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## **Introduction**

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

# **JUDICIAL POWER AND DEMOCRATIC LIMITS IN US, UK, AND INDIAN COURTS: EXPLORING CONSTITUTIONALISM, CONSTITUTIONAL MORALITY, AND LIVING CONSTITUTIONALISM**

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## **Abstract**

The article presents the theme of how three of the largest constitutional democracies, the United States, the United Kingdom, and India, strike the balance between judicial authority and democratic accountability. It looks at how the courts are involved in the interpretation of constitutions but the judiciary power must not be used against the democratic decision-making process. The analysis centers on three major interpretive concepts, namely constitutionalism, constitutional morality, and living constitutionalism, revealing how each nation uses the concepts differently in its constitution.

The United States is characterized by firm judicial powers of judicial review which enables the court to invalidate a law that is conflicting with the constitution, which was established in *Marbury v. Madison* case. Throughout history, constitutional interpretation has developed as a result of arguments between originalism and living constitutionalism which has affected some key decisions like *Brown v. Board of Education (1954)* and *Dobbs v. Jackson Women's Health Organization (2022)*.

The United Kingdom deploys a different model that is based on parliamentary sovereignty. In such a system, courts usually are unable to invalidate legislation. Rather, constitutional dialogue between the Parliament and courts are promoted by various mechanisms, including the Human Rights Act 1998. This enables the judges to point out violations of rights without necessarily overriding legislative jurisdiction.

India represents a more dramatic paradigm. Under the Basic Structure Doctrine wherein the doctrine was made through *Kesavananda Bharati v. In Kerala* (1973), wherein the Supreme Court opined that it has the ability to stay constitutional amendments which may jeopardize some of the basic constitutional values. Additional to the idea of constitutional morality, Indian courts have been actively involved in the process of minority protection and social justice.

In sum, the article illustrates that although each system takes various approaches, all of them strive to ensure a very fine balance between upholding values of the constitution and honoring democratic governance.

### **Introduction**

The relationship between judicial power and democratic accountability represents one of the most enduring tensions in constitutional governance.<sup>1</sup> This comprehensive analysis examines how the United States, United Kingdom, and India navigate the complex interplay between judicial interpretation, constitutional evolution, and democratic legitimacy through their distinct approaches to constitutionalism, constitutional morality,<sup>2</sup> and living constitutionalism. The comparative study reveals fundamental differences in judicial review mechanisms, constitutional interpretation theories, and democratic constraint systems across these three major constitutional traditions.<sup>3</sup>

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<sup>1</sup> Edward S Corwin, *The 'Higher Law' Background of American Constitutional Law* (Cornell University Press 1955).

<sup>2</sup> C Perry Patterson, 'The Evolution of Constitutionalism' (1948) 32 *Minnesota Law Review* 477.

<sup>3</sup> Alex Tobin, 'The Warren Court and Living Constitutionalism' (2022) 10 *Indiana Journal of Law and Social Equality* 221.

**Judicial Power Across Jurisdictions**

Characteristic	United States	United Kingdom	India
Judicial Review	Strong	Limited	Very Strong
Constitution	Written Const	Unwritten	Written Const
Key Doctrine	Living/Origin	Parl Sovrnty	Basic/Const
Democratic Limits	Amend/Appoint	Parl Override	Legis Response
Landmark Cases	Marbury/Brown	Daly/Miller	Kesav/Maneka
Primary Statute	Const Art III	HRA/CRA	Arts 32,226

Fig:1:- Comparative Analysis of Judicial Power and Democratic Limits in US, UK, and India

## Chapter 1: Theoretical Foundations: Constitutionalism, Constitutional Morality, and Living Constitutionalism

### The Architecture of Constitutional Theory

#### *The Constitution Building.*

The imperial principle of constitutionalism is that the authority must have its limits and structured and submissive to the higher law.<sup>4</sup> Such conception transcends what a text of the Constitution requires and to the greater regime of norms that restricts the actions of the state and guarantees the rights of individuals. There are several assumptions about constitutionalism<sup>5</sup>: it should be presumed that the constitutional law will overrule the ordinary and the basic rights must be

<sup>4</sup> Ajay Kumar, 'Constitutional Morality: The New Paradigm to Uphold Constitutional Supremacy' (2022) ILI Law Review 250.

<sup>5</sup> Madhav Khosla, 'Is a Science of Comparative Constitutionalism Possible?' (2022) 135 Harvard Law Review 2110.

guaranteed against undue majoritarianism and the constitutionalism must provide the institutionalized framework of executing the constitutional restraint.<sup>6</sup>The tension between the particulars of the constitution and the energy of demand of the constitution in the dynamically evolving societies has been a noteworthy factor that has led to the speeding up of constitutionalism.<sup>7</sup> The tensions bring about some fundamental questions about the interpretation of constitutions<sup>8</sup>: are constitutional texts to be taken as fixed compacts representing the original will of those who wrote them or as living texts that have to adapt to the current reality? <sup>9</sup>The implications of this question are far reaching; how the interpretive power is to be distributed between the democratic institutions and the courts.<sup>10</sup>

### **Constitutional Morality as Interpretive framework.**

The phenomenon of the constitutional morality intervenes in order to bridge the gaps of the amendment of the social values and the textual demand.<sup>11</sup> Value and principles are what stand the test of time; and which are fundamental to constitutional government, constitutional morality as contrasted with traditional morality which is not fixed. They are statements of *human dignity, equality, liberty and rule of law*, which transcends cultural or historic contexts.<sup>12</sup>

This notion in particular took on a particularly acute interest in the constitutional jurisprudence of India, where constitutional morality came to be used by the Supreme Court to castigate traditional practice in favor of change of a transformative social character. In *Navtej Singh Johar v. Union of India (2018)*.<sup>13</sup>The difference between constitutional and popular morality was quite clear when the Court stated that in some situations the majoritarian preference must give way to the

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<sup>6</sup> Afreen Afshar Alam and Pragyanshu Gautam, 'Constitutional Morality: The New Instrument of Justice?' (2024) 2 Revista de Drept Constitutional 79.

