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Constitutionalism Beyond the State: A Comparative Analysis of Power, Rights, and Justice in the Contemporary Era

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ABSTRACT

Constitutionalism represents a foundational principle of governance that seeks to limit arbitrary power and safeguard individual liberty through the rule of law, separation of powers, and protection of fundamental rights. This paper critically examines the evolution and conceptual foundations of constitutionalism, distinguishing it from the mere existence of a written constitution. It argues that constitutionalism is substantive in nature and may exist even in systems lacking a codified constitution, as exemplified by the British model. The study undertakes a comparative analysis of constitutionalism in the United Kingdom, the United States, and India, highlighting their distinct institutional approaches while underscoring their shared commitment to limiting power and preserving rights. Further, the paper explores the essential features of constitutionalism, including constitutionalisation, rule of law, separation of powers, independence of the judiciary, judicial review, and fundamental rights, with particular emphasis on the Indian constitutional framework and the doctrine of basic structure. Moving beyond classical theory, the paper engages with contemporary challenges such as digital governance, algorithmic decision-making, surveillance, and the shifting nature of power beyond the State. It argues that constitutionalism must evolve to address these emerging realities while retaining its normative core. The paper concludes that constitutionalism remains a living and adaptive doctrine, essential for maintaining the balance between power and liberty in an increasingly complex and technologically driven world.

Keywords: *constitutionalism, rule of law, separation of powers, judicial review, fundamental rights, basic structure doctrine, digital constitutionalism, algorithmic governance, comparative constitutional law*

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I. INTRODUCTION AND MEANING

Constitutionalism presupposes the concept of a constitution.¹ Having a constitution alone does not bring in constitutionalism.² A sovereign state which obeys constitutionalism may not necessarily have a constitution. Of course, constitutionalism leads to constitutionalisation, but not necessarily to textual constitutionalisation. Though the very fact that the American Constitution was the first such written document which profoundly instils into itself the principles of constitutionalism, an analogy for constitutionalism has been drawn with the written constitution. Thus, where constitutionalisation, on the one hand, involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a constitution,³ constitutionalism, on the other, checks the arbitrary power of the state and binds the state to the rule of law.⁴

The legal realist Walton H. Hamilton states that 'constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order'.⁵ Constitutionalism is the upholding of the principle of higher public law⁶ or fundamental law,⁷ the law higher than the state, the law which limits the government's arbitrary action. At this point it is important to emphasise again that a constitution may uphold constitutionalism, but the two terms are not the same. As the researcher has mentioned, constitutionalism may lead to constitutionalisation.⁸ Thus, constitutionalism can be defined as the doctrine that governs the legitimacy⁹ of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.¹⁰

II. HISTORICAL EVOLUTION OF CONSTITUTIONALISM

A. Contribution of Greece and Rome

¹ Gerhard Casper, *Constitutionalism*, University of Chicago Law Occasional Paper No. 22, at 4 (1987).

² Maru Bazezew, *Constitutionalism*, 3 MIZAN LAW REVIEW 358 (2009). 'Constitutionalism does not refer simply to having a constitution but to having a particular kind of constitution, however difficult it may be to specify its content.'

³ P. DOBNER & M. LOUGHLIN, *THE TWILIGHT OF CONSTITUTIONALISM?* 55-58 (Oxford University Press 2010).

⁴ N.W. Barber, *Constitutionalism: Negative and Positive*, 38 DUBLIN U. L.J. 251 (2015).

⁵ Gerhard Casper, *Constitutionalism*, University of Chicago Law Occasional Paper No. 22, at 3 (1987).

⁶ C. Perry Patterson, *The Evolution of Constitutionalism*, MINNESOTA LAW REVIEW 934 (1948). John of Salisbury (1120-80), in his *POLICRATICUS* (1159), repeats the Ciceronian conception of natural law where he says 'there are certain precepts of the law which have perpetual necessity, having the force of the law among all nations and which absolutely cannot be broken'. He maintained that government is limited by the *jus naturale* and that both the Prince and the judge are limited by this standard. (emphasis supplied)

⁷ *Supra* note 1. 'The fundamental law which determines the manner in which the public authority is to be exercised is what forms the constitution of the State.'

⁸ *Supra*.

⁹ Alexander P. d'Entrevs, *Legality and Legitimacy*, 16(4) THE REVIEW OF METAPHYSICS 687-702 (1963).

¹⁰ *Supra* note 2.

Ancient Greece was composed of smaller geographical units such as Athens, Sparta, Korinthos, Thebes, Syracuse, Aegina, Rhodes, Argos, Eretria, and Elis. The polity of all these units was not the same. Generally, three forms of government were recognised in ancient Greece, namely monarchy, oligarchy (generally synonymous with rule by the aristocracy), and democracy. Even in a democracy, not everyone had the right to vote. A constitution, to the Greeks, meant providing for the characteristics and features of the government. The Greek constitution thus provided for the types of the organs and their relationships, the methods of selecting officers for the state, and the location of supreme power.¹¹ The notion then was that a law could be good or bad but not unconstitutional. The constitution changed with the change in the form of government.¹²

According to Sophocles,¹³ an unjust law is not a law. A man-made law is only law when it is made in pursuance of a higher or fundamental law. Higher or fundamental law scrutinises the sanctity and validity of man-made law. The idea of higher law furnished the transition from the Greek to the Roman constitutionalism, where emphasis on the doctrine of natural law, or the doctrine of a higher law, was supplied.¹⁴

Rome's constitutionalism provided for the principle of checks and balances, the doctrine of popular sovereignty, and the principle of a higher law, or the doctrine of natural law, or the doctrine of a limited government. Cicero,¹⁵ in his book *De Republica*, advocated the doctrine of natural law. He said, 'True law instils the right reason and is in agreement with nature'.¹⁶ It was customary to include in a Roman statute a clause stating that it was not the purpose of the statute to violate what was sacrosanct, or *jus*. There were recognised limits on legislative power which assumed the character of a written constitution or a fundamental law. *Jus* was, therefore, superior in validity to a statute.¹⁷

But then neither Greece nor Rome embodied the constitutional law in a fundamental statute or written document, giving it a higher formal validity than ordinary laws.

B. Contribution of Britain

Constitutionalism, though in modernity it is more related to American fundamentalism, has as a concept evolved in England. The Magna Carta (1215), the Petition of Right (1628), and the

¹¹ *Supra* note 1, at 1.

¹² *Id.*

¹³ An ancient Greek tragedian.

¹⁴ *Supra* note 7.

¹⁵ A Roman statesman, lawyer, scholar and Academic Sceptic.

