

JUDICIARY VERSUS PARLIAMENT: A COMPARATIVE STUDY WITH RESPECT TO CONSTITUTION OF INDIA AND OTHER COUNTRIES

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Generally preamble is called the ornamental part of the constitution then an essential part of the constitution¹, theory of constitution tells us that constitution is a source of power which elaborated upon assigning different functions to different organs of the state² as well as flow of power among the organs³. There were different ideas envisaged in the preamble that is Sovereign, Socialist, Socialism, and Secularism which forms an important part in the Constitution of India.

The word constitution has been derived from a Latin word *constitutio* which means orders, imperial enactment, charters etc. Constitution can be defined as the rule book of the nation meaning thereby states conduct should be regulated within the periphery of the constitution. A constitution in other words set of principles according to which stated should be governed.

Comparison of Constitution of US and India:

¹ According to sartori the constitution is a power map.

² Enest Barker called Indian preamble as the key note of the constitution.

³ Nani palkiwala termed Indian preamble as identity card of the constitution.

1. US constitution is considered to be the oldest and the smallest constitution of the world, it was finalised in the convention held in 1787 which requires 9 states ratification and US constitution contains only 7 articles.
2. U.S constitution Doctrine of Dual-ship has been incorporated it implies that one constitution is for the entire us and one for their respective states and same is the provision for their citizenship.
3. In Indian context we have one constitution and One Citizenship for the entire nation subject to few exceptions.

Nature of Constitution:

1. U.S constitution is considered as an example of ideal Federal constitution because of vertical and horizontal bifurcation of powers meaning thereby vertically equal division of power b/w centre and state and horizontally separation of power can be seen b/w legislature, Executive and judiciary.
2. In U.S constitution basically ratification of power b/w states and ratification of contract b/w the states because U.S constitution is the result of ratification of an agreement by the states. In U.S the union government does not interfere with the functions of the state government.
3. Indian Constitution is basically the result of historical necessity and political compulsion meaning thereby during independence most of the states were under government of India and few princely states were persuaded to join union of India. In India we observe that federal government interferes with the power of the state government in the following manner:
 - a. *Appointment of the Governor*
 - b. *Imposition of emergency*
 - c. *Governor reserving the bill for the president's consideration*

Keeping in mind all the arguments the scholars were not unanimous in term holding Indian Constitution as true Federal constitution rather they have criticized it as Quasi federal constitution.

Cooperative federalism word given to India as some scholars thought India to be one of them The idea of cooperative federalism was given by Granville Austin he state that ” Centre and state in

India rather than conflict with each other cooperated with each other” meaning there by at the end National interest should prevail over any other thing.

The best example of cooperative federalism is the 100th Constitution amendment: Land boundary agreement b/w India and Bangladesh another example can be devaluation of the taxes from 32% to 42% in favor of the states.

Thus the message in Indian Constitution is categorically under Article 1 that is India i.e Bharat shall be the union of states. Thus India becomes the Indestructible Union of destructible state where as U.S is Indestructible union of Indestructible state.

CONSTITUTIONALISM

Constitutionalism is political philosophy according which the action of states much reflect constitutionalism and states must run in accordance with the provisions of constitution thus a concept of limited government is envisaged here.

In Indian constitution constitutionalism is present and it can be inferred on following grounds:

1. Fundamental Rights
2. Judicial Review
3. Separation Of Powers
4. Rule Of Law(Procedure established by law)

Whereas in U.S constitution also there is constitutionalism that can be seem in:

1. Fundamental Rights
2. Judicial Review
3. Rule Of Law(Due Process Of Law)

SEPERATION OF POWER

U.S Constitution adheres to the concept of SOP as propounded by Montesquieu and John Locke house of congress enact the law, judiciary interprets them and president executes them. In U.S president is not the member of the house of congress but he has the power of veto with respect to the bill passed by the legislature therefore in this manner the executive controls the legislature but at the same time for the purpose of legislation the president is dependent on legislation.

Thus the congress control's the president in these manner effective checks and balances are being followed in U.S thus a rigid separation of power is seen in the US.

In Indian context though we observe the concept of SOP on theoretical premises but practically it is no so. In fact under Article 50⁴ of the constitution the concept of SOP confine to executive and judiciary only not to the legislature.

In Indian context Prime minister and council of Minster are the real head of the executive since they belong to the ruling party there indeed have control over all the business of the house, whereas president is considered only as a nominal head of the state. Thus the Prime minister and Council of ministers enjoys dual capacity meaning thereby one in the capacity of the executive and other with the capacity of legislature.

In India a more flexible approach is seen with respect to separation of power. From the above explanation a rule of convenience is seen for the executive thus now all those legislation will passed which will suit the connivance of the executive the best examples⁵⁶ could be: Aadhaar, GST, and Triple Talaq.

