

Rethinking the Constitutionality of Statutes: Rights-Compliant Interpretation in India and the UK

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Abstract : When primary legislation is challenged for breaching fundamental rights, many courts around the world adopt interpretive techniques to avoid finding such legislation incompatible or invalid. In the UK, these techniques find sanction in section 3 of the Human Rights Act 1998, which directs courts to interpret legislation in a manner which is compatible with European Convention rights, 'so far as it is possible to do so'. In India, courts begin with the interpretive presumption that Parliament intended to comply with fundamental rights under the Constitution of 1949. In comparing rights-compliant interpretation of primary legislation under the Human Rights Act and the Indian Constitution, this paper makes two arguments. First, that in the absence of a section 3-type mandate, Indian courts have a smaller range of interpretive tools at their disposal in interpreting primary legislation in a way which complies with fundamental rights. For example, whereas British courts frequently read words into statutes, Indian courts consider this an inapposite interpretive technique. The second argument flows naturally from the first. Given that Indian courts have a smaller interpretive toolbox, one would imagine that *ceteris paribus*, Indian courts' power to strike down legislation would be triggered earlier than the declaration of incompatibility is in the UK. However, this is not borne out in practice. Faced with primary legislation which appears to violate fundamental rights, Indian courts often reluctantly uphold the constitutionality of statutes (rather than striking them down), as opposed to British courts, which make declarations of incompatibility. The explanation for this seeming asymmetry hinges on the difference between the 'strike down' power and the declaration of incompatibility. Whereas the former results in the disapplication of a statute, the latter throws the ball back into Parliament's court, if only formally.

Keywords : constitutional law, judicial review, constitution of India, UK Human Rights Act

Conference Title : ICSRD 2020 : International Conference on Scientific Research and Development

Conference Location : Chicago, United States

Conference Dates : December 12-13, 2020