¹⁶ *Supra* note 1, at 1.

¹⁷ *Id.*

Habeas Corpus Act (1679) are the best-known English illustrations of this point. The Convention Parliament of 1689, in its resolution to subvert James II, endeavoured to constitute the kingdom by breaking the original contract between king and people.¹⁸ The Declaration of Rights of 1689 was incorporated into the Act of Parliament known as the Bill of Rights, which prohibited the suspension of the laws by the monarch and provided for the election and privileges of Parliament.¹⁹

Common law precedents have been the source of constitutionalism to check the authoritative moves of the sovereign Parliament in England. In *Dr. Bonham's Case*,²⁰ decided in the Common Pleas in 1610, which later became the source of the principle of judicial review in America, Coke said:²¹

And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void. Common right and reason is something permanent and fundamental, and, therefore, higher law.

Even in England, despite parliamentary supremacy,²² judges are the sole interpreters of the fundamental law²³ (also constitutionalism). British courts have an inherent power to issue non-binding common law 'declarations of unconstitutionality' when Parliament legislates against constitutional norms. Some common law rights have a special constitutional status vis-a-vis conflicting statutes, with the result that Parliament can limit such rights only by expressly legislating against them. Nevertheless, the doctrine of parliamentary sovereignty simply cannot conceal the court's underlying conclusion of unconstitutionality.²⁴

C. The American Contribution to Constitutionalism

¹⁸ *Supra* note 1, at 1.

¹⁹ *Id.*

²⁰ *Dr. Bonham's Case*, 77 Eng. Rep. 638 (1610).

²¹ *Supra* note 1, at 1.

²² *Id.* 'When Montesquieu's book was published in 1748, some questions about constitutional liberty in England might indeed have been examined. For instance, the right to vote was extremely restricted and even that small electorate was not consulted when, by the Septennial Act of 1716, Parliament extended its own duration by another four years. For the American colonists who fought more against the British Parliament than against their monarch, this example of the "sovereignty of Parliament" marked the limit of British constitutionalism. As James Madison wrote in *The Federalist* No. 53, citing the Septennial Act: "Where no constitution paramount to the government, either existed or could be obtained, no constitutional security similar to that established in the United States, was to be attempted.'" (emphasis supplied)

²³ *Supra* note 1, at 1. The significance of this contest is that the principle of a fundamental law as a limitation upon government is involved, and its corollary that the judges are the sole interpreters of the fundamental law.

²⁴ David Jenkins, *Common Law Declarations of Unconstitutionality*, 7(2) 183-214 (2009).

In the modern sense, constitutionalism finds its analogy with American constitutional development. American constitutionalism is highly influenced by the natural law doctrine and the principle of higher law.²⁵ Natural law was revived in the seventeenth century by Grotius and Locke, and then Newton contributed to it in the eighteenth century.²⁶ The impact of natural law was evident when James Otis based his arguments, in the first legal battle for American constitutionalism in the Writs of Assistance case in 1761, on the doctrine of Coke in *Bonham's Case* and on natural law.²⁷

The *Pennsylvania Charter of Privileges of 1701*²⁸ was one of the earliest events of constitutionalism in America. There were several reasons why one may call it a moment of establishing constitutionalism. First,²⁹ it was adopted according to the provisions for amending the Frame of Government.³⁰ The procedure of the frame was constitutional. Secondly,³¹ the first priority of the charter was the issue of fundamental rights. That the liberty of conscience was beyond the power of amendment of the assembly was an ultimate conundrum of the constitutionalism of the time, which we confirm even today. Thirdly,³² it provided for a unicameral representative assembly elected annually by the freemen.³³ The assembly acted as the legislative body. Fourthly,³⁴ it placed the accused and their counsel at an equal footing with the witnesses and the prosecutor. This was a significant development in criminal jurisprudence. It was an ahead-of-its-time step that the charter took. Fifthly,³⁵ property rights and their dispute resolution were also provided for. Sixthly,³⁶ any law made and passed by this General Assembly contrary to the liberties, privileges, and benefits granted by the charter would not be valid. This is very much similar to the Indian doctrine of basic structure.³⁷ Seventhly,³⁸ to amend the charter, a minimum of six-sevenths of the members of the assembly had to vote for it and then obtain the consent of the governor.

²⁵ *Supra* note 15, at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Pennsylvania Charter of Privileges of 1701*.

²⁹ C. Perry Patterson, *The Evolution of Constitutionalism*, MINNESOTA LAW REVIEW 934, at 455 (1948).

³⁰ 'The Pennsylvania Frame of Government 1682 constituted a parliament consisting of two houses. The upper house, or the council, had the exclusive power to propose legislation. They were also authorised to nominate all officers in church and state and supervise financial and military affairs through committees. The lower house, or the assembly, consisted of smaller landowners. It had no power to initiate legislation but could accept or reject the council's legislative proposal only. The two-house parliament assists the governor with his executive functions.'

³¹ *Id.*

³² *Id.*

³³ Limited franchise.

³⁴ *Supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ The doctrine of basic structure was propounded in the Indian case of *Kesavananda Bharati v. State of Kerala*.

³⁸ *Supra* note 35.

The American Revolution (1775-1815) has been the ultimate source of establishing constitutionalism in the country. It was primarily a lawyers' revolution. The discovery of the constituent convention is the most significant fact of the American Revolution.

The *Virginia Declaration of Rights* 1776³⁹ is an important document which was founded on the principles of constitutionalism. It states that all power is vested in and derived from the people. The people have the power to establish and abolish the government.⁴⁰ All men are equally free and independent, and have certain inherent rights of which they cannot be deprived, such as the right to life and liberty and the right to property.⁴¹ All citizens are equal and no one shall have precedence over another, and the offices of public service shall not be hereditary.⁴² The declaration provided for the separation of powers⁴³ and for the free and fair election⁴⁴ of executives and legislators. It later influenced the United States Declaration of Independence (1776) and the United States Bill of Rights (1789).

The Constitution of 1787 was silent on the power of judicial review of legislation. How, then, did the American judiciary end up as the guardian of the Constitution? Chief Justice John Marshall in *Marbury v. Madison*⁴⁵ discussed the issue of judicial review. The researcher will discuss the topic in subsequent sections. The power of judicial review has its root in the doctrine of checks and balances. The power of the judiciary to review a law comes from the independence of the judiciary, which is a gift of the doctrine of separation of powers.⁴⁶

The doctrine of separation of powers was very strongly put forth by Montesquieu. The doctrine provided that the legislative, judicial, and executive functions and powers shall not be confined in the same hands. It is necessary to have a check upon one body by another. The doctrine, by having a check upon the functions of the organs of government, would provide a shield to liberty. Therefore the doctrine is one of the profound principles of constitutionalism.