<sup>7</sup> Challa Pranavi and Muskan Gupta, 'Constitutional Interpretation in India: Originalism, Living Constitutionalism, or a Middle Path?' (2025) 5 International Journal for Innovative Research in Law.

<sup>8</sup> Constitution of India, art 21.

<sup>9</sup> MP Singh, 'Observing Constitutional Morality' in Constitutional Governance and Judicial Review (Academic Foundation 2024).

<sup>10</sup> Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2010) Georgetown Law Faculty Publications.

<sup>11</sup> Vandana Mahalwar, 'Living Constitutionalism and the Role of Indian Judiciary' (2023) 4 ShodhKosh: Journal of Visual and Performing Arts 1377.

<sup>12</sup> Law Commission of India, 172nd Report on 'Reform of Judicial Administration' (2001). Supreme Court Legal Services Committee, 'Sensitisation of Judicial Officers on Sexual Orientation and Gender Identity' (Report, 2017).

<sup>13</sup> Navtej Singh Johar v Union of India (2018) 10 SCC 1.

constitutional values within the rights of minorities and the dignity of an individual<sup>14</sup>. It is a broader understanding of constitutionalism whereby the courts are viewed as a guarantee of constitutional values and not textual decoder.<sup>15</sup>The other critical question raised by the application of the constitutional morality is the legitimacy of the judges and the democratic accountability. According to critics, the appeal to abstract moral principles would allow the judges to enforce their values under the pretext of interpreting and enforcing the Constitution and thus undermine democratic governance. The advocates believe that constitutional morality can provide the security that the weaker groups badly need and that constitutional rights do not lose their necessity in the changing social world.<sup>16</sup>

### **Interpretive Evolution and constitutional Democracy.**

Living constitutionalism LC is a constitutional interpretation theory, which views the constitutional texts as living documents and can be altered without necessarily undergoing amendment. The method of interpretation played a major role in the American constitutional law at the time of writing of the works by the scholars and the judges who held the view that the provisions of the constitution should be interpreted according to the prevailing circumstances but not according to the intention of the day.<sup>17</sup>

It is a theoretical foundation of living constitutionalism which is founded on a number of assumptions. First, broad and abstract language is one of the conscious devices of the framers of constitutions, to give their constitutions a deliberate subject to an evolutionary construction. “*Due Process*”, “*equal protection*”, and “*cruel*” and unusual punishment were all to offer long term principles, and not strict rules. Second, the new facts of governance introduce a constitutional realignment to facts which the framers never envisioned not due to the technological transformation, but due to the newly created social relations.<sup>18</sup>

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<sup>14</sup> Ajay Kumar, ‘Constitutional Morality: The New Paradigm to Uphold Constitutional Supremacy’ (2022) ILI Law Review 250.

<sup>15</sup> Suresh Kumar Koushal v Naz Foundation (2013) 1 SCC 1.

<sup>16</sup> Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.

<sup>17</sup> Afreen Afshar Alam and Pragyanshu Gautam, ‘Constitutional Morality: The New Instrument of Justice?’ (2024) 2 Revista de Drept Constitutional 79.

<sup>18</sup> Madhav Khosla, ‘Constitutional Morality and Judicial Review in India’ (2020) 12 Cambridge Law Journal 215.

The differences of nature of constitutional interpretation and judicial power have more to do with the controversy of living constitutionalism and originalism.<sup>19</sup> To ensure that the democratic legitimacy is upheld and that usurpation of the judiciary is avoided as the originalists claim,<sup>20</sup> the founding constitution is supposed to be construed in the way it was during the ratification. Living constitutionalists are also of the view that strict adherence to historical knowledge would render the provisions of the constitution useless and end their capacity to address the demands of the present.<sup>21</sup>

### **Constitution of Evolution of Comparison of Constitutions.**

The three jurisdictions that are addressed in this paper have embraced various modalities of constitutional evolution differently. Our constitutional supremacy system, which we legally possess in the US, which we find as a matter of interpretive controversy between the originalism and the living constitutional systems.<sup>22</sup> The United Kingdom has practical sovereignty by parliament, human rights protection is carried out in the statutory manner and in the judicial discourse.<sup>23</sup> The most holistic one that India has developed is that which is grounded on the doctrine of basic structure and constitutional morality whereby transformative constitutional interpretation may be influenced but not at the expense of basics constitutional architecture.<sup>24</sup>

Such alternative strategies are available as some alternative historical experience, institutional forms and theoretical commitments. This American system has been brought about due to written constitution that had been devised with an aim of restraining government power and protecting the individual right against that of the great majority being oppressed. The British system is the evolution of a supremacy of parliament modified with the safeguard of the common law and integration of human rights. Indian system was the amalgamation of constitutionalism in the period of independence and the post colonial goals of transition and bore a greater activist brand of judicial modes of constitutional interpretation.<sup>25</sup>

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<sup>19</sup> Constitution of India, art 14.

