovereignty of the People of Sri Lanka and the Committee at Geneva, not linked with the Sovereignty of the People has purported to set aside the orders made at all three levels of Courts that exercise that judicial power of the People of Sri Lanka.'[70]

D. Constitutionalism as National Discourse

In this article, we seek to counter this kind of anti-constitutional, nationalist backlash by turning attention back to the national. Redeeming the national in constitutionalism includes reasoning on two different bases. First, it requires a close look at how constitutional text, structure, and purpose can be used to advance the principles of constitutionalism. Excavating the text, structure, and context of the national constitution for arguments that can support the principles of constitutionalism can ensure that arguments are anchored in the document itself. Second, it requires reimagining national history in a way that supports constitutionalism. This exercise of historical imagination is a reminder that national history is not necessarily a barrier to constitutionalism in countries with authoritarian legacies.

This approach has a number of advantages. First, and more practically, it can help to shape strategies of constitutional advocates. For many advocates and knowledge institutions, the first response to constitutional challenges is to appeal to the supranational. This can be found in legal strategies that focus on supra-national tribunals. This approach can be useful but risks further fuelling the nationalist backlash. Second, it can avoid blind spots

68 ICCPR of 1966 (ratified by Sri Lanka in 1980), and its First Optional Protocol 1966 (ratified by Sri Lanka in 1997).

69 *Nigel Rodley* The Singarasa Case: Quis Custodiet? – A Test for the Bangalore Principles of Judicial Conduct Israel Law Review 41 (2008), 500-521.

70 *Singarasa v Attorney General* [2013] 1 Sri LR 245, 258.

that miss important ways in which the general principles of constitutionalism can be practiced in particular contexts. For instance, an overly Anglo-American approach grounded on those constitutional practices tends to focus discussions of constitutionalism squarely on individual rights understood as civil and political rights. This can blind constitutional theorists to the important relationship between constitutionalism and the development of state effectiveness and the achievement of collective developmental goals. This can be particularly problematic in countries that have traditionally had a weak state.

I. Redeeming the national constitutional text

This strategy requires – at least in the first instance – arguments grounded in the national constitutional text: the Constitution itself. Constitutionalism is characterized by constitutional arguments that seek to shape political power by arguing from the text and structure of the Constitution. These arguments need not (and will not) always be fully textually-based (they can extend to the structure, for instance, of the constitution). But at the very least they need to contain an account of their relationship to the text. We are mindful here that constitutional text is only one of the many factors that shape constitutional identity as well as constitutional interpretation. However, to the extent that constitutional text matters, we show here that it can be used in specific ways to 'redeem' the national.

Redeeming the national constitution is grounded in the techniques and practices of lawyers – and they acknowledge the fact that constitutions are, first and foremost, legal documents. Underlying this form of argument is an attempt to ultimately ensure that there is a clear line between legal and political arguments. Unless there is something distinctly legal about constitutional arguments, the constitution will simply reflect the political, historical, or cultural context. If that is the case, the written constitution is not doing any work; it is in these cases, decorative. Furthermore, the arguments are no longer constitutional but are explicitly political arguments.

This form of argument recognizes that constitutionalism is a normative project that begins with arguments grounded on procedurally enacted text. The text of the constitution itself is used to shape the exercise of political power. An example would be the way in which the Indian Supreme Court eventually pushed back on the abuse of emergency powers by Prime Minister Indira Ghandi.[71] The constitutional text itself was used as the basis for arguments to strike down and control the exercise of executive power.

Moreover, this approach cannot be attacked for ultimately privileging or trying to converge with an external set of values or norms.[72] Instead, it is grounded in the actual text of the constitution, which itself is a reflection of the will of the people. It therefore can emerge as a powerful strategy for those interested in advancing constitutionalism –

71 *Nick Robinson*, Expanding Judiciaries: India and the Rise of the Good Governance Court, Wash U. Global Stud. L. Rev. 8 (1) (2009), p.3.

