

WHETHER CONSTITUTION OF INDIA IS BORROWED OR NOT

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ABSTRACT

26 January 1950, the date when the Constitution of India had been adopted and welcomed by Indians with warm hearted. But, today after almost 70 years of independence from the English people and their constitution the debate on Indian Constitution is adopted or borrowed or not is going on. Here, in this paper researcher mainly focus on the concept of borrowing and as it really applies in the Constitution of India or not. The paper also discussed about the historical background which is behind the constitution, the debates on the framing of Indian Constitution. The primarily objective is to throw torchlight on the countries from where the idea of the part of the constitution has taken. Like how the Fundamental Rights in India is different from the U.S.A. and this is also same with the federation system of Indian and Canada and the concept of parliamentary form of government in India and in England. This paper made to elaborate that the Constitution of India is not a borrowed and mercy of other countries rather it is a hard working efforts of the framers who worked by studying the constitution of other countries and it all was started with the Objective Resolution which later became a preamble of India. In this paper the researcher focus on the idea of borrowing and demonstrate certain facts which highlighted the idea that Indian Constitution is not a borrowed one.

KEYWORDS: Objective Resolution, Constitution of India, Fundamental Rights, Parliamentary government, Federal system, borrowed.

1.0 INTRODUCTION

“Injustice anywhere is a threat to justice everywhere.”...

- MARTIN LUTHER KING Jr.

The formation of Indian Constitution is a key to become fully democratic republic and sovereign. After the adoption of the Constitution in 26 January 1950, the India become sovereign as it was no more subordinate to English people who slave our country from 200 years, India took all the decision internally and externally according to their will without any interference of an alien.

The framers took the deep study of all the well known Constitutions and accumulated the ideas and model of their own Constitution. The Fundamental Rights which India had adopted after the removal of certain loopholes from the American Constitution and which too suits the circumstances of our country. The Fundamental Right is the basic rights which protect and give people the liberty to stand against any sorts of encroachment. In the same phase, the Constitution of India not allow its citizen to waive his fundamental rights, *Aruna Ramchandra Shanbaug v. Union of India*¹, another paramount of Indian Constitution is that it have the federal ground of government with unitary features. In the federal state, of dual government emerge and distribution of power between the in the national as well as state government and with the state

¹ AIR 2011 SC 1290

have its separate ambit of law in which central will not interfere. Supremacy of the Constitution and Authority of Courts as in first one, all the three organs executive, legislature and judicial are subordinate and controlled by the Constitution and in the later gives the view that final power vested in the Courts to interpret the Constitution and nullify and action on the part of the Federal and State Government or their different organs which violate the provision of the Constitution.²

The Constitution of India has the distinction of being the most lengthy and detailed constitutional document in the world. The critics' lies in the vicinity of the arena constitute the statement that our Indian Constitution is the 'slavish imitation of the west'.³ The chairman of drafting committee Dr. Ambedkar had said in this regard that – "As to the accusation that the Draft Constitution has reproduced a good part of the provisions of the Government of India Act, 1935,

I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution...."⁴

According to the aforementioned phrase, stated by the chairmen of the Drafting Committee Dr. Ambedkar that Constitution of India is an evolution of the Government of India Act, 1935 that basic features of the Act were the introduction of partial responsibility at the Centre, Provincial autonomy and an All India Federation.⁵ At the same juncture reading and taking ideas from other countries constitution does not amount to borrowing.

Here, the researcher draw his research on the concept of borrowing in the Indian Constitution and to prove the statement that the Constitution of India is not a borrowed document from other countries but it is a model of 'beautiful patchwork' that our leaders had made by studying the basics of other countries and eradicate the defects and loopholes for the fulfillment of the needs and conditions that had existed at that time.

