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Constitutionalism to Transformative Constitutionalism: The Changing Role of the Judiciary

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Abstract

Constitutionalism ensures protection of rights of its citizens. The Constitutional designers provided two models to ensure the same. These two models are-

a. *Parliamentary Sovereignty- It postulates that the legislature is the legitimate forum for safeguarding citizen's rights.*
b. *Judicial Supremacy- It emphasizes the significance of the Court to safeguard rights of citizens.*

Judicial Supremacy proliferated post Second World War as a reaction to the often violation of rights of minority group. The probability of imperilment of rights of groups having inadequate representation in the Parliament was supposedly more in Parliamentary Sovereignty. Judicial Supremacy ensured better protection of rights because it had the power to review and strike down any rights-infringing legislation. In almost all the countries the Apex Court is vested with the ultimate power of interpretation of the Constitution to ensure protection of rights. Judicial Review and Constitutional Interpretation by the Judiciary has led to the introduction of 'Transformative Constitutionalism'. Transformative Constitutionalism recognizes the changing nature of the Society and accepts the Constitution as a transformative document rather than a rigid one.

In this backdrop this paper undertakes the study of the written Constitution of India and the unwritten Constitution of the United Kingdom. The object of this study is to locate any shift in the principles of Constitutionalism in the Constitutions of these two countries.

Keywords- *Transformative Constitutionalism, Parliamentary Sovereignty, Judicial Supremacy, Constitution of India, Constitution of United Kingdom.*

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I. Introduction

Constitutionalism can be defined as a doctrine of the legitimacy of the action of the Government. It ensures that the governance or any action by the Government is in compliance with the pre-fixed legal norms. Constitutionalism denotes that the Government derives its authority from the law. However, a country may have the Constitution but not the Constitutionalism. The Constitution of a country lays down the structure of various organs of the Government and specifies their area of function. However, at the same time there is a necessity to check any abuse of power by the governmental institutions. Constitutionalism is that mechanism which restricts the governmental institutions from being arbitrary.

Constitutionalism is a system of governance where the Government adheres to some principles in order to ensure check on the arbitrary exercise of power by its organs. These principles are-

a. Democratic governments,
b. Parliamentary sovereignty,
c. Separation of power,
d. Rule of law,
e. Judicial review,

Giovanni Sartori[2] defines Liberal Constitutionalism constituted of following elements-

a. Having a higher law, either written or unwritten, i.e. the Constitution,
b. Independence of judiciary having judges appointed independently and who are dedicated to legal reasoning. It includes judicial review as well.
c. Law is enacted through a pre-fixed procedure,
d. Due process of law.

Therefore, the object of Constitutionalism is to ensure protection of citizen's rights from being violated by the arbitrary action of the government. Constitution of some countries upheld the Parliamentary Sovereignty to ensure protection of citizen's right, while some countries have evolved and emphasized upon Judicial Review of right-infringing legislations to ensure protection.

[2] Giovanni Sartori (1924-2017) was an Italian Political Scientist specialized in study of Democracy and Comparative Politics.

Parliamentary sovereignty postulated that the Parliament, rather than the Court, was the legitimate forum for safeguarding the right of citizens. British orthodoxy claimed that Courts be denied the right to review and strike down the legislation enacted in a democratic way. On the contrary, the American model of judicial supremacy empowers the court to review and strike down rights-infringing legislation[3]. This American model of judicial supremacy proliferated in India and was slowly absorbed into the Indian legal system.

II. Theories of Constitutionalism

The concept of Constitutionalism begins from the transformation of political society from natural state as propounded in the Social Contract Theory by Hobbes, John Locke and Reaussou.

Hobbes (1588-1679) in his social contract theory propounded that in natural state individuals were under constant threat of war. In natural state the rights of individuals were violated more often and the 'might is right' was followed. Hobbes observed that this kind of society could never bring stability, thus, the concept of 'government' paved its way into it. According to Hobbes there were two kinds of pacts, these are-

a. Pactum Unionis- due to constant threat of war in natural state people wanted to protect their property. Pactum Unionis was a pact amongst each other to understand and restpect each other's rights and to live peacefully.
b. Pactum Subjectionis- By Pactum Subjectionis people agreed to surrender themselves under the authority of a superior power who may be called the Sovereign. Pactum Subjectionis also brought, along with it, the concept of limiting natural rights of an individual to an extent so that it did not hurt the natural right of another individual.[4]

PactmSubjectionis, according to Hobbes, gave rise to the concept of Sovereign or Government. However, Hobbes did not say anything as to how to control the

[3] Chintan Chandrachud, *Balanced Constitutionalism*, xxix, (OUP, New Delhi, 2017)
[4]Hobbe's Social Contract Theory, (23.07.2020, 5:30 P.M.) https://www.researchgate.net/publication/261181816_Summary_of_Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau

Sovereign if it becomes arbitrary. Hobbes theory of Social Contract had Utilitarianism, Absolution, Individualism except Constitutionalism.

Hugo Grotious (1583-1645), a contemporary of Hobbes, propounded Social Contract theory on the same line as Hobbes. According to Grotious once the natural rights were surrendered to the superior political being men had no control over the governance. Thus, surrendering natural rights to superior political being amounted to forfeiture of the right to control the Government if turned to be arbitrary.[5] Therefore, Hugo Grotious also propounded a Government devoid of the principles of Constitutionalism.