The principles that became the foundation of American constitutionalism are separation of powers,⁴⁷ fundamental rights for limited government,⁴⁸ independence of the judiciary, and

³⁹ *Virginia Declaration of Rights* 1776.

⁴⁰ Article 2, *Virginia Declaration of Rights* 1776.

⁴¹ Article 1, *Virginia Declaration of Rights* 1776.

⁴² Article 4, *Virginia Declaration of Rights* 1776.

⁴³ Article 5, *Virginia Declaration of Rights* 1776.

⁴⁴ Article 6, *Virginia Declaration of Rights* 1776.

⁴⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴⁶ C. Perry Patterson, *The Evolution of Constitutionalism*, MINNESOTA LAW REVIEW 934, at 455 (1948). By 'auxiliary precautions' as means of obliging the government to control itself, Madison had in mind the principles of separation of powers and checks and balances. The latter he called a 'partial agency' of each department in the exercise of the powers of the other two.

⁴⁷ *Id.*

judicial review.⁴⁹ The researcher shall discuss these principles in the subsequent sections of the paper.

III. THE CONCEPT OF CONSTITUTIONALISM

Constitutionalism is a universal concept. It shall not be understood in the sense of having or not having a constitution. It does not refer to having a constitution; rather, it puts structural and substantive limitations on government.⁵⁰ It is less about the form and more about the substance of constitutionalism.⁵¹ At this point, it would be relevant to discuss constitutionalism in the two most referred-to jurisdictions for its comparative study.

A. Constitutionalism in Britain

It would be a mistake to limit the understanding of constitutionalism in Britain only to Dicey,⁵² but to an extent constitutionalism in Britain is majorly influenced by Dicey's rule of law theory. In his book AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885), Dicey talked about three distinct principles of the British Constitution, that is, 'equality before law, the rule of law, and constitutional conventions'.⁵³

Dicey's equality before law prohibits any form of discrimination in the application of law. Everyone, be it the king or the subjects, is equal before the law made by Parliament. So it is the prerogative of Parliament to enact the law, and such law cannot be questioned on any grounds. Once a law is made by Parliament, it has to be applied equally upon everyone irrespective of their position in society. But Parliament, under its legislative power, can discriminate and extend the jurisdiction of the law to a particular group. This is how, today, Parliament can very well create different legislations for different classes. This is very similar to the principle of 'equal

⁴⁸ C. Perry Patterson, *The Evolution of Constitutionalism*, MINNESOTA LAW REVIEW 934, at 446 (1948). 'The most significant and fundamental principle of American constitutionalism, according to James Madison, is the doctrine of a limited government. Constitutional government is meaningless on any other basis. This principle is based on the doctrine of a higher law because only a higher or a fundamental law paramount to the acts of government can be a limitation upon government. A constitution that is not a limitation on government is really not an instrument of government. The foundation of the principle of a limited government is the doctrine of natural law.'

⁴⁹ C. Perry Patterson, *The Evolution of Constitutionalism*, MINNESOTA LAW REVIEW 934, at 456 (1948). 'The adoption of the principle of judicial review as one of the "auxiliary precautions", as a means of obliging the government to control itself and to preserve the principle of a fundamental law and a limited government, was undoubtedly the most significant contribution that our forefathers made to constitutionalism. It culminated the movement for the establishment of constitutional government. The story of its adoption has been too well told to bear repeating.'

⁵⁰ Gerhard Casper, *Constitutionalism*, University of Chicago Law Occasional Paper No. 22, at 16 (1987).

⁵¹ Gerhard Casper, *Constitutionalism*, University of Chicago Law Occasional Paper No. 22, at 16-17 (1987). 'Great Britain meet most substantive requirements of constitutionalism without a written constitution, an entrenched bill of rights, or the power of judicial review.'

⁵² Luc B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Rule of Law: Dicey or Marshall?*, 6(1) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 76 (2006).

⁵³ Luc B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Rule of Law: Dicey or Marshall?*, 6(1) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 79 (2006).

protection of law'. Parliament is the final authority to make and decide the validity of law. Courts have no authority to question a law made by Parliament unless they source such authority from a law made by Parliament itself. Thus, the first principle of Dicey also establishes the supremacy of Parliament.

The second principle of Dicey is the 'rule of law'. This rule prohibits any arbitrariness and discretion on the part of any officials who execute or apply the law. It is the law that rules, and not the man. The researcher shall deal with this concept in detail in another section.

The third principle of Dicey is that 'the law of the constitution is the consequence of the rights of private persons, as determined by the courts in particular cases'. These laws are known as constitutional conventions, popularly known as the unwritten constitution of Britain. This forms the basis of constitutionalism in Britain.⁵⁴ How may the third principle be interpreted? Where the first principle lays down the supremacy of Parliament and law made by Parliament cannot be challenged in any court, then how did the judiciary get this power to decide upon the conflict arising out of these laws? The answer can be gathered by reading Dicey's mind. The rights determined by the courts were the result of conflict arising out of existing laws and customs. Once they were settled, they gave out a universal law which then became beyond the reach of ordinary law made by Parliament. Though Parliament still has the power to override those laid-down principles, it shall not do so, Dicey believes, as a matter of legitimate exercise. So eventually these rights become the principles of the constitution, and thus, according to Dicey, constitutionalism in the UK is protected and given by the courts through common law principles. The expectation of legitimacy on the part of Parliament is also a profound principle of British constitutionalism. Thus, Diceyan constitutionalism is descriptive in nature. It is then up to Parliament to follow the description to uphold constitutionalism.

B. Constitutionalism in America

American constitutionalism is the result of the American Revolution, as has already been discussed. The Constitution of America is probably the first written document of its nature. The prerequisite to writing American constitutionalism was that the document should instil in itself

⁵⁴ Luc B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Rule of Law: Dicey or Marshall?*, 6(1) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 79-80 (2006). 'The third meaning is much less known. It expressed what I take to be Dicey's model of constitutionalism. It expressed the idea that the law of the constitution is the consequence of the rights of private persons, as determined by the courts in particular cases. Dicey wrote: We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of given individuals... [W]ith us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; thus the constitution is the result of the ordinary law of the land.'

constitutionalism. A distinct feature of American constitutionalism is originalism. The proponents of originalism advocate that 'the reasons on the basis of which the courts may legitimately determine the legal validity of governmental action and decision must have been somewhat intended by the original people'.⁵⁵ Thus, there must be a set of pre-decided constitutional norms that shall direct the courts to follow a rational methodology to decide a matter before them. This lays the foundation of textualism, that is, a written document. Textualism instils originalism into it, so that everything is pre-decided by the people who have contracted with the state and among themselves to lay down methodological principles. The people themselves have decided the principles of constitutionalism and have prescribed them into the written constitution. Thus, in that sense, American constitutionalism is prescriptive in nature. At this point, we shall not go into judging the good and bad of the present model, but yet the contemporary practice of judicial review by American higher courts is not in sync with originalism.