72 Even imposed constitutions can become representative of the popular will over time.

defined by us as subordinating public power to a set of publicly-available textual norms and requirements set out in the constitution. This also involves the active development of a national discourse of constitutionalism that is ultimately distinct from the political. This method should start with the text in developing a constitutional discourse. It opens possibilities of claiming that arguments grounded in the nationalist backlash are themselves political and not grounded on the text of the constitution.

Finally, many disharmonic constitutional texts contain foundational commitments to constitutional principles in their foundational chapters. These principles are then often contradicted in other contexts. Citing the higher legal status of these principles can be a compelling textual strategy in advancing constitutional arguments.

II. Redeeming national history

A second strategy is to confront the challenge of interpreting history in constitutional adjudication in ways that advance constitutionalism. History is not an objective or neutral factor in determining the present. Instead, even in authoritarian nations, history is disharmonious, containing competing ideas and approaches. Advocates ought to de-essentialize anti-constitutional arguments about national identity or tradition by exposing them as selective versions of history. History can then support the project of constitutionalism by demonstrating how the principles of constitutionalism have been used in particular historical contexts. This shows that even in countries with traditions of valuing the strong state, national history need not undermine the project of constitutionalism.[73] In fact, the principles of constitutionalism can help to build a stronger, more effective state.

Underlying this approach are the insights of professional historians and its central methodology: historiography. Historiography focuses our attention on those that write history itself. It reminds us that those that write history are not neutral scholars unearthing an objective answer that settles a constitutional question. Instead, all historical accounts involve a *dialogue* between the past and the present. Historiography teaches us that we must critically interrogate how a particular *historical account* is related to the *contemporary context*. A range of relationships is present. Some historical accounts will be strategically constructed to suit contemporary political agendas or ideas. Other historical accounts will be unconsciously shaped by less visible methodological commitments. Either way, the possibility – or even likelihood – of a selective or one-sided historical memory requires that we take a critical perspective to history.

This critical perspective provides important potential for constitutional argument. In particular, it shows that histories advanced as part of the nationalist backlash are often strategically written to suit a particular political agenda. A critical perspective on these histories will de-essentialize and expose its political motivations. This de-essentialization

73 *Partlett*, Constitutional Historiography, Melbourne 2020 (under review and on file with authors) (arguing that selective versions of history can be used to support constitutional principles).

can also play a role in remembering how constitutional principles have been understood or practiced in national history. In this way, the "return to the sources, the process of rolling back or revolving, may provide grounds for radical disruption of existing structures and hierarchies" including histories that prioritize particular anti-constitutional values.[74] This return can in turn reinvigorate constitutionalism. The next section describes how these particular forms of argument can be used.

E. Redeeming constitutional disharmony in Russia and Sri Lanka

These two modalities of redeeming the text of the constitution and national history can help us to critique the national backlash in Russia and Sri Lanka as political – and not constitutional – arguments. In particular, these modalities help us expose how they selectively and strategically draw on particular parts of constitutional text and history; these arguments are therefore open to attack. In many cases, the nationalist backlash appeals more to emotion than the text of the national constitution or the reality of national history. In these cases, the relevant institutions of constitutional control – courts or other institutions – should not accept these as constitutional arguments. Furthermore, legal teaching and scholarship should also make these arguments in their contributions to constitutional discourse.

In both Russia and Sri Lanka, this approach helps to ensure that constitutions are interpreted in ways that recognise that key constitutional principles are textually placed at the foundation of the constitutional system. Furthermore, they clarify the nature of constitutional identity and the ways in which that identity is being formed through particular interpretations of history. Foregrounding the selective use of history, for instance, is helpful in critiquing a particular notion of constitutional identity. This section provides concrete examples of how this form of argumentation works in both the Russian and Sri Lankan context.