John Locke (1632-1704) presupposed that men surrendered their natural rights to the community and not to any superior political being. Locke acknowledged the two types of pacts i.e. Pactum Unionisnand Pactum Subjectionis by Hobbes. However, Locke was of the view that men did not surrender their natural rights by Pactum Subjectionis, rather they subject themselves to the rule by a superior political being who would also protect their natural rights. he also opined that a superior political being or the sovereign would be overthrown if turned out to be arbitrary. Thus, Locke has proposed limitation upon the power of the sovereign to some an extent which found its similarity with the principles of Constitutionalism.[6]

Rousseau (1712-1778) explained that during transformation of natural state into political society men were not in contact with each other, therefore, they have not though of surrendering their rights. Once, the political society was established there was conflict of interest which paved the way for limitation of natural rights by the superior political being. This gave rise to the necessity to have a sovereign or superior political being in a political society. However,

[5] Social Contract theory as propounded by Hugo Grotious, (23.07.2020, 6:00 P.M.) https://plato.stanford.edu/entries/grotius/

[6] DaudiMwita, Social Contract Theory of John Locke (1632- 1704) In the Contemporary World, (June, 2011) (23.07.2020, 6:15 P.M.) https://www.academia.edu/1489291/Social_Contract_Theory_of_John_Locke_19321704_in_the_Contemporary_World

Rousseau opined that sovereign power must be limited and obedience to the law must be subjected to 'General Will'.[7]

The above discussion makes it clear that the Social Contract Theory gave rise to the concept of Sovereign. This Sovereign is supposed to command obedience and impose limitation to the exercise of rights by its subjects. This concept of Sovereignty also induces that the power of the Sovereign must be limited. Thus, the origin of Constitutionalism can be traced back to the point where need was felt to control the sovereign power.

Blackstone (1723-1780) also expressed the necessity of controlling the sovereign power. According to Blackstone the factor controlling the sovereign power is the 'Natural law' which also includes the faculty of reasoning. Blackstone explained 'Sovereign Power' in English legal system where initially the sovereignty lied with the Monarch which later on transferred to the Parliament in 1688 through Glorious Revolution. Thus, in Blackstone's theory the Sovereign is the Parliament. According to him the Sovereign would not act arbitrarily because it has a moral obligation to comply with abstract and metaphysical norms.[8]

A.V. Dicey (1835-1922) explained Constitutionalism as existing in the English Legal System. A.V. Dicey also acknowledged absolute power of the Parliament to legislate. However, this absolute legislative power, according to him, could be controlled by Political Sovereign i.e. common people. Therefore, Dicey indicated that common people acted as restraint upon the arbitrary power of the Sovereign.[9]

Therefore, the Sovereign power needs to be controlled from being arbitrary is the fundamental object of Constitutionalism. The abovementioned jurists tried to give various theories as to how to restrain sovereign power from being arbitrary. This paper will discuss how Constitutionalism developed in India and United Kingdom. Both the countries have similar political history i.e. history of foreign

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[7] Rousseau's Social Contract theory, (23.07.2020, 6:30 P.M.) https://www.sparknotes.com/philosophy/rousseau/section2/

[8] Sir William Blackstone, Commentaries on the Laws of England, 115 (J.B. Lippincott Company, 1983).

[9] David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, Vanderbilt Journal of Transnational Law, 870-873 (2003).

invasion. The legal systems of both the countries have been influenced by foreign legal system. However, both the countries underwent different process while developing their respective legal systems.

III. Constitutionalism in India

The Constitution of India is the supreme Law of the land. Article 13 of the Constitution of India has provided that any legislation inconsistent with the constitutional provisions must be declared repugnant by the Court[10]. This means that India upholds the Constitutional Supremacy which allows no law or action to violate the provisions of the Constitution of India.

Principles embedded in the Constitution of India are-

i. Constitutional Supremacy

Constitutional Supremacy means that all the organs of the government i.e. the legislature, executive and judiciary shall owe allegiance to the set of principles as laid down by the Constitution of India. The judgment delivered in Virendra Singh &Ors. v. State of Uttar Pradesh[11]is significant as in this case the Constitutional Supremacy was upheld. This suit was filed under Article 32 of the Constitution regarding post-constitutional right to property which was

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[10] Article 13 of the Constitution of India
Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

[11] Virendra Singh &Ors. v. State of Uttar Pradesh AIR 1954 SC 447.

situated in Indian States that were not part of British India. However, later on these Indian States were acceded to India following independence and became the integral part of Indian Republic. These Indian States were independent during British raj and acknowledged as suzerain power and owed modified allegiance. These Indian states were acceded through Instrument of Accession post 1947. The rulers of these Indian States accepted to join India on the condition that their sovereignty within the State would not be affected because of this accession, and the same was also mentioned in the Instrument of Accession. States that were in question later on formed part of the state of Uttar Pradesh. These Rulers granted some rights to individuals regarding four villages in 1948 which was later on revoked by the Government of Uttar Pradesh in 1952 stating it as an act of the State. The Petitioners being aggrieved by this order filed this Writ petition.