In the subsequent sections of discussion, we shall deal in detail with the profound principles of American constitutionalism, such as the written constitution (which I call constitutionalisation), separation of powers, fundamental rights, independence of the judiciary, and judicial review.

IV. ESSENTIAL FEATURES OF CONSTITUTIONALISM: A COMPARATIVE STUDY OF INDIAN CONSTITUTIONALISM

The most important features of constitutionalism, according to the researcher, are constitutionalisation,⁵⁶ rule of law, separation of powers, fundamental rights, independence of the judiciary, and judicial review.

A. Constitutionalisation

Constitutionalisation involves the attempt to subject all governmental action, whatever the medium of its exercise, within a designated field to the structures, processes, principles, values, and discipline of constitutional⁵⁷ procedures and norms.⁵⁸ Do we need a written constitution for it? Many scholars are of the view that constitutionalisation of a state through a written

⁵⁵ Luc B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Rule of Law: Dicey or Marshall?*, 6(1) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 82 (2006).

⁵⁶ On the one hand we have unwritten constitutional conventions in Britain, whereas in America the constitution is written. Both these jurisdictions embrace constitutionalism, undoubtedly. These two jurisdictions have undergone constitutionalisation in their own way. The researcher believes that constitutionalisation is one of the features of constitutionalism and it shall not be limited to the written constitution.

⁵⁷ Constitutional procedure shall not merely be legal but legitimate as well.

⁵⁸ *Supra* note 3, at 1.

constitution is more proper to protect constitutionalism. This may not be true, because constitutionalism still prevails in Britain.

The constitution is a modern concept that emerged alongside social contract theories shaped by the philosophy of the Enlightenment, that people would come together to reject their traditional constitutions, the products of 'accident and force', and devise a new framework of government from 'reflection and choice'.⁵⁹ This modern concept of a constitution took the form of a written document with the aim of protecting the people from regimes of absolute, authoritarian, or arbitrary rule that had preceded them. The constitution is therefore linked to the promotion of the theory of limited government. This is the theory of constitutionalism.⁶⁰

Paine refers to the status of the constitution as fundamental law. The constitution is the court of judicature for government. The government neither makes nor can alter the constitutional laws which bind it. These can only be altered through an exercise of the constituent power of the people. It lays down the law-making guide and norms and provides the basis of the legitimacy of legality. These are now widely accepted principles of modern constitutions.⁶¹ Constitutionalisation is the reconfiguration of the political theory of constitutionalism and the extension of the main tenets of liberal-legal constitutionalism to all forms of governmental action.⁶² In the previous sections, we have discussed the main features of American and British constitutionalisation. The feature will again be dealt with in detail in the coming sections.

i. Indian Scenario

Discussions about constitutionalisation in India, though they started way back in pre-Independence times, in this paper shall be focused on the 'making of the Constitution of India'. Dr. B.R. Ambedkar, Chairperson of the Drafting Committee of the Constituent Assembly, studied the different jurisdictions and finally came up with a constitution that is very peculiar to the Indian situation. The principles of constitutionalism have not been compromised. The framework of the constitution is mainly based upon the Government of India Act, 1935. The philosophy of constitutionalism in the Indian Constitution has been incorporated by adopting the prominent features of constitutionalism from different jurisdictions. The fundamental rights have been taken from America, from its Bill of Rights. The independence of the judiciary has been maintained in the Indian Constitution, taken from the American Constitution again, and so is the doctrine of judicial review. We have adopted a written constitution like America and

⁵⁹ *Supra* note 3, at 1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

unlike Britain. Equality before law, as a principle of the rule of law, though it originated in Britain, has been reframed by the Americans as 'equal protection of law'. The Indian Constitution, in Article 14, has adopted both 'equality before law' and 'equal protection of the law'.

B. Rule of Law

The term 'rule of law' is associated with the English jurist A.V. Dicey. He discussed this concept in his book *AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION*. The principle has three elements, discussed below.

First, 'that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.⁶³ Secondly, 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.⁶⁴ Thirdly, 'the general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.⁶⁵

Brian Tamanaha, in his book *ON THE RULE OF LAW: HISTORY, POLITICS AND THEORY*, has formulated two models of the rule of law, namely the thin version and the thick version of the rule of law.

The thin version provides that the state can do anything which is provided by law. The court cannot question the law, but can question the action of the state if the same is not sanctioned by law. This concept mainly propounds formal legality and the literal sense of the rule of law. According to Raz, the literal sense of the rule of law comprises two aspects: first, people should be ruled by the law and obey it; and second, for people to obey it, the law must be capable of guiding the behaviour of its subjects, the people.⁶⁶ Thus, a formal rule of law conception imposes only procedural requirements, only restrictions about the form that law must take.⁶⁷ Under this version, excessive reliance is placed upon the courts, and courts are mainly not supposed to go beyond the literal interpretation of the law. Thus, the thin, or formal, legality is mainly rule by the text, and the check is only on the procedural part of the law. The substance of the law cannot be questioned. If we examine it now, Dicey propounded the thin version of the rule of law.

⁶³ A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Conceptualizing the Rule of Law: A Multi-dimensional Approach*, ch. 3, at 77.

⁶⁷ *Supra* note 66, at 12.

The rule of law, in Britain, is mainly associated with the principle of equality before law. Everybody is equal before the law and no one is above the law. Law is uniformly applied to everyone. One law is applied to every citizen equally, and any dispute arising out of that law shall be adjudicated in the same court for everybody. There is no special class of people to whom a special law is applied, unlike in France, where there are special tribunals for the resolution of disputes for administrators. In Britain, everyone, be it a commoner or an official, has to go to the same court for a dispute over the same set of law. The British concept of equality before law prohibits any special privileges in favour of any person. It advocates for the equal subjection of all persons to the ordinary law of the land administered by ordinary law courts. The content of law cannot be questioned because law made by Parliament is final by virtue of parliamentary supremacy. Though the situation in Britain has considerably changed after the passing of the Human Rights Act, there is still a thin version of the rule of law.