2.0 FRAMING INDIAN CONSTITUTION: HISTORICAL BACKGROUND

The concept of framing an Indian Constitution is not the result of instant inspiration and observation from other countries but, itself it is the significance of emergence. The seeds of framing a Constitution had already been sowed in India, two centuries before the actual roots of drafting of an Indian Constitution uprooted. The difference between the two was that one was imposed by an imperial power and the other by the body of the eminent representatives of the people who sought to improve upon the existing system of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.⁶ The drafting of independent Constitution for India and the idea of Swaraj had been already put forward by Mahatma Gandhi as early as in 1922 as people of India is determined to govern by themselves and not by the mercy of free gift by the British Parliament.⁷ On 9 December 1946, the first session of Constituent Assembly was organized and the Expert Committee appointed on July 20-22, 1946 by the Indian National Congress for preparing material for the Constituent

² Dr. Durga Das Basu, INTRODUCTION TO THE CONSTITUTION OF INDIA 53 (19th ed; 2003)

³ *Ibid* pg- 32

⁴ Akhil Prasad et al., COPYRIGHT LAW DESK BOOK Knowledge, Access & Development 191, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009)

⁵ Dr. J.N. Pandey, CONSTITUTIONAL LAW OF INDIA 11, (52nd ed; 2015)

⁶ Dr. Durga Das Basu, Introduction to the Constitution of India 3, (19th ed; 2003).

⁷ *Ibid* pg- 14

Assembly. The Constituent Assembly set up 13 committees for framing of Indian Constitution and on the basis of reports of these committees, a draft of the Constitution was prepared by a seven member of the Drafting Committee under the Chairmanship of Dr. B R Ambedkar.⁸ In accordance with historical purview and from taking reference and observing the parliamentary speeches and debates at the time of drafting a constitution it is worth questioning about the borrowing of Indian Constitution. Does taking the constitution of other countries as a reference amounts to cheating or borrowing? If yes, then the prominent leaders like the Chairmen of Drafting Committee Dr. B. R. Ambedkar, Alladi Krishnaswamy Iyer, N Gopalaswami Ayengar, B L Mitter, Md. Saadullah and D P Khaitan. The eminent constitutional advisor Sir Benegal Narsing Rau had nothing to do. If our constitution is just copied then what our educated and illustrious leaders did till 2 years, 18 months and 11 days? Taking an example if a student of history enumerate the articles on the 'Powerful and the eminent rule of Akbar' through the notes found in internet and with the help of that articles as a reference or helping hand make their own notes. Does taking historical notes from internet amounts to borrowing? The researcher here tries to make the picturesque of the circumstances and the problems at the time of framing a constitution and through which a hypothetical statement acquired the researcher mind, 'The Constitution of India is not a borrowed constitution.'

3.0 INDIAN CONSTITUTION: ORIGINALITY AND WORK OF SINCERITY

3.1 Meaning of borrowing, cheating and adopting

The constitution of India in strict sense called a bag which is fully borrowed and copied from other countries. It has been said that various policies and rights that acquire the place in our Indian Constitution is already borrowed from others. This concept of borrowing has been elaborating with sanctity in this section. Here, the researcher mainly deal with some of the concept to prove that Constitution of India is not a borrowed constitution infect it is the result of almost three years of hard work and patience of prominent leaders and scholars. Directly jump to the meaning and by relating it to the practical application, the word borrow means taking a thing for a specified time and return it back to the real owner. If a person ask for a history notes copy for two days and return it thereafter, that person only take a overview of the notes only not copy the whole picture. Seeing someone notes and makes their own does not amount to borrowing, plagiarism and copying. So, the Constitution of India is not a borrowed constitution but it is a continuance study and research of the scholars and use the best out of the other countries constitutions and removing the loopholes with various amendments.

4.0 FUNDAMENTAL RIGHTS: NOTES, DISTINCTION AND EXCEPTIONS

In September 1946 the Constitutional Adviser B. N. Rau issued notes on the subject matter of fundamental rights. The notes give an outline over the nature, scope and analyzed the problems which were facing by the constitution of other countries and how our constitution is somewhat different from others. Later, K.T. Shah

⁸ Mamta Aggarwal, Indian Constitution: Framing, Implementing and Structure, <<http://www.historydiscussion.net/history-of-india/indian-constitution-farming-implementing-and-structure/688>>, Last visited on 18th June 2018, 1:59 PM

in December sent the President another notes on the same subject. The analysis of that notes by the researcher is given below:

The Fourteenth Amendment to the Constitution of the U.S.A., which come in force in 1868 put forward the 'equality law' that no State shall "deny to any person within its jurisdiction the equal protection of the laws".⁹ In actual sense, if one go to the literary meaning of this clause it would render some invalid terms e.g. the state will not deny any person who is in jurisdiction of U.S.A., equal protection of the laws but it is the same law which exempted children who are below the age of seven years from all criminal liability, it also grant special protection to women and children, as distinguished from other inhabitants.¹⁰ According to Article 14 of Indian Constitution "the state shall not deny any person equality before the law or the equal protection of laws within the territory of India."¹¹ This article itself have negative as well as positive purview. 'Equality before law' is a negative concept and at juncture 'equal protection of the laws' is the positive concept and possible too. It also has four listed exceptions which make it different from the adopted clause of the U.S.A. Taking another example, *Missouri v. Gaines*¹² in this case apart from the clause of fourteenth amendment about equal protection of the laws, the U.S.A. Constitution does not expressly provide equality in terms of educational opportunities for all citizens within its territory irrespective of race. If one scrutinizes Article 15, it talks about the equality and no discrimination in the grounds of religion, race, caste, sex place of birth or any among them. It also makes a special provision for the benefit of women and children. Turning to another of Fundamental Right which is amended in fourteenth amendment which states, "Nor shall any State deprive of life, liberty or property without due process of law." This latter amended to 'due process doctrine' which is taken from English Magna Charta and that give rise to a volume of judicial review cases. In reference to Article 21 of Indian Constitution classify that no person is deprived of his life and personal liberty but with the limitation of the certain procedures established by law like in case of emergency etc.

5.0 PARLIAMENTARY GOVERNMENT

A system of government in which the cabinets have the real power to composed legislature which makes laws and another executive to implement laws both the houses comes under the democratic system of elected parliament. Many critics argued that India has borrowed or cheated the model of parliamentary system of government of England. But, if one compare both the system closely then the underline principle come to the light is that although both the system has the parliamentary government yet there is a large distinction between them, as both follow it both regulates the things in accordance with the situation of their country.

⁹ B. Shiva Rao THE FRAMING OF INDIA'S CONSTITUTION 23,(Vol. 2, 2004)

¹⁰ *Ibid* pg- 23

¹¹ Article 14, The Constitution Of India 1949, Available at < <https://indiankanoon.org/doc/367586/>, last visited : June 15 2018, 5:00 PM.

¹² 305 US 337 (1938)

5.1 INDIA vs. ENGLAND

The background and the root of legislature had already come in India during the rule of the East India Company but it is originally a result of persistent struggles and demand of greater representative in government. The starting approach of parliamentary form of government in India was the consequence of UK model of parliament. Though, the idea of parliamentary form of government is taken from the UK model but with the advent of time various distinction made between the two which makes both parliamentary form is different and far apart from each other.

The three important elements to make a Parliament in Britain are - the Queen, the House of Lords and the elected House of Commons. The agreement of all three in any issue is required for the legislation. As there are no legal restraints imposed by a written constitution, Parliament can make or change any law.¹³ The Queen is the head of the State who acts on the advice of her ministers. The government is governed by Her Majesty's Government in the name of the Queen.¹⁴ In contrary to India, the Parliament has three important bodies- The Prime Minister, Lok Sabha and Rajya Sabha. The Prime Minister is the head of the Government appointed by the President with the advice of Council of Ministers whose party is in majority in Lok Sabha. India itself has written Constitution. Parliament in India can make the laws and amend it (exception with the Basic Structure Doctrine) with respect to present scenario but cannot change the existing and replace it with new one. The England follows constitutional monarchy system in which there may be written, unwritten or blended constitution with monarch is the head of the state. On the other hand, India is a federal republic and democratic parliament which is far apart from the England purview. In England the First Lord of the Treasury is considered to be the Prime Minister by tradition and Minister for the Civil Service. The rule of the doctrine of collective responsibility regulates there which means that the Cabinet must act unanimously even when the Cabinet Ministers do not all agree on a subject.¹⁵ Comparing it with Indian system, the head of the Treasury and wealth department goes in the hands of the Indian government and the whole of the economic system directed by Finance Ministry of India in which the ex officio minister responsible is Piyush Goyal. In comparing it with the latter, the Indian bill or any related problem first have to gain majority of votes in the cabinet and also includes tones of negotiations of the ministers then by passing the motion it come into existence.