I. Russia

It is possible to draw on these forms of argument to fundamentally critique the claims underpinning the national backlash in Russia.

1. Constitutional identity and the text of the Russian Constitution

Recall that some have argued that Russia has a collectivist constitutional identity that requires prioritising the interests of the state over individual rights. This argument, however, is not supported by the foundational chapter of the Russian Constitution (Chapter 1). In fact, these provisions suggest a desire to break away from Russia's deeply-engrained history of executive centralism and statist resistance to rights.

74 Glenn, note 10, p. 22.

The first key value contained in Chapter 1 of the Russian Constitution is that Russia is a "democratic federal law-bound state with a republican form of government" (Article 1). The second key value is that "man, his rights and freedoms, are the supreme value" (Article 2). A third key value—which further seeks to underpin Russia's democratic and republican form of government—is that Russia has a separation of powers which seeks to ensure that "the organs of legislative, executive, and judicial power are independent" (Article 10). Chapter 1 also guarantees "political pluralism and party diversity" (Article 13). Finally, this foundational chapter also states that the "universally recognized principles and norms of international law and binding international treaties" are themselves superior to legislation in the Russian context (Article 15).

Furthermore, the text does not appear to privilege historically-contingent values such as social solidarity over individual rights. On the contrary, there is a strong textual basis to suggest that supra-national and international norms should inform the scope of the rights in the constitution. Article 15.4 argues that the recognized norms of international law and treaties are a "component part of the Russian legal system" and are superior to domestic law. Article 17 of the Russian Constitution guarantees that "individual rights and freedoms" are recognized and guaranteed in light of "generally agreed upon principles, norms of international law, and the principles established in this constitution."

Perhaps the part of the Constitution that provides the strongest basis for a unique Russian identity is Article 55.3 (see above). This allows for rights to be limited on more grounds than many other constitutions. In particular, it allows the limitation of individual rights in order to protect "national security or the security of the state." This broad limitation allowance arguably suggests the basis for a unique constitutional identity. But, at most, what it provides is a textual system where individual rights are *balanced* against a broader set of collective values. Nowhere are public interests prioritized over individual rights.

The text of the Russian Constitution therefore suggests that there is very little that is legal or "constitutional" about these arguments about the priority of state interests over the individual. Instead, the text of the Russian Constitution – which must be the legitimate starting point for any legal methodology – shows that these are political arguments about identity. For this reason, these arguments should have no force in shaping constitutional interpretation or implementation.

This argument about Russian identity is instead borrowed from political argument. For instance, Vladimir Putin made this argument in his "Message to the Russian People" that he released prior to becoming President in 2000. His political message engaged in historical essentialism, claiming that "[i]t is a fact that a striving for corporative forms of activity has always prevailed over individualism...Let's not dwell on whether it is good or bad. The important thing is that such sentiments exist. In fact, they still prevail." This message was repeatedly used to justify the return to more centralized government control and state involvement in the economy over the next 20 years.

2. Constitutional identity and Russian history

Second, recall that many have argued that Russia has historically always needed centralized, autocratic government to build a strong state that can overcome external threats. A critical look at Russian history, however, shows that this is a contestable reading of history. Russian history provides equal support for the view that engagement with the principles of constitutionalism will help to build strength and effectiveness of the state. Russian history therefore suggests ways of engaging with and therefore adapting the principles of constitutionalism to national context.