In the thick version of the rule of law, the content or substance of the law can be questioned for its arbitrariness. Law has to be fair and reasonable. The law shall imbibe into itself the principles of constitutionalism, such as social, economic, and political justice, along with formal legality. To put it more appropriately, formal legality shall stand the test of constitutionalism. A law cannot be made thoughtlessly; rather, it shall be reasonable.

The American concept of the rule of law talks about 'equal protection of law'.⁶⁸ The concept connotes that, firstly, there shall be equality of treatment under equal circumstances, both in privileges conferred and liabilities imposed by law; secondly, the similar application of law to those who are similarly situated; and thirdly, that likes should be treated alike without any discrimination. This concept is the child of the American Revolution. It would be fair to say that not all human beings are situated in similar circumstances. Because all human beings are not similarly situated, it would be unfair to apply the same law to all people without getting to know their position. If we examine the American concept of the rule of law, we find that the Constitution of America has ensured that none of its citizens is discriminated against on any grounds. Equal protection of law, unlike equality before law, provides that no two persons placed in different situations shall be subjected to the same law in the same manner. Thus, if there is a class of people who are differently placed from another class, both these classes shall be subjected to different laws depending upon their peculiar situation. Thus, the American concept of the rule of law is in sync with the thick version of the rule of law.

i. Indian Scenario

⁶⁸ U.S. CONST. amend. XIV (1868).

Article 14 of the Constitution of India provides for the right to equality. The article reads, 'the State shall not deny to any person equality before law and equal protection of law'. The provision has two parts. The first says equality before law. It has been taken from the British concept of the rule of law. The framers of our constitution knew the uniqueness of our situation and that it would be unjust to place every single person in one net. Our society, even today, unfortunately recognises so many non-normative factors that themselves create different classes. All are not similarly situated in our society. And that is why our framers thoughtfully adopted the American concept of the rule of law, that is, equal protection of law. The latter concept envisages positive discrimination in favour of women, children, and socially and educationally backward classes. It has been further substantiated by Articles 15 and 16 of the Constitution. The economically backward classes have also been added to this protection net through the 103rd Constitutional Amendment Act, 2019, which amended Articles 15(6) and 16(6).

The Preamble of our constitution envisages 'JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity'. It is very clear from the Preamble that we practise a thick version of the rule of law. Though the phrase 'rule of law' has not been mentioned anywhere in the text of the Constitution, the spirit of the Indian Constitution very well instils into itself this novel idea. The basic structure doctrine, which was propounded in the celebrated case of *Kesavananda Bharati v. State of Kerala*,⁶⁹ substantiated the fact that the Indian Constitution is founded on the stones of constitutionalism. It was held in this case that the rule of law, as provided in Article 14, is the basic structure of the Indian Constitution.

The controversies around the basic structure may be dispelled by the very fact that the Indian Constitution is a living document. The amending provision of the Indian Constitution gives evidence of the fact that the constitution shall speak in tune with the dynamism of society. The judiciary, among the three organs of government, has been shouldered with the duty to see that the fundamental rights of the citizens are not violated. Most important of all the rights enshrined in Chapter III of the Indian Constitution is the right to life and personal liberty provided under Article 21 of the Constitution. Article 21 provides that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law'. In *Maneka Gandhi v. Union of India*,⁷⁰ it was held that the law shall be just and fair. So how do we check that a law is just and fair? Let us go back to Article 14, where it is said that a law shall

⁶⁹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 : (1973) 4 SCC 225.

⁷⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248.

not be arbitrary in its substance, meaning that a law cannot be made applicable to all in the same manner. The differently situated shall be subjected to different law. Thus, Article 14 envisages non-arbitrariness.⁷¹ Coming back to Article 21, the law shall not be arbitrary and unreasonable. It was thus held in *Maneka Gandhi* that any procedure has to meet all the requirements of Articles 14, 19, and 21 to be held valid. Not only the substantive law, but also the procedural law, shall be just, fair, and reasonable. The case establishes the fact that the Indian legal system follows the 'due process model'. The whole system of government is linked with the rights of the individuals of that particular nation. This was very well recognised by the Americans while they were framing their constitution. Montesquieu, as has been discussed earlier, recognised the fact that the genesis of separation of powers is to protect the civil liberties of people. Thus, the judiciary, particularly the higher courts, can scrutinise every action of the state which goes against the scheme of the Indian Constitution, particularly Chapter III. Following Montesquieu, it can be said that the rights and civil liberty of the citizens are not restricted only to Chapter III. In order to protect the civil liberties of people, the Supreme Court rightly came up with the theory of basic structure in *Kesavananda Bharati*. The principles laid down in the *Kesavananda Bharati* case are principles of constitutionalism that our constitution, as a living document, advocates.

Thus, it is very clear from the above discussion that the Indian legal system follows the thick version of the rule of law.

C. Separation of Powers

The political doctrine of separation of powers envisages that the organs of government, namely the legislature, executive, and judiciary, shall be independent to function in their own jurisdiction of power, and one shall not transgress into the domain of the other.

i. Montesquieu's Separation of Powers

Montesquieu recognised a tripartite system of government, although he did not use this term. In his work *THE SPIRIT OF THE LAWS* (1748), he referred to the distribution of power among three organs of government, that is, among the legislature, executive, and judiciary. He wrote:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

⁷¹ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 : (1974) 4 SCC 3.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Montesquieu was influenced by the Roman model of distribution of power that has been previously discussed in this paper. He also saw the British model as one following this principle. He remarked:

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

ii. American Model

As has been discussed previously, the American Constitution has been influenced by Montesquieu's theory of distribution of power. In modern times, the doctrine of separation of powers has been associated with the American model of constitutionalism. Article I of the US Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'. Article II of the US Constitution provides that 'the executive power shall be vested in a President of the United States of America'. Article III of the US Constitution provides that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish'.

It is pertinent to mention here that the separation of powers is not absolute in America. The system follows the principle of checks and balances. Checks and balances are necessary because at the centre of the constitution and its constitutionalism are the citizens and their civil liberty.

If one organ transgresses to violate the fundamental rights of the citizens, the other organ can scrutinise the same.