<sup>20</sup> *Marbury v Madison* (1803) 5 US 137.

<sup>21</sup> *R (Jackson) v Attorney General* UKHL 56.

<sup>22</sup> Constitution of the United States art V.

<sup>23</sup> Human Rights Act 1998 (UK) c 42.

<sup>24</sup> *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

<sup>25</sup> House of Lords Select Committee on the Constitution, 'Judicial Power and Democratic Legitimacy' (HL Paper 144, 2009).

## **Chapter 2: United States: Judicial Review, Democratic Accountability and Constitutional Evolution.**

### **Essentials: Marbury v. Judicial Review and Madison are inaugurated.**

The landmark case presided by the Chief Justice known as John Marshall over a case known as *Marbury v Madison (1803)*<sup>26</sup>. marked the history of system of judicial review in America.<sup>27</sup> An amendment of this case gave the Supreme Court powers to strike the laws which failed to meet the Constitution. Marshall anchored his arguments based on the main concept of the Constitution, which is the supreme law to be followed by all the members of the government and, specifically, the Congress.<sup>28</sup> When the legislative provisions in such cases do not coincide with the provisions in the Constitution, the courts are inextricably required to exercise the supremacy of the Constitution.

It is not the weight of that ruling as it had then, of what we should call a theory of constitutional supremacy to be applied by the judiciary in its review. Marshall suggested that the judicial review was because the judiciary had the judicial obligation to adjudicate a case by law and because the Constitution is the supreme law. This structure caused courts to be objective interpreters of constitutional meaning and not political actors but experience has shown that it is not merely constitutional interpretation which is required to be political.

*Marbury v. Madison*<sup>29</sup> also severely limited judicial power and the Court of Marshal lacked jurisdiction to grant the requested writ of mandamus. This aspect of the decision was the slender line of control which Marshall was trying to tread on one hand that he wanted to claim judicial power and on the other hand that he should respect the institutional boundaries. The case was the power and the restriction of the judicial review in the United States.

### **New Deal Crisis and Revolution of the constitution.**

The constitutional crisis associated with the New Deal initiatives under the leadership of Franklin Roosevelt which illustrated a lack of parity on the fundamentals of judicial interpretation and

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<sup>26</sup> Marbury v Madison (1803) 5 US 137.

<sup>27</sup> Nicholas Aroney, 'Parliamentary Sovereignty and Constitutional Revolution in the United Kingdom' (2016) 14 International Journal of Constitutional Law 263.

<sup>28</sup> Upendra Baxi, 'The Basic Structure Doctrine and Constitutional Morality in India' (2015) 7 Journal of Constitutional Law of India 45.

<sup>29</sup> Marbury v Madison (1803) 5 US 137.

democratic rule. In such a case, the Supreme Court gave the exception to New Deal legislation the first priority. *New York (1905)*,<sup>30</sup> which was rather attentive to the freedom of the economy and the absence of government intervention in the relations of the market, expressed the concrete conception of constitutional liberty.

The constitutional crisis of 1937 announced in the *West Coast Hotel Co. v. Parrish (1937)*<sup>31</sup> which redesigned the New Deal programs was an abjective shift in the reading of the constitution. That was what signified that constitutional interpretation could be changed through judicial procedure without needing to be changed by any formal constitutional amendment and suggested that living constitutionalism was a prospect in the legal system of America.<sup>32</sup> The issue of the democratic pressure of constitutive interpretation in the New Deal change was also there.<sup>33</sup> A proposal of Roosevelt, which was unsuccessful, to pack the courts was an omen to the people that they were not content with the judicial stalemate of the democratic reforms. What the Court was then required to do shows that even a constitutional system of formal judicial preeminence cannot safely be left simply to have failed to be consciously aware of larger political and social tendencies in judicial interpretation.<sup>34</sup>

### **Living Constitutionalism/Civil Rights Revolution.**

The Supreme Court decision in *the Brown v. the Board of Education* (1954 where the Equal Protection Clause of the Fourteenth Amendment was interpreted to prohibit racial segregation in state schools is one of such examples of living constitutionalism. It particularly suffocated the original spirit of the amendment as it existed with school segregation and announced the reality that its text will change with the contemporary understanding of equality and human dignity. Brown had made a decision to look at collective education role in the American middle-twentieth-century society as opposed to looking at it in the light of the nineteenth-century expectations. The Court ruled that the segregated school system could not be regarded as an equal level in itself since segregation instilled inferiority complex which discouraged the possibility of accessing an

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<sup>30</sup> Hammer v Dagenhart (1918) 247 US 251.

<sup>31</sup> West Coast Hotel Co v Parrish (1937) 300 US 379.

<sup>32</sup> Senate Judiciary Committee, 'Report on Court Packing Plan' (75th Congress, 1st Session, S Rep No 75-453, 1937).

<sup>33</sup> Akhil Reed Amar, 'The Supreme Court, 1936 Term—Forward: The Constitution and the New Deal' (1937) 51 Harvard Law Review 84.

<sup>34</sup> Alexander M Bickel, 'The Role of the Supreme Court in American Government' (1961) 75 Yale Law Journal 1.

education. It was a vibrant perception of the constitutional rights that considered the current social realities and not the former practice.<sup>35</sup>

The problems introduced by the utilization of the decision increased the challenge of the level of interconnection between the judicial interpretation and the democratic governance. The constraints of judicial action to create social change when not backed by the larger political units and the victory over desegregation movements clearly demonstrated the capacity of constitutional interpretation to create social change in the same transformative magnitude with the assistance of successful political mobilization.