⁴ The state shall take steps to separate the judiciary from the executive in the public service of the state. The constitution is directing the legislature to maintain Judicial Independence.

⁵ Forty Second Amendment act-1976 , enacted during emergency (25 June 1975- 21 March 1977)

⁶ Thirty ninth amendment act, enacted on 10th Aug 1975.

Legal perspective of separation of power in U.S can be seen with the case of *Marbury v. Madison*⁷, and with respect to India a series of judgements can be seen starting form *Golaknath v State of Punjab*⁸, *Indira Gandhi v Raj Narayan*⁹, *Ram Jawaya Kapoor v State of Punjab*¹⁰.

PARLIAMENTARY SOVEREIGNTY AND PARLIAMENTARY SUPREMACY

Britain constitution has adopted the parliamentary form of government in U.K there exists an unwritten constitution i.e. no single document defines the power of government the existence of unwritten constitution tells us that it has parliamentary supremacy/ parliamentary sovereignty meaning thereby if they had written constitution then this would have resulted in supremacy of the constitution which was not the intention of the constitution makers.

In India, U.S, Japan there exist a written constitution which means that constitution is supreme law of the land but in past few years a transformation is seen where judiciary has become supreme i.e. judiciary being the interpreter of the constitution. Scope of judicial review in India is written in the Constitution itself but In U.S the scope of judicial review is not derived from U.S constitution.

⁷ (1803), 5 U.S (1 Cranch) 137 First case in U.S where Supreme court declared the actions of the executive as unconstitutional.

⁸ (1967) AIR 1643, 1967 SCR (20) 763: In India Constitution different powers has been provided to different organs of the state and expects them not to over stab there limits.

⁹ (1975) AIR 865, 1975 SCR (3) 333: Indian Constitution has accepted the concept of separation of power in a flexible manner not in the manner as accepted by U.S Constitution.

¹⁰ AIR 1955 SC 549, 1955 2 SCR 225: Justice Mukerjee has observed that in India Separation of power has been adopted rigidly.

CONCLUSION:

Following arguments will support the relations b/w Judiciary and parliament and how this relation in the following years has been evolved in a form that parliament has nearly stepped in to the shoes of judiciary and vice-versa.

1. Constitutional Amendments: The frequency through which constitutional amendments are made in past followings year gives us the clear view as to the involvement of legislature in the matters of judiciary.

For eg. 42nd Amendment Act by late Prime Minister Indira Gandhi where emergency was proclaimed to save the chair of incumbent PM whose election was set aside in an election petition the Supreme Court declared Article 329(a) (A) as void.

2. Integrated judiciary is contradictory to the federal spirit of the country. The judicial intervention in the policy making, especially a subject like education included in the concurrent list, is creation more confusion and chaos in policy implementation. Diversification of policy is merit of the federal form of government but judicial intervention is hindrance to it. Cases with regard to self-financing Education can be regarded as the best example.

3. Judicial review and Indian Constitution: U.S has adopted the parliamentary form of government but it has incorporated Due process of law and favours the notion of judicial supremacy whereas Indian constitution explicitly included procedure established by law meaning thereby laws legislated by the parliament must confirm to the minimum attributes like liberty non arbitrariness etc.

In *A.K. Gopalan v. State of Madras*¹¹ Supreme court held that Indian parliament can legislate laws which may not be considered fair enough from the liberal perspective and if the correct procedure has been followed then court cannot question such law, it was also held that if it would had been the intention of the constituent assembly them they would have incorporated due process law in spite of procedure established by law.

4. The legislature, Executive and the Judiciary are the three main organs of the government all of them are bound by the constitution and they have swear an allegiance to the constitution. It is

¹¹ AIR 1950 SC. 27:1950 SCR 88

said that Judiciary is the guardian of the constitution, but this does not imply that legislature and executive are not equally the guard of the constitution, for the progress of the nation these three wings has work together in order to maintain harmony. Judiciary is vested with lot of power and this powerful attitude of the judiciary does not argue well with the healthy democracy this can be understood by the fact that the actions of executive are subject to judicial review when there is social economic and political injustice similarly when legislature make laws beyond the constitutional bounds of in contrary to the basic structure then the courts corrects it but prime facie when judiciary is guilty of the excess use of the power then only a bench or constitution amendment can intervene in it, a judge can only be removed by the way of impeachment thus the lack of accountability requires the judiciary to watch its steps and exercise self-restraint among themselves. Thus the governance of our republic in the totality of the administration, is vested in the trinity of the executive, legislature and the judiciary in the democratic republic country like India the constitution is supreme and the rule of law requires that each and every organ of the government, adheres to the constitutional policy.