The Congress confirms presidential appointments of federal judges, executive department heads, ambassadors, and many other officers. It ratifies treaties with foreign nations. It may impeach, and remove, executive and judicial officers. The Congress has power to create federal courts except for the Supreme Court and to decide the number of justices on the Supreme Court. The Congress can even override presidential vetoes. On the other hand, the President may veto laws made by Congress. The judiciary checks the constitutionality of a law. It is important to note here that the power of judicial review has not been provided in the Constitution, and it was decided in *Marbury v. Madison* (1803) that courts have this power to review a law for its constitutionality. Even executive actions can be reviewed by the judiciary.

iii. British Model

The majority of theorists have remarked that separation of powers is not applicable to the British parliamentary form of government. But Montesquieu saw the British model as one following the principle of separation of powers. And this is actually evident in the recent past. Separation of powers has a unique style in the UK. Parliament is supreme and laws made by Parliament cannot be questioned in a court of law. Once a law is made, its execution completely falls in the domain of the executive. Any violation of law between two private parties is then brought before the court. The decision of the court is final and becomes precedent. The Constitution of Britain has been recognised as a collection of common law precedents that has taken the form of conventions. The above discussion clearly shows that Britain, too, follows the separation of powers. But before believing this in totality, let us see another angle of the matter as well.

A.V. Dicey expected⁷² that each organ of government would act legitimately in its domain. He recognises that Parliament is superior in the domain of law-making and that law made by Parliament shall not be questioned in any court of law. This responsibility places a huge burden upon Parliament to act in a legitimate manner. The institution shall see that it does not make a law which is *prima facie* arbitrary. Political legitimacy shall be respected by Parliament while enacting a law. Parliament, through law, can delegate power to the executive and judiciary branches, but cannot delegate the essential legislative functions.

Section 3(1) of the Human Rights Act, 1998 provides that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Parliament, in the above case, has given power to the

⁷² *Supra* note 52, at 8.

court that the court must read any statute passed by Parliament so as to uphold Convention rights, where this is possible. It is possibly the section of the Act with the widest scope. In recent times, even the British model has recognised the importance of judicial review, especially against arbitrary executive actions.

The above discussion establishes two facts. One, the British model places a duty upon the three organs of government to work in their domain legitimately and therefore recognises the principle of separation of powers. Though Parliament is supreme, it is accountable to the people. This accountability checks the legitimacy of parliamentary actions. Second, the principle of checks and balances is also recognised, especially in recent times.

iv. Indian Scenario

In *I.R. Coelho v. State of Tamil Nadu*⁷³ it was observed that 'the separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in Kesavananda Bharati's case by the majority'. Later, it was reiterated in *Indira Gandhi's case*.⁷⁴ It was held that:

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

But in *Indira Nehru Gandhi v. Raj Narain*⁷⁵ it was observed that:

The rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to our country. The constituent power is independent of the doctrine of separation of powers. The constituent power of

⁷³ *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

⁷⁴ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 : (1975) Supp SCC 1.

⁷⁵ *Supra* note 75, at 19.

parliament is sovereign. It is the power which creates the organs and distributes the powers.

The Constitution of India has opted for the British parliamentary system of government over the presidential form of government. It is based on the principle of cooperation and coordination between the legislative and executive organs. As the executive comes from the legislature, they do not oppose each other's action, because these actions originate with consensus. Academically, the legislature and executive are independent of each other and they can check the other's arbitrary action.

Parliament can make the government resign by passing a no-confidence motion if the government loses its majority on the floor of the House. On the other hand, the Prime Minister may, at any time, ask the President to dissolve the Lok Sabha. Parliament can also initiate impeachment proceedings against the President on the grounds prescribed under the Constitution. The relationship between the legislature and the judiciary shall be dealt with in detail in the relevant section of the paper.

Thus, the position is very clear. We do recognise the doctrine of separation of powers under our constitution, but not in the sense provided in the American Constitution. We may place ourselves at par with the British model with respect to the legislature and executive, but with respect to the judiciary we are closer to the American model. We have adopted a hybrid model suited to our peculiar conditions.

D. Independence of Judiciary and Judicial Review

The idea of independence of the judiciary is auxiliary to the doctrine of separation of powers. The doctrine envisages that each organ of government shall function within its own limited domain and shall not trespass into the others' domain.

Among the three organs, the judiciary has been assigned to adjudicate disputes between the parties. The state is formed by its citizens, who come together to contract. The conditions of the contract are predefined. The state, once decided, cannot violate the rights of the citizens. But what if the state does so? There has to be an independent body which is not under the influence of, or likely to be under the influence of, the state. Thus, it is one of the cardinal principles of constitutionalism that a true constitutional state shall have an independent judiciary.

The role of the judiciary is not limited to the adjudication of disputes. Ideally, in a state, the powers of the organs shall be kept in check by the other organs so that no organ can misuse its power to violate the rights of the citizens. The state governs its citizens through law. Law is made by the legislature. If the power of the legislature is left unchecked, then it can form a law

which might be against the civil liberties of the citizens. The law made shall be subject to scrutiny if there is suspicion that the law may be misused to curtail the rights of the citizens.

The process of placing legislation for scrutiny by the judiciary is called judicial review. The term is associated with the independence of the judiciary. The judiciary can review legislation only when it is independent. In the following sections, we shall now discuss the independence of the judiciary and its power to review legislation under the jurisdictions of America and England, and then we shall compare it with the Indian judiciary.

i. American Model

Article III of the US Constitution provides that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish'. The abovementioned article clearly provides that all judicial power in the United States shall be vested in the Supreme Court. The article further provides that the Congress shall have the power to establish and organise it. There is a double system of courts in the USA, one for the federal and the other for the states. Thus, there is no unified judiciary in the USA.

Article III(2) of the US Constitution provides that the Supreme Court has original jurisdiction over suits between two or more states and cases involving ambassadors and other public ministers. It has appellate jurisdiction over any other case on constitutional and federal law. It also decides cases involving disputes in treaties and on the law of the seas.

Judicial independence is at the core of political value in the United States. The independence of the judiciary is ensured by 'secure tenure and salary and self-administration of the judicial branch'.⁷⁶ The Declaration of Independence (1776) provided that '[the King] made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries'. Thus, Article III(1) of the U.S. Constitution (1787) provides that federal judges 'shall hold their offices during good behavior' and 'shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office'.

The power of judicial review of the Supreme Court is provided in the Constitution. The doctrine was established in the case of *Marbury v. Madison*.⁷⁷ Under the power of judicial review, the Court can declare a legislative or executive act void if it is in violation of the Constitution.

⁷⁶ Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, FEDERAL JUDICIAL CENTER (last visited Mar. 11, 2021).

⁷⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *Marbury v. Madison*, the Court had to decide whether an Act of Congress or the Constitution was the supreme law of the land.⁷⁸ The facts of the case were:

The Judiciary Act of 1789 gave the Supreme Court original jurisdiction to issue writs of mandamus (legal orders compelling government officials to act in accordance with the law). A suit was brought under this Act, but the Supreme Court noted that the Constitution did not permit the Court to have original jurisdiction in this matter.