This case was presided over by five judges Bench comprising of the then Chief Justice M.C. Mahajan, Vivian Bose, N.H. Bhagwati, B.K. Mukherjea and T.L.V. Aiyyar JJ. Justice Vivial Bose (for himself and on behalf of four other judges) observed that the State of Uttar Pradesh can not exercise 'an act of State' power against its own subjects. Prior to the adoption of the Constitution people of Indian States and/or Dominion of India may have owed allegiance to different sovereign. However, with the adoption of the Constitution all other territorial allegiance were wiped out and the past was obliterated except where preserved expressly, at that moment all the allegiance sprang from one source for all grounded on the same basis, the sovereign will, of the people of India with no race, caste, creed, class, distinction, reservation etc. Petitioners, in favour of who grants were made, were acknowledged as Indian citizens from the beginning of accession of their states into Indian Territory. Petitioners and the authorities both were subjected to the Constitution of India. Therefore, the State Action of the State of Uttar Pradesh against its own subjects was declared to be void.

This case, undoubtedly, upheld the Constitutional Supremacy in 1954. This judgment can be said to be in support of words of Abraham Lincoln i.e. the government of the people, by the people and for the people.

ii. Judicial Review

In India the Constitution has empowered the Judiciary with ultimate power of declaring any Act as unconstitutional by virtue of Article 13 of the Constitution of India on the following ground-

- **i.** Acts so far as inconsistent with the provisions of the Constitution of India,
- **ii.** The State shall not make any law which takes away or abridges rights of citizens,
- **iii.** Any Bye Law, Regulations, Orders inconsistent with the Constitutional provision shall not be effective.

The Indian Judiciary immediately after the adoption of the Constitution of India was entrusted with review of several legislations. In A.K. Gopalan v. State of Madras[12]the six judges Bench, comprising of Chief Justice H. Kania, Fazl Ali, Patanjali M. Shastri, M.C. Mahajan, S.R. Das and B.K. Mukherjea JJ., reviewed constitutionality of Preventive Detention Act, 1950. The Bench declared Section 14 of this Act unconstitutional on the ground that this section prevents the disclosure before the Court the grounds of detention.

In Shankari Prasad Deo v. Union of India[13]initiates the series of cases where the Indian Judiciary reviewed the Constitutional amendments involving important questions of interpretation of the Constitutional provisions. In R.C. Cooper v. Union of India[14]the eleven judges Bench comprising of J.C. Shah, S.M. Sikri, J.M. Shelat, Vishishtha Bhargava, G.K. Mitter, C.A. Vaidyailingam, K.S. Hegde. A.N. Grover, A.N. Ray, J.P. Reddy, I.D. Dua JJ., reviewed the Constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The majority judgments by ten judges upheld the validity of the Act, however, declared that the calculation of compensation for acquisition under this Act was not adequate and was ordered to be amended.

Besides reviewing constitutionality of legislations, the Indian Judiciary also reviewed administrative action and/or discretion. A.K. Kraipak v. Union of

[12] A.K. Gopalan v. State of Madras AIR 1950 SC 27.
[13]Shankari Prasad Deo v. Union of India AIR 1951 SC 458.
[14] R.C. Cooper v. Union of India AIR 1970 SC 564.

India[15] is a significant case where the Indian Judiciary reviewed the administrative action. In this case five judges Bench comprising of Hidayatullah, J.M. Shelat, K.S. Hegde, A.N. Grover, V. Bhargava JJ., declared that the administrative action exhibiting biasness could not be held constitutional. In this case the appellant, A.K. Kraipak, was one of the members of an interview Panel taking interview for Indian Forest Service. However, it was alleged that A.K. Kraipak also appeared in the interview as one f the candidates. Therefore, biasness was alleged on the part of the administrative authorities. The Bench unanimously declared this administrative action as unconstitutional.

iii. Judicial Activism

Judicial Activism in India was introduced with the power of review of legislation and administrative action by the Judiciary under Article 13 of the Constitution of India. Significant features, as subsequently developed, of judicial activism under the Constitution of India were-

i. Access to justice through procedural innovations i.e. relaxing the *locus standi* rule to introduce Public Interest litigation,
ii. Interpretation of the Constitution in a manner that stretched it beyond the intention of the framers in order to ensure justice.[16]

Procedural innovation was introduced by relaxing *locus standi* rule to Public Interest Litigation.Hussainara Khatoon &Ors. v. Home Secretary, State of Bihar[17]disclosed shocking conditions of under-trial prisoners in the State of Bihar and their accessibility to justice was seemed to be bleak. Alarmingly, large numbers of inmates of prisons in the State of Bihar were awaiting their trial. In some cases the inmate was already in the prison for a period more than the period of imprisonment had the trial been completed and punishment imposed. In this case two judges Bench of the Supreme Court comprising of P.N. Bhagwati and D.A. Desai JJ. observed that inaccessibility of speedy trial amounted to infringement of rights guaranteed under Article 21 of the Constitution of India.

[15] A.K. Kraipak v. Union of India air 1970 Sc 150.
[16] Abhinav Chandrachud, Supreme Whispers, 29 (Penguin Random House, Haryana, 2018).
[17]Hussainara Khatoon &Ors. v. Home Secretary, State of Bihar AIR 1979 SC 1369.