A critical point in this history is the Great Reforms of 1864. These reforms were initiated as a response to Russian state weakness on display in the Crimean War. These reforms drew on a growing constitutionalist movement in Tsarist Russia at the time which sought to adapt the principles of constitutionalism to Russia in order to strengthen the Russian state. Underpinning this late Tsarist trend toward constitutionalism was a movement – spearheaded by the Kadet party – which saw the principles of constitutionalism as the way to revitalize and strengthen the Russian state. The leading intellectual figure in this movement was Boris Chicherin. Chicherin called for the introduction of a constitutional regime and a law-based state.[75] He was a "Rechstaat liberal"[76] who strongly believed that "law and order will never be able to establish itself where everything depends on one personal will and where each person can have the power to put himself above the law."[77]

Chicherin explicitly argued that these constitutional ideas were about building a strong state. In Chicherin's thesis defence, he stated that "All [epochs] have one goal, one task – the building of a state."[78] For instance, Chicherin explained that excessively executive government was regulated by decrees (*rasporiazheniia*) and not laws (*zakony*). This form of executive governance led to inefficiencies and inequalities; Chicherin argued that laws should be introduced to ensure the uniformity of legal application.[79] This creation of a law-based state would build a strong and effective state.

After the collapse of the Soviet Union, Russia's 1993 Constitution sought to revive this late Tsarist constitutional movement. The Preamble to the new Constitution linked fundamental commitments to the principles of constitutionalism – like a law-based state and individual rights – to the revival of Russian statehood (*gosudarstvennost'*). This represented the culmination of more than one hundred years of efforts by Russian constitutionalists to do this. Almost thirty years later, this historical aspiration of applying the principles of constitutionalism to ultimately strengthen the Russian state has not been implemented in part because of the nationalist backlash. A strong historical case can therefore be made

75 *Gary M. Hamburg*, Boris Chicherin and Early Russian Liberalism, Stanford, California 1992, p. 3.

76 *Hamburg*, note 75.

77 *Pavel N. Miliukov*, Russia and its Crisis, Chicago 1906, p. 329-330.

78 *Hamburg*, note 75, p. 87.

79 *Hamburg*, note 75, p. 89.

that this is an important lesson of Russian history and that it is time for Russia to engage seriously with this tradition in order to build an effective and stable (and therefore strong) Russian state.

II. Sri Lanka

The Sri Lankan judiciary has entrenched the concept of a unitary Presidency in Sri Lanka. In particular, the Court has required approval at a referendum for any proposed amendment that would restrict the powers of the Executive President (but not for the expansion of the powers). This interpretation has helped to undermine attempts at restricting the powers of the president in 2001 and 2019. The Court has held that executive power 'must be exercised by the President directly or someone who derives authority from the President.'[80] By contrast, attempts at reforming the Presidency to extend the powers of the office in 2010 and in 2020 were successful.[81]

In redeeming 'the national' for the advancement of constitutionalism, advocates of constitutionalism should criticize this position for contradicting the text of the Sri Lankan Constitution. Some parts of the Sri Lankan Constitution are entrenched. For instance, Article 3 declares that sovereignty lies with the People and is inalienable; it requires a referendum to be changed.[82] But the text of the constitution that establishes the office of the President (Article 4) and its powers are not included in the list of articles that the Constitution explicitly identifies as entrenched. The Court has held that Articles 3 and 4 are linked and therefore by implication that Article 4 is in effect entrenched too. But the linkage of Article 4 with Article 3, for the purpose of resisting reforms to the Executive Presidency, stands in tension with the plain reading of the constitutional text. If the drafters had intended to entrench the executive presidency, they would have made its central provision an explicitly entrenched provision. Thus, the Court's position seems to derive from a non-textual, political understanding of the constitutional scheme which presumes that the Executive Presidency is part of the basic structure of the Constitution and can only be reformed with approval at a referendum (in addition to approval by a special majority).

The political nature of this position is further buttressed by the fact that where proposed amendments have sought to expand the scope of the Executive Presidency, the Court has not required approval at a referendum.[83] Thus, the text has only a *secondary* relevance; the

80 *In Re the Nineteenth Amendment to the Constitution* Decisions of the Supreme Court on Parliamentary Bills XII (2014-2015) (November 2016) 26, 33.

81 In 2010 and in 2020, Governments with a strong majority in Parliament successfully expanded the powers of the Executive Presidency with the 18th and 20th Amendments respectively.