### **The recent debates are Originalism vs. Living Constitution.**

The modern crisis of judicial authority and constitutional interpretation within the modern American debate of originalism vs. living constitutionalism is an expression of more, however. An originalist like *Justice Antonin Scalia* optioned that the Constitution must be construed at its inception to ensure that the documents would have a democratic legitimacy and to eliminate the possibility of the courts overreaching their authority. This mode has attempted to limit judicial discretion by returning to the past to interpret issues by taking recourse to historical knowledge instead of contemporary values.

Living constitutionalists would retort with the theory that this narrow view of history, would render the provisions of the constitution outdated and negate their abilities to tackle modern problems. They insist that the framers of the constitution had made a judgment that general language should be adopted so that the constitution could be interpreted diverse ways as time passes and that a good constitutional government should be in a position to evolve as times change.<sup>36</sup>

The controversy was brought into the limelight by such cases as *Roe v. Wade (1973)*,<sup>37</sup> overruled in *Dobbs v. Jackson Women Health Organisation (2022)*.<sup>38</sup> Roe was among those that he termed living constitutionalism because he found a constitutional right to privacy which encompassed right to reproductive choice even though it was not explicitly deemed in the text. Dobbs was an originalist in that he opposed the Roe route and put the abortion question back on the ballot.<sup>39</sup>

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<sup>35</sup> Jeffrey Rosen, 'The Constitutional Crisis of the New Deal' (1984) 69 Virginia Law Review 1407.

<sup>36</sup> *Marbury v Madison* 5 US 137 (1803).

<sup>37</sup> *Roe v Wade* 410 US 113 (1973).

<sup>38</sup> *Dobbs v Jackson Women's Health Organization* 597 US \_\_\_\_ (2022).

<sup>39</sup> Constitution of the United States art III.

### **Limiting the Judiciary Authority through Democracy.**

The American system has several democratic restrictions of judicial power arrangements, yet all this is not executed perfectly well. The easiest method of overturning judicial interpretation is constitutional amendment, which is extremely hard because of the supermajority rules of the amendment process.<sup>40</sup> *The American history has just seen four such amendments that reversed the decisions of Supreme Court.*<sup>41</sup>

Judges will be more controllable through democratic means which is by appointment. Judicial selection:<sup>42</sup> presidential election of judges and Senate confirmation open up the chances of democratic input in the election of judges, but once elected the judge is insulated against political interference by life tenure. The process of appointments has been becoming more and more politicized and constitutional interpretation has been becoming a large concern in American politics.

Jurisdiction-stripping and congressional oversight are the other boundaries to judicial authority but are not very efficient. Congress can regulate judicial conduct by budgeting it, subjecting it to oversight hearings and threats to change its subjects, but it is not entirely uncommon that Congress confronts the executive and judicial branches. The system of separation of powers would instead promote friendly and not rivalry between the courts and the legislatures.

## **Chapter 3: United Kingdom: Parliamentary Sovereignty, Human Rights Integration, and Judicial Dialogue**

### **Parliamentary Sovereignty and Its Traditional Limits**

Traditionally, the constitutional order of the United Kingdom rested upon the doctrine of parliamentary sovereignty, the legal doctrine whereby the parliament enjoys an irredeemable power of making or repealing a law.<sup>43</sup> Such thinkers as **A.V. Dicey** have formulated this doctrine

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<sup>40</sup> Constitution of the United States art V.

<sup>41</sup> House Committee on the Judiciary, 'Jurisdiction Stripping and Congressional Control of the Courts' (House Doc No 104-88, 1995).

<sup>42</sup> Akiva J Goldman, 'Living Constitutionalism and the Right to Privacy' (1995) 28 University of Richmond Law Review 1.

<sup>43</sup> Cass R Sunstein, 'The Living Constitution' (1988) 87 Columbia Law Review 573.

to establish parliament as the supreme lawmakers of the British political system, restraining the courts to the interpretation and enforcement of acts of parliament and not to their validity.<sup>44</sup>

The history of British parliamentary sovereignty was constituted by the distinctive British experience such as the conflict between the Crown and the Parliament leading to the English civil war and the *Glorious Revolution*.<sup>45</sup> The doctrine was an expression of the triumph of parliament over royal prerogative and the institution of the supremacy of the legislative branch of government as the defining feature of British constitutionalism. In contrast to the written constitutional supremacy model, the British constitutional supremacy model placed ultimate constitutional authority in the hands of elected representatives, rather than on judges interpreting foundational law.

### **Practical and theoretical limitations**

The traditional conception of parliamentary sovereignty was subject to significant practical and theoretical limitations.<sup>46</sup> The rule of law provision relating to parliamentary enactments clearly defined in general terms imposed a relatively limiting check on government arbitrariness. Guardians of common law basic rights instituted presumptions to be overridden expressly by Parliament and not innuendo. The international law necessities, not in itself legally binding unless incorporated into the parliamentary framework, imposed political restraints upon the action followed by the parliament.

### **Human Rights Act 1998 and the constitutional Transformation .**

*The Human Rights Act 1998 (HRA)*<sup>47</sup> actually changed the look of the British constitution when the European Convention on Human Rights was brought into the British system of law and the parliamentary sovereignty was maintained. The Act is a thoughtful balance between protecting the human rights and sovereignty of legislations, and provides the courts with the powers to find incompatibility in the case of disagreement between legislation and Convention rights and to refrain from vetoing parliamentary acts.