This is how we can say that Indian parliamentary system is different from the England. The greater change comes into existence after the formation of the Indian Constitution. This is how the researcher tries to make a difference between the Indian parliamentary system and the England. The underlining part of this is that India took a model of the England parliamentary system and keeping that thing in mind made their parliamentary form of government which satisfies the needs, geographical and cultural diversity as well.

¹³ M.V. Pylee SELECT CONSTITUTIONS OF THE WORLD 796,(4th ed. 2016)

¹⁴ Supra note. 795

¹⁵ Supra note. 798

5.2 DOCTRINE OF SEPARATION OF POWER

Today discussing about the doctrine of separation of power in this constitutional scenario is an utmost importance. One hand this doctrine is welcomed by most of the countries warmly but it is a little impracticable and undesirable to adopt the whole separation of power without the interruption of any third body. In accordance to the great political thinker and French scholar Montesquieu found that the concentration of power in one person or in a particular group of persons results in tyranny. As it means that there should be decentralization of power that is divided into three organs of the government – executive, legislative and judiciary. This principle implies that all the three organs should be independent and no other organ performs the function of any third organ.

5.2.1 Comparative analysis: India and England

Constitution of India follows the doctrine of separation of power among the three organs of the government. The three organs are legislative, executive and judiciary. All three organs must perform their functions individually in accordance to the doctrine of separation power ideally. But, this doctrine is a little far away from the constitutional body of India. In India, there is a sort of interruption of judiciary in legislature and executive. As legislature is the law making body of India and executive is responsible for the execution of such law. For example, if legislature makes any law which is inconsistent with the constitution of our India then there is a powerful body that is judiciary who can question the legislature upon the formation of any law and this is same with executive. Judiciary is also responsible if any disputes arise between legislative and executive.

United Kingdom is one of the countries who do not have the concept of written constitution but it is very unfair to claim that there is no room for the separation of power. Separation of power exists but it is weak and their functions overlapped. The three organs contain the executive which includes the Crown and the government in which prime ministers and council of minister is a part. A parliament has a power to dismiss the government and form the new government. The legislative body consists of the Monarch, House of Commons and the House of Lords. However, the monarch has the nominal power and listen the advice of prime minister. House of Commons consist of elected members from the people. House of Lords includes the unelected heredity peers. The parliament has the authority to make/amend the law and scrutinize the government. Judiciary is third organ of the governments who hears and resolve the matters. Judiciary in UK have one special function is to make the law through the judgments'

Although Montesquieu statement of separation of power is based on British system yet it is a weak separation of power. As one or the other way around one organ appears to be dominating. Like legislative executive dominates legislative when the government is form by the leader who wins most of the seats in the House of Commons. Judiciary is also dominated by the executive as the senior judges appointed by the Lord Chancellor.

So, in both the aforementioned countries it can be seen that the separation of power is fully used but it is also not absolute. The country like India adopted the separation of power but the little power to judiciary is more accepted as it is important for the country where corruption take breathe and emerge at every stage.

6.0 FEDERALISM AND ITS DYNAMICISM

6.1 HISTORICAL REVIEW

In 1863 Pierre-Joseph Proudh prophetically wrote about federalism, “the twentieth century will open the age of federation, or else humanity will undergo another purgatory of a thousand years.”¹⁶ After almost hundred years in 1964 William Ritter again proposed the concept of federalism which now becomes the basis of many countries. In India, the concept of federalism is very old as starting from the times of Delhi Sultanate, Mughals and the lastly Britishers. At that time one or the other feature of federalism was there but it was not absolute federalism. The concept of federalism established in India by The All India Federation under The Government of India Act, 1935 which comprises British India Provinces and includes those who want to come into federation. Before the commencement of this act all the previous Government of India Acts, the Government of India was unitary. This act of 1935 provides the Provinces and the Indian States as single unit. In this the ruler of each state had to sign an Instrument of Accession in which it must clarify that to which extent the ruler surrender their authority to central federation but in the end it never come into existence because of the state never gave their consent and the Act collapsed. In accordance with the view of the framers of the Indian Constitution is that it is a Federal Constitution.