Procedural innovation also involves court's power to exercise Epistolary Jurisdiction. Epistolary jurisdiction empowers the Judiciary to take letters into consideration and initiate a trial on the basis of such letter. This procedural innovation was introduced to ensure accessibility of justice to oppressed people. In Sunil Batra v. Delhi Administration[18]Justive V.R. Krishna Iyer again converted a letter from the inmate of a prison into a Public Interest Litigation. The letter disclosed human rights violation of prisoners in prison. V.R. Krishna Iyer, O. Chinnappa Reddy and R.S. Pathak (concurring) JJ. in this case observed that in no circumstances the human rights of prisoners could be violated by jail authority.

Since 1950 various judges interpreted the Constitutional provisions stretching its meaning beyond the intention of the framers of the Constitution of India in order to ensure justice. In A.K. Gopalan v. State of Madras[19] Justice S. Fazl Ali interpreted the Constitutional provision liberally and dissented to the majority judgment where it was held that 'right to freedom of movement' guaranteed under Article 19 (1) (d) was mutually exclusive of 'right to life and personal liberty' guaranteed under Article 21 of the Constitution of India. Justice S. Fazl Ali observed that in order to ensure enjoyment of all the fundamental rights by the citizens it was necessary to ensure that these fundamental rights were inter-linked to each other.

In I.C. Golaknath v. State of Punjab[20]the eleven judges Bench in 6:5 majority (Chief Justice K. Subba Rao, for himself and on behalf of Shah, Shelat, Vaidiyailingam, Sikri JJ, with Justice Hidayatullah concurring) observed that the power of the Parliament to amend the Constitutional provision was limited to the extent it did not abridge or take away the fundamental rights of the citizens.

In Keshavananda Bharti v. State of Kerala[21] the concept of 'Basic Structure' was given by the Indian Judiciary. The Basic Structure doctrine limited the Parliament's power to amend the Constitution to the extent of the amendment changing the very basic structure of the Constitution. S.M. Sikri, J.M. Shelat,

[18] Sunil Batra v. Delhi Administration AIR 1980 SC 1579.
[19] A.K. Gopalan v. State of Madras AIR 1950 SC 27.
[20] I.C. Golaknath v. State of Punjab AIR 1967 SC 1643.
[21]Keshavananda Bharti v. State of Kerala AIR 1973 SC 1461.

A.N. Grover, K.S. Hegde, B.K. Mukherjea, P. Jaganmohan Reddy and H.R. Khanna JJ. observed that the Constitution of India had Basic Structure which if altered would change the very nature of the Constitution of India. However, there is no unanimous decision as to the features which constitute Basic Structure of the Constitution of India. Nonetheless, this case is a glaring example of judicial activism in India because of the effort of the Supreme Court of India to protect fundamental values of the Constitution of India.

Maneka Gandhi v. Union of India[22]is another example of judicial activism in India where the Judiciary reversed the precedent upheld in A.K. Gopalan case since 1950. In Maneka Gandhi case the five judges Bench overruled the judgment of A.K. Gopalan case and held that-

i. Right to Equality guaranteed under Article 14, Right to Freedom guaranteed under Article 19 and Right to life and personal liberty guaranteed under Article 21 are mutually inclusive and interlinked. These fundamental rights can not be said to be exclusive of each other,
ii. 'the procedure established by law' in Article 21 of the Constitution of India connotes fair and just procedure. Article 21 of the Constitution of India ensures procedural fairness as well.

Vishaka v. State of Rajasthan[23] marks a significant milestone in the journey of judicial activism in India. The judicial activism in Vishaka case is different than the abovementioned two types of activism. In this case there is neither stretching of the meaning of legislation beyond intention of the framers nor any procedural relaxation is found. This case is significant because the Judiciary had to deal with an issue where there was no pre-existing legislation. The three judges Bench analysed the case through the lens of gender equality recognizing sexual harassment at workplace as a social problem and discriminatory form of violence against women. The Bench referred the guidelines provided in Convention on Elimination of All forms of Discrimination against Women and provided guidelines to be followed by the employer in the establishment. This guideline is known as Vishaka Guidelines and to be effective until any appropriate legislation is enacted.

[22]Maneka Gandhi v. Union of India AIR 1978 SC 597.
[23]Vishaka v. State of Rajasthan AIR 1997 SC 3011.

Therefore, the Indian Judiciary has rarely hesitated to address the issues of infringement of rights of the citizens. The procedural innovation relaxing the rule of *locus standi* was introduced when the Judiciary noticed that in most of the cases the infraction and infringement of Constitutional rights go unheard and unremedied because the person could not even approach the Court. The Judiciary resorted to liberal interpretation of the Constitution whereby the meaning of a provision was stretched beyond the intention of the framers of the Constitution when the case demanded so. The Judiciary did not even hesitate to come forward and fill the void left by the lawmaking institution, as it has done in Vishaka v. State of Rajasthan.

a. Separation of Power

Separation of power as explained by Wade and Philips is that the same person should not be part of more than one organ of the government. It also means that the organs of the government should not control and interfere with the functioning of each other.