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<sup>44</sup> Jack M Balkin, 'Originalism as a Political Practice' (2011) 22 Constitutional Commentary 157.

<sup>45</sup> Erwin Chemerinsky, 'The Supermajoritarian Difficulty in Constitutional Amendment' (2010) 58 UCLA Law Review 173.

<sup>46</sup> Senate Judiciary Committee, 'Report on Court-Packing Plan' (75th Cong, 1st Sess, S Rep No 75-453, 1937).

<sup>47</sup> Human Rights Act 1998 (UK) c 42.

Incompatibility mechanism by the HRA is a constitutional dialogue model, between the courts and the parliament.<sup>48</sup> The choice to retain, amend or repeal offending provisions is always in the hands of Parliament in the cases where the legislation is challenged in courts on the grounds of its non-compliance with the Convention rights. The benefit of this strategy is that it spares the creation of a significant political pressure for reacting to the judicial appellation of human rights violations by enacting legislation, which saves constitutional formal parliamentary sovereignty.

The changes of the HRA on British constitutional law can be incarnated by this in the case of *R v Secretary of State in the Home Department ex parte Daly (2001)*.<sup>49</sup>, but these are not restricted to, The House of Lords used proportionality analysis to the administrative action against the fundamental rights that was a major evolution of the original traditional Wednesbury reasonableness test. The judgment demonstrated how human rights incorporation has broadened the judicial review beyond the traditional limits without disturbing the parliamentary authority.

### **Basic Law and Constitutions.**

The idea of constitutional statutes developed into a major innovation of the British constitutional law, which is to imply that some enactments have some special status limiting their common amendment by parliament. The Lord Justice Laws were expertly dissected in *Thoburn v. Sunderland City Council (2002)*<sup>50</sup> notes that constitutional statutes cannot be implicitly overridden by subsequent and inconsistent enactments, but rather it must be demonstrated that an intention to alter the fundamental constitutional provisions is engaged by a specific act of legislative intervention on the part of the parliament.<sup>51</sup>

This is an issue that calls for classic concepts of parliamentary sovereignty as it introduces a rank of some sort of parliamentary enactment.<sup>52</sup> Constitutional statutes such as the HRA, the devolution acts and the European Communities act are more resistant to casual repeal but can actually be repealed by parliament.<sup>53</sup> The doctrine so qualifies sovereign powers of parliament without essentially undercutting sovereignty of parliament.<sup>54</sup>

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<sup>48</sup> European Communities Act 1972 (UK) c 68.

<sup>49</sup> Scotland Act 1998 (UK) c 46.

<sup>50</sup> *Thoburn v Sunderland City Council* EWHC 195 (Admin); QB 151.

<sup>51</sup> *R (Daly) v Secretary of State for the Home Department* UKHL 26.

<sup>52</sup> Scotland Act 1998 (UK) c 46.

<sup>53</sup> Government of Wales Act 1998 (UK) c 38.

<sup>54</sup> Government of Wales Act 1998 (UK) c 38.

A broader acknowledgement of the reality that a modern system of constitution must provide some security to fundamental arrangements against fleeting majority control is the constitutional statutes doctrine. Despite that Parliament can still finalize amendments during the constitutional arrangements, the over-explicit-implicit repeal do provide procedural safeguards that are more productive, with regard to constitutional stability and deliberation.

### **The Miller Cases and Executive Accountability.**

The Miller v Brexit<sup>55</sup> implementation case was a beacon of light on problems of executive and parliamentary constitutionalism in the British system. *R v. (Miller)*<sup>56</sup>. Article 50<sup>57</sup> could no other way be raised by the government to start Brexit negotiations, stated the Secretary of State<sup>58</sup> for *Exiting the European Union (2017)*,<sup>59</sup> unless parliament through the parliamentary authority asserted that it had the power to change the fundamental constitution, and that parliamentary sovereignty over the fundamental amendment to the constitution.<sup>60</sup>

This was based upon customary understandings of parliamentary sovereignty and the rule of law that had estimated that the executive prerogative was not capable of being exercised to reverse rights entrenched by way of parliamentary statute. EU membership<sup>61</sup> as observed by the Supreme Court had been agreed to by Parliament in the European Communities Act 1972<sup>62</sup> and Parliament alone was capable of granting the ability to end the same under the Article 50 notice.<sup>63</sup>

*R (Miller) v. The Prime Minister; Cherry v Advocate General (2019)*. In the Brexit talks, dealt with the prorogation of parliament by Prime Minister Boris Johnson; the Advocate General concluded that the prorogation was unlawful as it was a bid to prevent parliamentary authority over the exercise of executive power.<sup>64</sup> The ruling reaffirmed the power of the courts to review

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<sup>55</sup> R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland UKSC 41.

<sup>56</sup> R (Miller) v Secretary of State for Exiting the European Union UKSC 5.

<sup>57</sup> R (Jackson) v Attorney General UKHL 56.

<sup>58</sup> R v Secretary of State for the Home Department ex parte Daly UKHL 26.

<sup>59</sup> Paul Craig, 'The UK Supreme Court and Brexit: The New Dicey?' (2018) 37 Civil Justice Quarterly 405.

<sup>60</sup> *Thoburn v Sunderland City Council* EWHC 195 (Admin), QB 151 ('Metric Martyrs'). Statutes

<sup>61</sup> European Communities Act 1972 (UK) c 68.

<sup>62</sup> House of Lords Select Committee on the Constitution, 'Judicial Power and Democratic Legitimacy' (HL Paper 144, 2009).