82 Art 83 of the Constitution of Sri Lanka.

83 An example is the determination by the Court that the removal of the Constitutional Council, which had binding powers with a Parliamentary Council which had no binding powers, under the 18th and 20th Amendments respectively was constitutional.

primary driver of the analysis is political. However, as we argue, if the national constitution is to be 'redeemed' the text must matter. In the examples discussed here, for the text to matter, the *failure* to let the text matter must be a matter of academic, professional as well as public debate and discussion.

1. Historical reinterpretation as a form of critique.

History can also be used as a way of engaging with constitutional principles. This redemption of history in Sri Lanka can be illustrated in the case of *Bulankulama v Min of Industrial Development*, more commonly known as the Eppawala case.[84] The use of history in the interpretation of the Constitution in this case illustrates the possibilities for redeeming 'the national' in constitutional adjudication, without necessarily endorsing an essentialist interpretation.

The Eppawala case was a collective fundamental rights petition filed by several members of a village against the potential lease of a phosphate deposit to a multi-national company. The petitioners claimed that their constitutional rights to equality, their right to engage in a lawful occupation, and their right to the freedom of movement would be violated if the Government would lease this deposit. The Court upheld the petitioners' claims on the ground that all organs of the state are 'guardians' of natural resources. In describing the nature of that guardianship, the Court quoted from the Mahavamsa, (a text from 5th century AD that offers an account of pre-modern Sri Lanka) as well as dicta from *Hungary v Slovakia* in which Judge Weeramantry had cited examples from Sri Lanka's ancient history in establishing the obligation of rulers to act as trustees, particularly in relation to natural resources and the environment.[85] The Court used these concepts to interpret the fundamental rights guarantees and concludes that the state has an obligation to act according to the law and be accountable to the people and to future generations.[86] The jurisprudential approach in this case therefore is a strong example of the way in which history can be used to develop and draw out a context specific approach to constitutional interpretation. The Court's reference to jurisprudence from the International Court of Justice and comparative jurisprudence suggests a way of excavating history – central Sinhalese texts in this case – to find support for constitutional principles.

Conclusion

In this article we have provided a set of argumentation techniques for countering the nationalist backlash. They are grounded on a conceptual distinction between resistance, engage-

84 Bulankulama v Min of Industrial Development [2000] 3 Sri LR 243.

85 Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7.

86 Bulankulama v Min of Industrial Development [2000] 3 Sri LR 243, 254.

ment, and convergence.[87] We argue that constitutionalism is *not* a project of convergence toward a universal norm, model, or set of best practices. Instead, constitutionalism is a pluralist project that engages with the 'partial' principles of constitutionalism. Adapting these constitutional principles to the national context will create different forms, institutions, and doctrines. Our article presents two modalities of argument that enable constitutional advocates to engage with the principles of constitutionalism and find this discourse.

These modalities fundamentally rely on the idea that constitutional text and history are disharmonious. This disharmony suggests that both text and history can provide support for engaging with the principles of constitutionalism. The first form of argument counsels that advocates not lose sight of the text of the constitution in advancing constitutional arguments. Constitutionalism is a legal discourse and therefore at first relies on the text of the constitutional document. The second kind of argument suggests that national history is not a subject that should be ignored or avoided by constitutional advocates. Too often, essentialized national histories that appeal to the emotions underpin a national backlash. Our method, which is used, for instance, in the Eppawala case, potentially offers support for engaging with the principles of constitutionalism by de-essentializing history and re-membering how constitutionalism has been practiced in the past.

Using text and history to engage with constitutional disharmony provides constitutional advocates the specificity with which to discover the particular way in which constitutional principles should be implemented in a particular context. This pluralist use of text and history thus allows constitutional practice to remain adapted to context, while also engaging with universal principles. It therefore provides a potent set of tools for overcoming the nationalist backlash and finding a national foundation for constitutional argument.

87 *Jackson*, note 3.