Article 50 of the Constitution of India mandated the state to separate judiciary from the executive. Except this provision no other provision lays down regarding separation of power in the Constitution of India. However, the framers of the Constitution has provided an arrangement of power sharing which shows that in India separation of power doctrine is followed to some an extent. Article 245 of the Constitution of India has laid down that separate list would be provided regarding area where the Union and the State legislature would be empowered to legislate. This provision was to avoid any further confusion in matters of legislation. The Constitution of India has provided separate arrangements explaining the rights and responsibilities of the executive and the legislature, however, no express provision is there regarding separating both the organs of the government.

However, in the Constituent Assembly Debate on 10th December, 1948 the matter of 'Separation of Power' between important organs of the government was discussed. Prof. K.T. Shah also suggested for insertion of new Article i.e. Article 40-A in the Draft Constitution separating the organs of the government. Dr. B.R. Ambedkar dissented to the proposal of insertion of new Article and contended that separation of executive and legislature might be there under the Constitution of United States of America but the same arrangement was

criticized as well. Therefore, the motion of inserting the Article 40-A was rejected.[24] Therefore, despite the attempts being made the strict separation of power was rejected under the Constitution of India.

b. Rule of Law

Rule of law embodies the doctrine of the supremacy of law. Rule of Law, as explained by A.V. Dicey, is –

i. Supremacy of law,
ii. Equal protection by law and equal subjection of all classes before the law, and
iii. Paramountcy of the law over the government.

The principle of Rule of Law is an underlying principle of the Constitution of India. This principle was upheld in Indira Nehru Gandhi v. Raj Narain[25]. Raj Narain and Indira Gandhi both contested General election of 1971 from Rae Bareilly constituency. In the election Mrs. Indira Gandhi won with sweeping majority. Raj Narain brought a suit before the High Court of Allahabad challenging the election of Mrs. Gandhi and contended that Mrs. Gandhi has resorted election malpractices. After hearing of both the parties the High Court of Allahabad declared Mrs. Gandhi guilty of election malpractices, misuse of government machinery under the Representation of People Act, 1950 and declared her election void. An appeal was filed before the Supreme Court of India. However, Supreme Court issued a stay on execution of the order of the Allahabad High Court on 24th June, 1975 since the Court was in vacation. One the very next day the Indira Gandhi imposed emergency on 25th June, 1975. During this emergency the Congress government introduced the 39th Amendment to the Constitution of India on 10th August, 1975. This amendment inserted Article 329 A in the Constitution of India. By virtue of this amendment the Parliament placed the election of President, Vice President, Prime Minister and the Speaker of Lok Sabha beyond the judicial scrutiny. Indira Nehru Gandhi v. Raj Narainwas heard by five judges Bench consisting of A.N. Ray, H.R. Khanna, K.K. Mathew, M.H. Beg, Y.V. Chandrachud JJ. The Bench unanimously declared 39th Constitutional Amendment void as it affected the rule

[24] Constituent Assembly Debate, 10th December, 1958, Vol- VII.
[25] Indira Nehru Gandhi v. Raj NarainAIR 1975 SC 2299

of law and the basic structure of the Constitution of India. Therefore, bringing the election in the posts of the Government institution under the judicial scrutiny the Indian Judiciary upheld the doctrine of Rule of Law.

IV. Constitutionalism in United Kingdom

United Kingdom consists of four countries England, Wales, Scotland and Northern Ireland. The capitals of these countries are London, Cardiff, Edinburgh and Belfast respectively. The Kingdom of Wales was annexed with the Kingdom of England in 1536 which was then followed by union with Scotland in 1707 forming Kingdom of Great Britain and ended with the union of Kingdom of Ireland in 1801 building the United Kingdom of Great Britain. It was initially a Monarchy that later on transformed into democracy through Great Revolution in 1689 with Parliamentary form of representative government.

The Constitution of the United Kingdom is unwritten. However, the principles of good governance are upheld in several texts like Magna Carta 1215, English Bill of Charter 1689. Legal system of the United Kingdom is not written in standing orders. The responsibilities of major institutions of the government and the arrangement of power sharing have been institutionalized through a continued practice over centuries. Most of the practices in the legal system of the United Kingdom have been developed through precedents and become a tradition. Principles of Constitutionalism as designed in the unwritten Constitution of the United Kingdom are explained herein below.

i. Parliamentary Supremacy/ Parliamentary Sovereignty

Parliamentary supremacy was introduced in English legal system through the Great Revolution in 1689 when the Monarch accepted the sovereignty of Royal Council. Royal Council was an institution of members representing the common people in the government. This Royal Council later on was developed to Parliament.

Parliamentary Supremacy or the Parliamentary Sovereignty has been established in the United Kingdom through continued practice. It means that the Parliament in the United Kingdom has the absolute power to legislate. Therefore, the Parliament has been vested with a significant power where there is a probability

of act in an arbitrary fashion. However, according to Blackstone (1723-1780) Parliament would restrain itself from being arbitrary because any man made law cannot survive unless its compliance with the natural law. Therefore, Blackstone resorted to natural law as a method of limiting the absolute power of the Parliament to legislate. According to him, a man made law has to comply fundamental and basic principles of natural law.[26]

A.V. Dicey (1835-1922) has propounded the concept of Political Sovereign and Legal Sovereign. Political sovereign is common people while the legal sovereignty belongs to the Parliament. Dicey has stated that Parliament would not legislate arbitrarily because the political sovereign has power to change their representatives in the Parliament. Therefore, the right to election of common people would act as restraint on the Parliament's absolute power to legislate.[27]