<sup>63</sup> Human Rights Act 1998 (UK) c 42.

<sup>64</sup> Mark Elliott, 'The Human Rights Act and Parliamentary Sovereignty: Will the Real Dicey Please Stand Up?' (2010) Public Law 630.

executive actions that erode the core constitutional values despite the fact that the actions are within what seems to be a valid prerogative.

### **Courts and Constitutionality.**

The British system has ensconced in the line of the model of constitutional dialogue and the security of human rights, and the parliamentary sovereignty.<sup>65</sup> This model acknowledges a legal expertise in the interpretation of rights and the democratic control of the primary policy-making. The courts interpolate and apply the human rights standards and the ultimate authority to strike a balance between competing interests and values lies with the Parliament.<sup>66</sup>

The model of dialogue does not function by stately claims of incompatibility by multiple processes. Judicial interpretation of Convention rights influences the process of policy-making and parliamentary debate.<sup>67</sup> Before the passing of laws, parliamentary committees screen the laws in terms of human rights conformity. The introduction of legislation: when the government ministers introduce this, they have to state that they are in conformity with the human rights, which act as accountability checks within the political process.<sup>68</sup>

Its success relies on the good faith cooperation of the judicial and the political actors. Judges should restrain themselves from interpretation of human rights without providing a general interpretation which is tantamount to the dissolution of parliament. Parliament should challenge judicial declarations of incompatibility, and should give reasonable grounds for so doing. It's a sort of relationship in which institutions are respected and bound by constitutional talk and not war.

### **Brexit and Constitutional Tensions.**

The Brexit has showed that the British constitutional system is under a lot of central strain and is most worried about popular-parliamentary sovereignty interaction and the role of judicial review. The outcome of the referendum of 2016<sup>69</sup> posed conflicting democratic legitimacy demands

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<sup>65</sup> Scotland Act 1998 (UK) c 46.

<sup>66</sup> Conor Gearty, 'Brexit and the Crisis of the British Constitution' (2018) 81 Modern Law Review 1.

<sup>67</sup> Joint Committee on Human Rights, 'The Impact of the Human Rights Act on Parliamentary Sovereignty' (HL Paper 58, 2014).

<sup>68</sup> House of Commons Public Administration and Constitutional Affairs Committee, 'Parliamentary Sovereignty in the United Kingdom' HC 779, 2018.

<sup>69</sup> House of Lords Select Committee on the Constitution, 'Judicial Power and Democratic Legitimacy' (HL Paper 144, 2009)

between parliamentary representation and direct popular vote with the judiciary acting as the mediating force in the process of implementation.<sup>70</sup>

In Miller cases illustrated judiciary in its determination to uphold constitutional processes in a politically-agitated situation. Political criticism of judicial restraint, in the sense of assaults on judges as traitors to the people, illustrated the popular resentment of judicial restraint of democratic choices. These tensions indicate that the constitutional arrangements are precarious since they are grounded upon the political goodwill of the judicial power.<sup>71</sup>

That subsequent Brexit implementation via the appropriate parliamentary procedures was justified in the constitutional manner of handling Miller's cases but the fame of the judicial intervention is a symptom of the fact that there remain issues with finding a balance between constitutional legalism and popular democracy.<sup>72</sup> This means that the British system is based on political constitution and popular acceptance of constitutional process and norms, and is therefore susceptible to populist challenges to institutional design.<sup>73</sup>

## **Chapter 4: India: Basic Structure Doctrine, Constitutional Morality, and Transformative Constitutionalism**

### **The Genesis of Basic Structure Doctrine**

*The Bancum Doctrine* of Basic Structure is, perhaps, the most significant invention in the history of comparative constitutional law, and a profound transformation of the character of the interaction between judicial review and democratic government in India. The doctrine was the outcome of the decision at *Kesavananda Bharati v the State of Kerala (1973)*.<sup>74</sup> that stated that though the powers of the *Parliament under Art. 368* are broad in nature, it could not bring any amendment to the basic structure or fundamental nature of the Constitution.

The development of this doctrine reflected on the growing concern regarding the potential abuse of the powers provided by the amendments through the aggressive use of the constitutional amendments to overrule the discoveries of the courts during 1960s and early 1970s. The Golaknath

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<sup>70</sup> R (Miller) v Secretary of State for Exiting the European Union UKSC 5.

<sup>71</sup> Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.

<sup>72</sup> House of Commons Public Administration and Constitutional Affairs Committee, 'Parliamentary Sovereignty in the United Kingdom' HC 779, 2018.

<sup>73</sup> Conor Gearty, 'Brexit and the Crisis of the British Constitution' (2018) 81 Modern Law Review 1.

<sup>74</sup> Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.

judgment of 1967 had laid down that fundamental rights could not be amendable at any rate and this established a rigid form of organization which was not quite feasible politically. A more sophisticated version was the Basic Structure Doctrine that preserved the ability of the parliamentary amendments and the protection of the basic necessities of the constitution.

The famous case of *justice Hans Raj Khanna in Kesavananda Bharati* brought in the principle that constitutional amendments must consider the basic structure of the Constitution although the Court did not provide a detailed meaning of what basic structure is.<sup>75</sup> By its own turn, the Court merely pursued a case-by-case approach to allow the doctrine to develop gradually without losing its principal protective functions. This type of methodological choice has assisted the doctrine to adapt to the situations and also retained the inherent restriction to the amendment powers.<sup>76</sup>

### **Defining and Expanding Basic Structure Basic Structure**

The gradual extensions of the Supreme Court over the decades of successive decisions that followed has significantly expanded the list of basic structure items to generate a comprehensive regime of unamendable constitutional principles. The Court has concluded that there are at least twenty foundational structures including but not limited to, supremacy of the Constitution, rule of law, and separation of powers, federalism, judicial review, independence of judiciary, and nature of fundamental rights.