In the words of Dr. Ambedkar, the Chairmen of the Drafting Committee,

“I think it is agreed that our Constitution notwithstanding the many provision which are contained in it whereby the Centre has been given powers to override the Provinces (States) nonetheless, is a Federal Constitution.”¹⁷

The aforementioned statement and according to historical background it can be clarified that establishment federalism rooted in India with the arrival of Mughals and continues but not took place because of certain inappropriate acts. The federalism finally took his breathe when Indian Constitution become live.

6.2 CONTRAST: INDIAN FEDRATION & CANADIAN FEDERATION SYSTEM

The idea of federalism in India is the erected image of the Canadian federal system. India does not follow absolute federalism unlike Canada. As the latter is strict in its terms of federalism and only provide a model of federation to India. The country like India having lots of socio-economic diversity with the same large geographical area it is worthy of adopting both the features that is unitary as well as federal system.

India as federal constitution usually has the following characteristics-

¹⁶ Mokbul Ali Laskar DYNAMICS OF INDIAN FEDRALISM, See- Chapter 1, Federalism- The Conceptual Interpretation.

¹⁷ Constituent Assembly Debate Vol. 4, p. 133

➤ Distribution of Powers-

It means the power is distributed between the other co-coordinative bodies like the central and state in which the state and centre can make laws in their own sphere and controlled by the Constitution. This is the most important essential for the federalism.

➤ Supremacy of Constitution-

The federal state derives its existence from the Constitution. The Constitution is the supreme and nothing is above then a Constitution. Hence, every power whether it is executive, legislative or judicial which is for the nation all are controlled by the constitution.

➤ A Written Constitution-

The importance of a federal Constitution is that it must be written Constitution. If taking an example, India is a federal Constitution as it have written Constitution as well this is important to keep the things in written form because it impossible to maintain the supremacy of the Constitution unless its terms is not written.

➤ Rigidity-

Rigidity of the constitution is important if it comes under the federal. A constitution is considered to be the supreme law of the land and it must be the rigid because in a rigid constitution the procedure of amendments is not easy and it is very complicated as state and central cannot amend anything if it not suits his election manifesto and not in his favor.

➤ Authority of Courts-

In a federal state to have an independent authority like a court who cannot come into any political influence and not have any such relations among the government of the state as well as central. The judiciary is therefore the final authority who can see the law making body and the proper division of power and solve the disputes if any arises. **Articles 32 of the Indian Constitution clause (1) provide the right to move to the Supreme Court for the enforcement of the rights by appropriate proceedings.**

Indian Constitution also provides some modification in the federal principle-

➤ Appointment of Governor-

The president appoints the governor that is the head of the state. He holds the office during his pleasure. This enables the Union Government to exercise the power over the state.

➤ Emergency Provisions-

It includes (**Art. 352-360**) in which state have to work according to the direction given by the Central. Parliament can make laws in any matter listed in the state list. With the same Art. 356 president can dissolve the state legislature and dismiss the state ministry and assume all functions of the state if the state cannot carry the provision of the constitution.

Canada in strict sense follows federalism principle. Indian federalism cannot say a model of federal government as it has both the federal government with unitary features. Therefore, Indian federation has the system of 'quasi-federal'.

7.0 CONCLUSION

The Constitution of India take his breathe on January 26 1950, after the intense hard work of the framers and workers. The framers of the constitution studied the constitution of other countries and adapt some of the features while creating certain amendments and changes. So, it cannot be truly said that India Constitution is a borrowed work or the bag of borrowers as it is adapted with knowing the historical perspective, geographical diversity, cultural diversity and traditional characteristics of India. And, with a changing time certain changes and amendments have also been made with giving special reference to neglected classes and like high power to president in the time of emergency. Thus, the researcher after going through these features draw a conclusion that Indian Constitution is unique and not to be referred as borrowed.

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