It was held that:⁷⁹

Since Article VI of the Constitution establishes the Constitution as the Supreme Law of the Land, the Court held that an Act of Congress that is contrary to the Constitution could not stand. In subsequent cases, the Court also established its authority to strike down state laws found to be in violation of the Constitution. Before the passage of the Fourteenth Amendment (1869), the provisions of the Bill of Rights were only applicable to the federal government. After the Amendment's passage, the Supreme Court began ruling that most of its provisions were applicable to the states as well. Therefore, the Court has the final say over when a right is protected by the Constitution or when a Constitutional right is violated.

ii. British Model

The judiciary in the United Kingdom is not unified. Jurisdiction has been divided into three legal systems, namely England and Wales, Northern Ireland, and Scotland. The power of the judiciary is very limited. The judiciary is not independent. Judges are appointed by Parliament. It cannot question the validity of any law made by Parliament.

The power of judicial review is not known to the British judiciary. It is only very recently that British courts have got the power to review administrative actions. Post the Human Rights Act, 1998, by virtue of Section 3(1), the Supreme Court has got the power to check the validity of any legislation made by Parliament in accordance with the Human Rights Act.

iii. Indian Scenario

Unlike the USA, the Indian Constitution provides for an integrated judiciary with the Supreme Court at the top, the High Courts below it, and below the High Courts the subordinate courts. This system of integrated judiciary has been adopted from the Government of India Act, 1935.

⁷⁸ *Id.*

⁷⁹ *Supra* note 77, at 22.

Articles 124 to 147 in Part V of the Constitution deal with the organisation, independence, jurisdiction, powers, procedures, and so on of the Supreme Court. The independence of the judiciary has been ensured by the Constitution itself through provisions such as the mode of appointment, security of tenure, fixed service conditions, and expenses charged on the Consolidated Fund. Other provisions are that the conduct of a judge cannot be discussed unless there is an impeachment proceeding going on against the judge.

Judges of the Supreme Court and High Courts are appointed by the President after consultation with the judiciary itself. The consultation is done with the collegium, which consists of judges. In *Supreme Court Advocates-on-Record Association v. Union of India*,⁸⁰ the National Judicial Appointments Commission, which consisted of executive members as well for appointing a judge, was held to be invalid and against the scheme of the basic structure of the Constitution, which provides for the independence of the judiciary. The case reaffirmed the independence of the judiciary under the Constitution of India. In *Union of India v. R. Gandhi*,⁸¹ it was observed that:

Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things - security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the Judiciary) and without (from the Executive).

iv. Judicial Review in Indian Constitution

⁸⁰ *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1 (Writ Petition (Civil) No. 13 of 2015).

⁸¹ *Union of India v. R. Gandhi*, (2010) 11 SCC 1 (Civil Appeal No. 3067 of 2004).

Article 13⁸² of the Indian Constitution provides for the doctrine of judicial review. This power has been conferred on the Supreme Court under Article 32 and on the High Courts under Article 226. Dr. B.R. Ambedkar, for Article 32, remarked that it is 'an article without which this constitution would be a nullity. It is the very soul of the constitution and the very heart of it'. Though Article 13(4) declares that a constitutional amendment is not a law and hence cannot be challenged, the Supreme Court in *Kesavananda Bharati* held that a constitutional amendment can be challenged on the ground that it violates the fundamental rights that form the basic structure of the constitution.

Judicial review extends to administrative actions as well, under administrative law. The Supreme Court and High Courts exercise their writ jurisdiction of habeas corpus, mandamus, certiorari, quo warranto, and prohibition. In *Fertilizer Corporation Kamgar Union v. Union of India*⁸³ it was observed that:

The judicial function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration. Judicial review of administrative action depends upon the facts and circumstances of each case. Its dimension is never closed and must remain flexible.

E. Fundamental Rights

The concept of human rights originated from 'natural law philosophers like John Locke and Jean-Jacques Rousseau'. They pondered over the idea of human rights and tried to preserve them by postulating 'the social contract theory'. Locke propounded that man is born 'with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature'. He also theorised that man has power, by nature, 'to preserve his property, that is, his life, liberty and estate against the injuries and attempts of other men'.

Way back in 1215, the English were successful in exacting a promise from their monarch, King John, for the respect of the ancient liberties. Their success is evident in the form of the Magna

⁸² INDIA CONST. art. 13: '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 usage having in the territory of India the force of law; "laws in force" includes laws passed or made by a 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.'

⁸³ *Fertilizer Corporation Kamgar Union v. Union of India*, AIR 1981 SC 344 : (1981) 1 SCC 568.

Carta, the first written document with reference to the fundamental rights of citizens. Again in 1689, the Bill of Rights was enacted, consolidating basic civil rights and liberties for the English. In 1789, the Declaration of the French Revolution stated that 'the aim of all political association is the conservation of the natural and inalienable rights of man'.

The civil liberties of humans are at the centre of the principle of constitutionalism. Whatever has been discussed so far is a foundation for placing the interest of the citizen at the highest place. These are highly sacrosanct rights that are protected by the constitution or through due process of law. These are the rights that a person is born with. Constitutional documents or conventions just reaffirm these rights and protect them from the arbitrary actions of the state.

i. The American Model of Fundamental Rights

The United States Bill of Rights consists of ten constitutional amendments that placed limitations on the power of the state in favour of the rights of citizens. The American model follows the doctrine of absolute rights. It hardly places any restriction on the fundamental rights.

ii. Human Rights in United Kingdom

The rights of the citizens in the United Kingdom are the result of common law principles, rights recognised by Parliament, and, most importantly, the Magna Carta and the Bill of Rights, 1689. Membership of the European Union has influenced the human rights scenario to a great extent in the UK. Post membership, the UK enacted the Human Rights Act, 1998, which provided for many human rights that are common among the other jurisdictions.

The codification of human rights is recent in the United Kingdom. The Human Rights Act of 1998 sets out human rights under different articles. Some of the more prominent rights set up in the Act are as follows:

Right to life (Article 2), Freedom from Slavery and Forced labour (Article 4), Right to a Fair Trial (Article 6), Freedom of Thought, Belief and Religion (Article 9), Freedom of Expression (Article 10), Right to Education (Protocol 1, Article 2), Abolition of Death Penalty (Protocol 13, Article 1).

iii. Indian Scenario: Fundamental Rights

Chapter III, ranging from Article 12 to 35, of the Indian Constitution provides for the fundamental rights. The fundamental rights are held to be the basic structure of the Indian Constitution in *Kesavananda Bharati*. India has adopted a 'rights with restriction' model, unlike the USA, which provides almost absolute rights to its citizens. The fundamental rights are so

sacrosanct that upon their violation one has the liberty to approach the Apex Court under Article 32 of the Constitution, though one may also go to the High Courts under Article 226.