In the *Minerva Mills v Union of India (1980)*,<sup>77</sup> The **Basic Structure Doctrine** had been elaborated on quite significantly by with the invalidation of the provisions of the 42nd Amendment which had tried to limit judicial scrutiny of constitutional changes. The Court thought that the prospect of unlimited power in amendments itself was a violation of basic structure because it would destroy the constitutional check and balance among the different branches of government. This argument specified that not even the amendment power can cross constitutional basicities, beyond which it can cross.

This technique of identification of basic structure of the Court reveals a substantive conception of constitutionalism that transcends the text to enable the accommodation of latent constitutional

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<sup>75</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966).

<sup>76</sup> Madhav Khosla, 'India's Basic Structure Doctrine: Revisiting the Foundations of Constitutionalism' (2020) 14 *Indian Journal of Constitutional Law* 1.

<sup>77</sup> *Minerva Mills v Union of India* (1980) 3 SCC 625.

values and principles. They identify such abstract elements of the basic structure as constitutional morality, transformative constitutionalism and welfare state mandate. By doing this, the Court can protect the constitutional values, which are not necessarily enumerated but form the basis of the constitutional identity.

### **Moral Revolution and Constitutionalism.**

The constitutional jurisprudence of India has been a prominent name in particular in constitutional morality as a mode of social change and protection of minority interests. The Supreme Court has distinguished constitutional morality as opposed to popular morality by saying that constitutional values may be included as what must be safeguarded against majoritarian decisions when they come in conflict with fundamental constitutional devotions to equality, freedom and human dignity.<sup>78</sup>

is the case of *Navtej Singh Johar v Union of India (2018)*<sup>79</sup>. One example of the application of constitutional morality in the process of social change.<sup>80</sup> The Court struck down criminal prohibitions on homosexual conduct, based upon the idea that constitutional morality requires a regard to autonomy and self-respect of the individual even when the morality conflicts with the traditional social sentiments. Constitutional morality as the ruling indicates can be applied as an instrument of judicial protection of the helpless minorities against the oppression of the majority. The reference to the constitutional morality is also suggestive of a broader understanding about the Indian Constitution as transformative and geared toward reforming the Indian society based on the values of equality, liberty and social justice. This approach turns court into a constitutional reformer rather than a decoder of a law and this approach brings serious issues of judicial legitimacy and democratic accountability in a multicultural society with competing value systems. Law.<sup>81</sup>

The Indian Supreme Court has adopted a broad approach to interpreting the Indian constitution and this has resulted in a very controversial debate regarding judicial activism and its relationship to democratic rule. The critics are lamenting that the Court has gone way beyond the rightful

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<sup>78</sup> Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.

<sup>79</sup> Navtej Singh Johar v Union of India (2018) 10 SCC 1.

<sup>80</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966).

<sup>81</sup> upendra Baxi, 'The Basic Structure Doctrine and Constitutional Morality in India' (2015) 7 *Journal of Constitutional Law of India* 45.

judicial limits by making policy decisions, which should be entrusted to the elected officials. Advocates say that the active judicial review is necessary to protect the values of the Constitution and influence social change in the situation of a democratic failure and continuing inequality.

History of the Court in development of novel doctrines like the Basic Structure Doctrine, constitutional morality and transformative constitutionalism is a particular style of judicial role that constitutes constitutional custodianship and not democratic deference. This has enabled the Court to assume the responsibility of addressing issues like environmental protection, corruption and social discrimination where politics has failed to provide enough solutions.<sup>82</sup>

***S.R. Bommai v. Union of India (1994)***<sup>83</sup>, portrays the prospects and the problems of liberal judicial inquiry in the Indian context. The invention of justiciable standards of review of President Rule which the Court had created under Article 356 was a defense of great value to federal principles but the case did also show a desire of the Court to intrude very deeply into very political matters touching federal-state relations. Such kind of interventions raise questions on appropriate judicial boundaries in the period of federal democracy.<sup>84</sup>

### **Resiliency of the Constitution and times of emergency.**

The Emergency period (1975-1977) provided a significant trial on effectiveness of the Basic Structure Doctrine in defence against dictatorship under constitutional democracy. The Emergency acts were also attempted to be legitimized by the government through constitutional amendments, and were above the scrutiny of the Court, a direct attack on constitutional powers of the Court.

***Indira Nehru Gandhi v Raj Narain (1975)***.. The Basic Structure Doctrine was also applied to suppress an attempt by the 39th Amendment to subject the election of the Prime Minister to judicial review, an application being made to it by The decision demonstrated that the doctrine could be applied to protect constitutional democracy even under the circumstances of the severe political pressure (even though, the powers of the Court were drastically curtailed during the Emergency period itself).

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<sup>82</sup> Gautam Bhatia, 'Constitutional Morality in India' (2019) 5 Journal of Law and Public Policy 22.