Therefore the English legal system definitely upheld Parliamentary Sovereignty, but the same is not absolute.

ii. Separation of Power

In the United Kingdom there was no separation of power in that sense until the enactment of the Constitutional Reform Act, 2005. By virtue of the Constitutional Reform Act, 2005 the Apex Court of the country was separated from the Upper House of the Parliament. The idea of separation of power is that the major organs of the government act independently. However, the same was not followed in the United Kingdom till 2005 when the highest appellate court of the country i.e. the House of Lords was also the Upper House of the Parliament. This practice prior to 2005 is criticized because the legislation enacted by the Houses of the Parliament if found to be right infringing may go to the House of Lords as it was the highest appellate court of the Country. Thus, the probability of biasness could not be ruled out. Therefore, this practice imperiled the rights of common people and was finally removed by the Constitutional Reform Act, 2005.

[26] Sir William Blackstone, Commentaries on the laws of England, 115 (J.B. Lippincott Company, 1983).

[27] David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, Vanderbilt Journal of Transnational Law, 870-873 (2003).

iii. Judicial Review

Judicial review is the power of the court by which it can review legislation and executive action. The unwritten Constitution of the United Kingdom has been misunderstood for not upholding judicial review because the Apex Court has been a part of the Upper House of Parliament and there is no written text delineating the responsibilities of the organs of the government.

A.V. Dicey opined that judicial review has been ensured under the unwritten Constitution of the United Kingdom. The judges of the United Kingdom hold their offices for permanent tenure which definitely raised them above any direct influence of the executive. In Dr. Bonham's case[28](1610) Sir Edward Coke (1552-1634) observed that sometimes the Parliament might enact legislation contrary to common right and reason. Sir Coke declared an Act enacted by the Parliament as void as it was contradictory to common law principles. He also observed that restrcting absolute power of the Parlaiment was not an alien concept to the English Legal system. This precedent was further continued by Lord Chief Justice Henry Hobart in Day v. Savadge[29]. In this case Justice Hobart observed that common law principle overrode the enactment of the Parliament. In Sheffield v. Ratcliff[30] Justice Hobart observed that judicial review of legislations and executive action derived from liberty and the authority of judges was to interprete the legislation to bring out the truest and best use.

iv. Rule Of Law

Rule of Law indicates subordination of arbitrary power of authorities to well defined law. Henry de Bracton (1210-1268) for the first time introduced the concept of subordination of arbitrary power of Monarch by demanding Royal Council, a sytem alike Parliament. Sir Edward Coke advocated for the supremacy of the common law and codification of the same for ensuring primary condition of freedom limiting the arbitrary power of the Monarch.

Dicey gave three meanings to the rule of law, these are-

[28]Dr. Bonham's case [1610] 8 Co. Rep. 107, 114 (CP)
[29]Day v. Savadge (1614) Hob. 84 (CP)
[30]Sheffield v. Ratcliff (1615) Hob. 338 (CP)

i. Absolute supremacy or predominance of regular law as opposed to arbitrary power,
ii. Equality before the law or equal subjection of all classes before the law,
iii. Paramountcy of the law over the Government. Therefore, Constitution is the consequence of the predominance of the legal spirit of any country.[31]

Therefore, according to Dicey's theory of Rule of Law English Court was closely associated with upholding rule of law in english legal system.

v. Unitary Government

Government of the United Kingdom is Unitary though all the local authorities are elected and independent to execute policies within the limits of the Constitution. The administaions of England, Wales, Scotland and Northern Ireland are different from each other. However, all these four countries of the United Kingdom are members of the European Community and are under direct control of the Central Government and the Parliament of the United Kingdom. The United Kingdom parliament is empowered to enact laws. Any law enacted by authority other than the Parlaiment is under Royal Prerogative or is delegated by the Parliament.

V. Transformative Constitutionalism

Transformative Constitutionalism is that theory which recognises the changing nature of the society and acknowledges that the Constitution must go through amendments in order to keep pace with the change. The origin of 'Transformative Constitutionalism' is found in the history of post-apartheid South Africa. Karl E. Klare in 'Legal Culture and Transformative Constitutionalism' stated that *transformative constitutionalism is a long-term project of constitutional enactments, interpretation and enforcement committed to transform the political and social institutionas and power relationships in*

[31]RocardoGosalbo Bono, The Significance of the Rule of Law and its Implications upon the European Union and the United States, University of Pittsburgh Law Review, 254.

democratic, participatory and egalitarian society.[32] Transformative Constitutionalism could be seen in Germany post Denazification. Therefore, the shift from constitutionalism to transformative constitutionalism is mainly due to institutionalised violation of rights by the State.