V. CONTEMPORARY CHALLENGES TO CONSTITUTIONALISM IN THE 21ST CENTURY

The classical understanding of constitutionalism, as discussed in the preceding sections, is premised upon limiting arbitrary state power through doctrines such as the rule of law, separation of powers, fundamental rights, and judicial review. However, in the twenty-first century, the structure and location of power have undergone a fundamental transformation. Constitutionalism is no longer concerned solely with the excesses of the State; rather, it must now respond to dispersed and technologically mediated forms of authority. This transformation necessitates a reconceptualisation of constitutionalism as a dynamic and adaptive doctrine capable of regulating both public and private concentrations of power.

One of the most significant developments in this regard is the emergence of digital constitutionalism, which seeks to extend constitutional values into the digital sphere. Edoardo Celeste defines digital constitutionalism as an ideology that adapts the values and principles of contemporary constitutionalism to the digital society.⁸⁴ It reflects a broader attempt to constitutionalise the internet environment by embedding norms of rights protection, accountability, and limitation of power within digital governance frameworks.⁸⁵ Importantly, this development marks a shift from a purely state-centric conception of constitutionalism to a multi-level and multi-actor framework, where private entities such as social media platforms and technology corporations exercise regulatory authority akin to that of the State.⁸⁶

Closely connected to this development is the rise of algorithmic governance and artificial intelligence, which challenges the traditional foundations of the rule of law. Decision-making processes that affect individual rights are increasingly mediated through automated systems, often characterised by opacity and lack of accountability. In such contexts, classical constitutional guarantees such as transparency, reasoned decision-making, and procedural fairness are significantly undermined. As contemporary scholarship notes, the increasing reliance on algorithmic systems risks creating new forms of unaccountable power that escape

⁸⁴ Edoardo Celeste, *Digital Constitutionalism: A New Systematic Theorisation*, 33 INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY 76 (2019).

⁸⁵ Edoardo Celeste, *Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges* (HIIG Discussion Paper 2018).

⁸⁶ EDOARDO CELESTE, *DIGITAL CONSTITUTIONALISM: THE ROLE OF INTERNET BILLS OF RIGHTS* (Routledge 2022).

traditional constitutional scrutiny.⁸⁷ This raises a fundamental question: whether the rule of law, as a principle of constitutionalism, must now extend to regulate not only human decision-makers but also algorithmic processes.

Another critical dimension of contemporary constitutionalism is the expansion of surveillance and data-driven governance. The digital age has enabled both state and private actors to collect, process, and analyse vast quantities of personal data, thereby altering the relationship between the individual and authority. The emergence of data protection regimes and digital rights frameworks reflects an attempt to embed constitutional values such as privacy, dignity, and autonomy within these new regulatory structures.⁸⁸ In this context, the right to privacy assumes a central role in constitutional discourse, functioning as a safeguard against both visible and invisible forms of power.

Furthermore, contemporary constitutionalism is shaped by the persistent tension between national security and civil liberties. In response to threats such as terrorism, cybercrime, and misinformation, states have expanded their surveillance and regulatory capacities. While such measures are often justified on grounds of security, they raise significant concerns regarding proportionality, necessity, and the preservation of fundamental rights. Constitutionalism, in this context, must function as a balancing mechanism, ensuring that the pursuit of security does not undermine the core values of liberty and dignity that it is designed to protect.

In the Indian context, these global developments intersect with ongoing debates concerning the balance of power between constitutional institutions. Issues relating to judicial independence, executive dominance, and the scope of judicial review continue to shape the trajectory of Indian constitutionalism. The doctrine of basic structure, which has historically functioned as a safeguard against constitutional erosion, must now also respond to emerging challenges posed by digital governance and technological regulation.

Taken together, these developments demonstrate that while the core objective of constitutionalism, namely the limitation of arbitrary power and the protection of individual liberty, remains unchanged, the nature of the threats to these values has evolved significantly. Contemporary constitutionalism must therefore extend beyond its traditional boundaries to engage with new actors, technologies, and forms of governance. Constitutionalism in the twenty-first century must thus be understood not as a static doctrine, but as a living and evolving

⁸⁷ Giovanni De Gregorio, *The Rise of Digital Constitutionalism in the European Union*, 30(1) INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY 68 (2022).

⁸⁸ Edoardo Celeste & Federico Fabbrini, *Competing Jurisdictions: Data Privacy Across Borders*, 8 EUROPEAN DATA PROTECTION LAW REVIEW (2020).

framework that continues to mediate the relationship between power and liberty in an increasingly complex world.

VI. CONCLUSION

Constitutionalism, as explored in this paper, is not merely a structural framework of governance but a normative commitment to limiting arbitrary power and protecting individual liberty. While its historical evolution and doctrinal foundations establish mechanisms such as the rule of law, separation of powers, and fundamental rights, the comparative analysis of the British, American, and Indian models demonstrates that constitutionalism is fundamentally substantive rather than formal. It is not the presence of a constitution, but the effective operation of constitutional principles, that determines the legitimacy of governance.

At the same time, contemporary developments reveal that the traditional state-centric understanding of constitutionalism is undergoing transformation. The rise of digital technologies, algorithmic governance, and data-driven regulation has expanded the nature of power beyond the State, bringing private and transnational actors within the sphere of constitutional concern. These changes do not undermine constitutionalism; rather, they demand its evolution.

In this evolving landscape, constitutionalism must extend its foundational principles to new domains of governance. Accountability must apply not only to the State but also to entities exercising significant regulatory power. The rule of law must adapt to ensure transparency and fairness in algorithmic decision-making, while fundamental rights, particularly privacy and personal liberty, must be strengthened against expanding surveillance. At the same time, the tension between national security and civil liberties must be carefully balanced through standards of necessity and proportionality.

In the Indian context, the resilience of constitutionalism lies in doctrines such as the basic structure, which continue to safeguard constitutional identity. However, its future vitality depends upon maintaining institutional balance and engaging with emerging challenges, particularly those arising from technological governance. Constitutional actors must therefore uphold not only the form, but the spirit, of the Constitution.

Ultimately, constitutionalism remains an evolving project. While the forms of power continue to change, its central objective endures: to ensure that all authority is subject to law, reason, and accountability. Its continued relevance lies in its ability to adapt while preserving the fundamental balance between power and liberty.