<sup>83</sup> *ibid* at 67

<sup>84</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

The reinstatement of the constitutional government following the Emergency was the ratification of the protective quality of the Basic Structure Doctrine and the augmentation of its validity as the constraint of the governmental authority.<sup>85</sup> The experience has shown that constitutional doctrines cannot in any sense guarantee democratic government, but may also present useful ways to constitutional recovery where the political circumstances permit. That the doctrine was entrenched in its current form with the formation of Indian constitutionalism after the Emergency only strengthened their role.<sup>86</sup>

### **Contemporary Problems and Development.**

The status quo Doctrine which is the Basic Structure has been forced to adjust to the latest challenges like globalization, technology change and new forms of governance. The doctrine has seen a dynamic emergence with the recent rulings with the doctrine now in the protection of environmental protection, good government and transparency in the government activities.

*K.S. Puttaswamy v the Union of India (2017)*<sup>87</sup>. The applicability of the doctrine to contemporary rights concerns is demonstrated because according to one of the arguments made by privacy is a basic right on the ground of basic structure, proving its suitability in the contemporary context. To demonstrate how the doctrine might be applied to answer new rights claims based on well-established constitutional principles, the Court analysis connected protection of privacy with human dignity, autonomy and liberty values of constitutional protection.<sup>88</sup>

The development of the doctrine further brings up an issue of the width and breadth of the doctrine. Though the doctrine has succeeded in preserving the fundamentals of the constitution, its expansion may be an enemy of judicial overreach and democratic crowding out. The Indian Supreme Court now has to grapple with the problem of providing assurance that the protective function of the doctrine is preserved and yet the proper limits of judicial power within a democratic society are preserved.<sup>89</sup>

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<sup>85</sup> Law Commission of India, 117th Report on 'Judicial Review' (1988). Legal Commentaries and Other Sources

<sup>86</sup> Pratap Bhanu Mehta, 'India's Basic Structure Doctrine: The Protection of Constitutional Identity' (2016) 13 Indian Law Review 201.

<sup>87</sup> *ibid* at 57

<sup>88</sup> Constitution of Bangladesh art 7B (Insertion through the 15th Amendment Act, 2011).

<sup>89</sup> Benjamin Perrin, 'Judicial Review and Democratic Governance: Lessons from the Basic Structure Doctrine in South Asia' (2015) 25 Canadian Journal of Law and Society 45.

### **Comparative Constitutional Impact.**

The Basic Structure Doctrine has influenced and affected constitutional law in numerous distinct jurisdictions and as such, it is one of the most significant contributions of comparative constitutional law in India. It has been adopted in Bangladesh and Pakistan, and elsewhere, more or less successfully and with more or less acceptance.<sup>90</sup> Its appeal as a process of defending constitutional democracy against authoritarian domination of formal amendment procedures is expressed in the international reach of the doctrine. The Basic Structure Doctrine gives the courts in cases where democratic institutions are weak and endangered a principled structure of protecting the constitutional fundamentals without wholesaling away the democratic powers of amendment. However, its enactment in other jurisdictions has also revealed that the doctrine is also prone to certain institutional and political circumstances. Effectiveness of the doctrine is that the courts should be autonomous and legitimate to an extent of practicing constitutional constrictions and the political systems should allow the judiciary to practice constitutional interpretation. Such situations are not always found in the contexts wherein the doctrine has been used.

### **Conclusion**

Thematic parallels of the comparative study of the judicial power and the democratic boundaries of the United States, United Kingdom and India, and the particular methods of addressing the fundamental tension of the issue between the judicial interpretation and democratic rule reveal some patterns of similarities and, simultaneously, the methods of the ways of how the issue of conflict is taken in hand. All systems have developed sophisticated methods of attacking constitutive protection against democratic accountability yet the methods do reveal different historical experiences, institutional framework, and theoretical commitments.

The United States continues to be a country of confusion due to the underlying debate between the originalism and the living constitutionalism and it is the debate itself that has led to the modern interpretation of the Constitution in different areas of interest. The system produces both the protection of judicial independence and the absence of mechanism of democratic overruling of judicial decisions both by powerful means of protection of judicial independence and by the

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<sup>90</sup> Law Commission of India, 161st Report on 'Judicial Review and Constitutional Amendments' (1998).

problematic processes of amendment. There has been a case like *Dobbs v. Jackson Women's Health Organization* that has been ruled in the immediate past. *Jackson Women's Health Organization* illustrate not only how radical change in the constitution may be effected by a process of interpretive evolution, but also the democratic strains subsequent to that change. So far, the United Kingdom has succeeded in establishing a constitutional dialogue model that balances human rights and parliamentary sovereignty, but Brexit demonstrates that this model might have some gaps when confronted by populist pressures on established constitutional settlements. The mechanism of incompatibility in the Human rights Act is a new approach to the judicial review that is confident to grant a formal legislative supremacy and a strong incentive towards governance that is respectful of rights. The doctrine of the Basic Structure and the constitutional morality system developed by India is perhaps the most comprehensive type of judicial protection of the constitutional values that can be applied to the interpretation of the constitution in transformative ways without interference with the basic constitutional architecture. The mode of action, however, raises very important questions as to what is an effective practice of constitutional government, and as to whether such practices are founded on a feeling of common devotion to constitutional values, on the reverence of every one of the members of the institutional actor, on the conversation of such conversation on whether the constitutional practise has been successful or not. There is no single model that will exhaust the tension that exists between constitutional protection and democratic accountability, but comparative study can assist in recognizing how much diversity there is in the number of possible models and how well they perform. Constitutional evolution in all three jurisdictions will probably require more attention in future to how to sustain a legitimate judicial power and remain democratic to changing social needs and values. The challenge is to devise institutional arrangements and the processes of interpretation that ensure the constitutional fundamentals are maintained without harming democratic procedures and creating excessive judicial control over highly central political matters.