Indira Jaising, a senior lawyer of the Supreme Court of India, stated that transformative constitutionalism for her is 'personal liberty'. The difference of transformative constitutionalism with constitutionalism is that in transformative constitutionalism the central role of the state is to fulfil the project of emancipationa and constant development of constitutional ideals i.e. liberty, equality and fraternity. Advocate Indira Jaising has mentioned that in India the judge constantly working for such development was Justice V.R. Krishne Iyer and Advocate jaising accepted his influence on her works.[33] According to her the Constitution is explained as radical document which even if guarantees freedom but upheld old hierarchical positions. Therefore, the duty to ensure transition keeping pace with the change in the society lies upon the State. The two key aspects of Transformative Constitutionalism is

- It envisages attainment of substantial equality by recognising and eliminating all forms of discrimination as they may have existed or may develop in the future;
- It calls for a realisation of full human potential within positive social relationships – the use of the term "positive social relationships" instead of limiting it to an individual's interactions with the state is indicative of the pervasive nature of Transformative Constitutionalism in the private sphere as well.

Michaele Hailbronner observed that Transformative Constitutionalism is perceived differently in different countries by lawyers and Courts. Some countries associate it with the role of judges while some countries attribute

[32]Karl E. Klare in 'Legal Culture and Transformative Constitutionalism', (26.07.2020, 6:50 P.M.) https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism.

[33] Transformative Constitutionalism explained by Advocate Indira Jaising, (26.07.2020, 6:35 P.M.) https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism.

transformation to the political process.[34] According to Michaele Hailbronner the U.S. Constitution did not empower the Judiciary with task to bring out more just and egalitarian society.

Constitutionalism ensures freedom, equality and fraternity. However, transformative Constitutionalism recognizes the transformation and tries to attain more just and egalitarian society.

In India the institution recognizing this social transformation and ensuring justice is the judiciary. Post 1975 i.e. after declaration of emergency, Judicial pronouncements were delivered favouring rights and interests of citizens and judges who facilitated this and expanded the scope of judicial activism were Justice P.N. Bhagwati, Justice V.R. Krishna Iyer, Justice H.R. Khanna, Justice O.P. Chinnappa Reddy etc. Justice V.R. Krishna Iyer recognized the social transformation and acknowledged-

a. Inviolability of fundamental rights in Maneka Gandhi v. Union of India (1978)

b. Human rights of under-trials and convicted person in Sunil Batra v. Delhi administration (1979)

c. Inadequacy of the rights of a divorced Muslim wife under the personal law in Bai Tahira v. Ali Hussain (1979)

Justice Bhagwati recognized that the social transformation also brought awareness amongst citizens about the rights. However, filing a suit was still involved a lot of procedural complicacies which restricted many from instituting suits. Therefore, Justice Bhagwati relaxed the Locus standi rule to allow any public spirited person to file a suit for public at large, for example Hussainara Khatoon v. State of Bihar (1979).

The very recent case explaining transformative constitutionalism is *Navtej Singh Johar* v. *Union of India*[35]. Justice Dipak Mishra (for himself and Justice A.M. Kahnwilkar) observed that *the Constitution of India is regarded as a social document. The society is ever changing and to cope up with the change the Constitution must evolve. This points out towards the transformative role of the*

[34] Michaele hailbronner, Transformative Constitutionalism: Not Only In the Global South, Americal Journal of Comparative Law (2017).
[35]Navtej Singh Johar v. Union of India AIR 2018 SC 4321.

Constitution. The ability of the Constitution to transform makes it an organic document.[36]

Justice D.Y. Chandrachud observed that *the society acknowledging the injustices which it has perpetuated is a mark of evolution. There are instances of suppression of identity and one's sexual orientation in the fear of persecution*. Justice Chandrcahud also regarded the Constitution as being transformative in character and upholding rights of marginalized and deprived sections in the society. He further held that LGBT community has following rights without discrimination-

i. All the Constitutional rights,

ii. Equal rights of citizenship,

iii. Right to choose partner.

For citizens of the United Kingdom the rights were not consisted of set of guarantees embodied in a written instrument. Liberty and freedom for British citizens are residue of liberties that remained untouched by the Parliament (consisting of House of Commons and House of Lords). Rights were safeguarded through parliamentary scrutiny of legislations as well as through judicial review of administrative actions.[37] However, towards the later half of the twentieth century appeals for the enactment of bill of rights increased. It was probably because a realization was drawn that Parliament was no longer an effective check on the government. After at-least three attempts the Parliament of the United Kingdom enacted the Human Rights Act, 1998. [38] The Human Rights Act, 1998 was enacted to ensure better protection of rights guaranteed under the European Convention on Human Rights. The government set out threefold rationale for enacting Human Rights Act, 1998-

Firstly, it would enable citizens to enforce their Convention rights in domestic courts instead of filing it to Strasbourg court of Human Rights,

Secondly, it would be brought more meaningfully into the courts of the United Kingdom, otherwise, till now courts used to refer Convention rights as an aid to interpretation of rights available to British citizens,

[36]Navtej Singh Johar v. Union of India AIR 2018 SC 4321 at 65.
[37] Chintan Chandrachud, Balanced Constitutionalism, xxxi, (OUP, New Delhi, 2017)
[38] G.W. Jones, British Bill of Rights, 43 (1), Parlaimentary Affairs, 27 (1990)

Thirdly, it would allow British judges to influence jurisprudence of Convention rights in Europe.

Until 1998 individuals did not have direct access to Strasbourg Court. They had to apply in the European Commission on Human Rights which would launch a case in the Strasbourg Court on Human Rights on behalf of the aggrieved individual.[39]

The Preamble of the Human Rights Act, 1998 states that this Act is enacted to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. Prior to the ratification of the Convention rights the difficulties faced by the Judiciary was that the Judiciary had to treat the Convention rights as an aid while interpreting domestic legislations. Any domestic legislations, if found to be contradicting the Convention rights, would outweigh the Convention rights. The Parliament did enact legislations safeguarding rights of British citizens. However, the same still seemed to be inadequate to protect rights of citizens.

In Taylor v. Co-operative Retail Services[40], the employee, Tailor was subjected to some pressure to join Trade Union Association which was legal under the domestic law of United Kingdom but violated rights guaranteed under the European Convention on Human Rights. The plaintiff's complaint was dismissed in an action brought before the Employment Appeals Tribunal. The Court of Appeal upheld the decision of the Employment Appeals Tribunal and the plaintiff was wrongfully dismissed from his employment for not joining Trade Union Association. The Court of Appeal decided the case under the domestic law which justified the dismissal. However, the Court made an observation that *the pressure to join Trade Union Association and subsequent dismissal for failing to join such amounted to violation of rights guaranteed under the European Convention on Human Rights. Had the Plaintiff gone to the European Commission on Human Rights, the Plaintiff would have definitely won the case. However, this road to justice is long.*

This observation of the Court of Appeal in this case disclosed two things-

[39] Chintan Chandrachud, Balanced Constitutionalism, xxxiii, (OUP, New Delhi, 2017).
[40] Taylor v. Co-operative Retail Services 1982 Indus. Cas. R. 600.

a. The Judiciary recognized the disparity between the domestic law and Convention rights,

b. There is a necessity for ratifying the Convention Rights and to enact legislation.

Thus, the Parliament was not at all an effective check on arbitrary power of the government and the Judiciary had to intervene. Post enactment of the Human Rights Act, 1998 there is an increase in cases related to human rights violation in the United Kingdom.

VI. Conclusion

It is realized that changes occur in the society so often that sometimes it is not possible to amend the legislation keeping pace with it and the parliamentary scrutiny of laws is no more a guarantee of protection of rights of citizens. The role of Indian Judiciary in upholding rights of prisoners in Charles Sobraj v. Superintendent, Central Jail, Tihar case, Sunil Batra v. Delhi Administration case, Francis Coralie Mullin v. The Administrator,Union Territory of Delhi case[41] shows the transformative character of the Constitution of India. The rights of prisoners, with some restrictions, were upheld by the Judiciary by interpreting the constitutional provisions liberally and most importantly without having any specific law laid down on that issue. Recognizing and acknowledging rights of LGBT community in Naaz Foundation v. Government of NCT, Delhi case, NALSA v. Union of India case and Navtej Singh Johar v. Union of India[42] case are also example of transformative nature of the Constitution.

In the United Kingdom the parliamentary scrutiny of legislation seemed to fail to protect the rights of citizens which led to a demand for enactment of Human Rights Act, 1998. The enactment of Constitutional Reform Act, 2005 separating the highest Appellate Court of the Country from the Upper House of the United

[41] Charles Sobraj v. Superintendent, Central Jail, Tihar AIR 1978 SC 1514
Sunil Batra v. Delhi Administration AIR 1980 1579
Francis Coralie Mullin v. The Administrator,Union Territory of Delhi AIR 1981 SC 746.
[42]Naaz Foundation v. Government of NCT, Delhi WP (C): 7455/2001
NALSA v. Union of India (2014) 5 SCC 438.
Navtej Singh Johar v. Union of India AIR 2018 SC 4321.

Kingdom Parliament was another step in ensuring impartiality and better protection of human rights of British citizens.

Therefore, the Constitution, written or unwritten, cannot be rigid and the institutions must be able to amend it keeping pace with the changing society. The purpose of having the Constitution is to transform the society in a better way and this is the fundamental feature of Transformative Constitutionalism. In both the cases of India and the United Kingdom the institution recognizing this change and further institutionalizing the same is the Judiciary. Besides the enacted legislations the Judiciary is there to protect the rights of deprived and marginalized section of the society. Thus, in both the countries Parliament is no more the only institution for protection of rights. Keeping pace with the change India and the United Kingdom have been found to adopt a balanced approach for protection of rights. Chintan Chandrachud in 'Balanced Constitutionalism' has argued that this balanced approach in the United Kingdom has been able to foster far more balanced allocation of power[43]. In the United Kingdom for the protection of right the Parliamentary scrutiny of enactments was supposed to be the effective mechanism. However, with the change in English society the role of the judiciary is protection of rights of British citizens is recognized and the United Kingdom has taken a balanced approach.

This balanced approach is also found in the Constitution of India where the legislature enacts the law and the same is being reviewed by the judiciary and if necessary is also declared as unconstitutional. The recent judgments of the Supreme Court of India recognizing the rights of minority group, marginalized group exhibits the significant role assumed by the Indian Judiciary for the welfare of the society.

As elaborated by South African Chief Justice, Justice Pius Langa, *the transformative character of the Constitution holds the key to more equitable future. Thus, transformation does not end when we all have equal access to resources, lawyers and judges embrace the culture of justification. It is a permanent phenomenon where there is a scope of dialogue. Where the change is unpredictable but the idea of change is constant.*

[43] Chintan Chandrachud, Balanced Constitutionalism, (OUP, New Delhi, 2017).