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EXECUTIVE AUTHORITY IN COMPARATIVE PERSPECTIVE: A STUDY OF UK, USA AND INDIA

AUTHORED BY - ANKIT RAI¹, TANUSHREE²

Introduction

I. Review of Literature

1. Balakrishna - Presidential Power of Pardon³ – The article deals with the Presidential power of the Pardon of the Indian President while contrasting the pardoning powers vested in the Crown. However, the major drawbacks of this article are that the author has restricted himself to the powers of the Crown while comparatively analyzing the pardoning powers of the Indian President, and has taken into account only the historical circumstances of India while differentiating the prerogatives of the British Crown and the Indian President.
2. P S Ruckman Jr - Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)⁴: The major drawback of this Journal article is that it merely reviews the current literature of the US with its origins and development. Considering that the pardoning powers' origin can be traced in the common law system, this article simply compares the present powers to those powers which were vested in the Crown.
3. Margit Cohn - Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural Institutional Context⁵: The article discusses the increasing unilateral making of measures in the emergency and foreign affairs without having any authorization to do so by the POTUS and the British Govt, and the source and nature of such unilateral, non-statutory executive powers without comparing it with the statutory executive powers.
4. Paul Daly - Executive Power in the United Kingdom⁶: The article discusses in-depth the powers of the Executive, but since, in the UK Westminster system of Parliamentary

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³ Balakrishna, 'Presidential Power of Pardon' [1971] 13 Journal of the Indian Law Institute 103.

⁴ P S Ruckman Jr, 'Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)' [1997] 27(2) Presidential Studies Quarterly 251.

⁵ Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural Institutional Context' [2015] 64(1) International and Comparative Law Quarterly 65.

⁶ Paul Daly, 'Executive Power in the United Kingdom' (2021) Ottawa Faculty of Law <<https://dx.doi.org/10.2139/ssrn.3906218>> accessed 28 November 2021.

government, there is an overlap between the Executive and the Legislature, overlapping of the topics, i.e., powers of the executive and the powers of the legislature, can be noticed.

5. Sahil Arora - Executive Power of the Union and the State⁷: The article briefly sums up all the powers which are vested with the Executive organ of the State. However, had it been compared to the other jurisdictions, it would have proved more beneficial.
6. IGNOU The People's University - Unit 11: Executive⁸: The Module provided by the University provides an in-depth discussion on the powers of the Executive in the Indian scenario while mentioning various examples wherein such powers were used

II. Statement of Problem

There exists a distinction between the traditional Westminster form of Government, Westminster form of Government, and Presidential form of Government. This project assignment for the course of Comparative Constitutional Law attempts to point out the similarities and differences in the powers vested in the Executive organ of the State under these 3 different forms of Government while comparatively analyzing the powers of the Executive in the US, UK, and India.

III. Research Objectives

1. To comparatively analyze the powers of the Executive in the US, UK, and India.
2. To study the origin and development of Executive Powers in India and US while taking into account the powers which were vested in the Crown.
3. To study the difference between powers vested in the Executive under the Presidential form of Government to that of the powers vested in the Executive under the Westminster form of Government.

IV. Hypothesis

It appears that the scope of powers under the written Constitution is limited than that of the scope of powers vested in the Executive organ under the unwritten Constitution. In the case of a written constitution, since the US follows a Presidential form of government, more powers are vested in the Executive than the powers vested in the Westminster form of government.

⁷ Sahil Arora, 'Executive Power of the Union and the State' *Lawctopus* (20 February 2019) <<https://www.lawctopus.com/academike/executive-power-union-state/>> accessed 29 November 2021

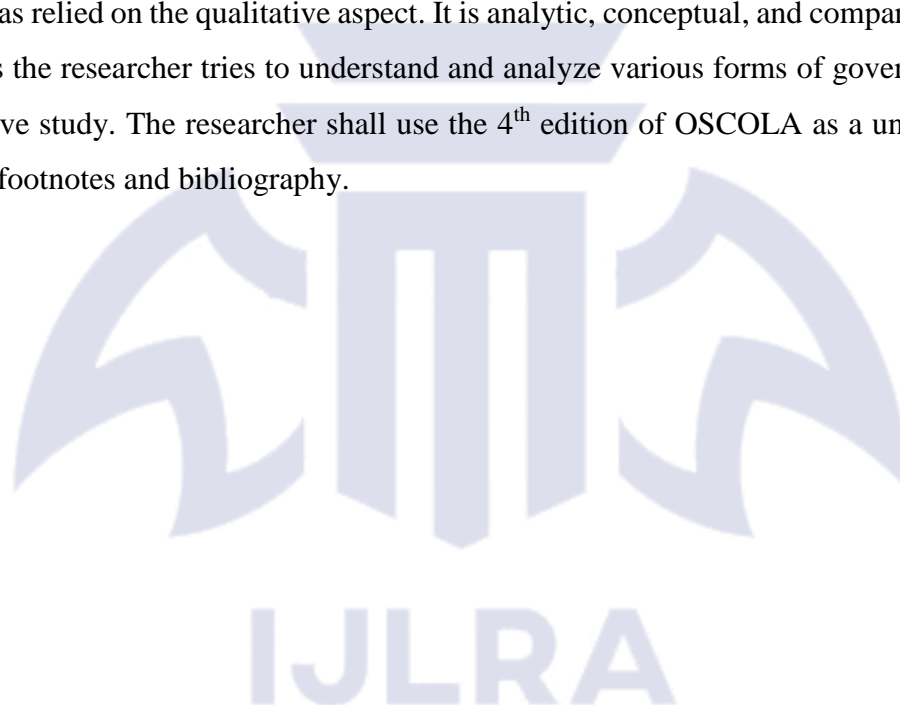
⁸ IGNOU The People's University, 'Unit 11: Executive' <http://gdcganderbal.edu.in/Files/a8029a93-30ad-4933-a19a-59136f648471/Link/unit-11_e5dcc836-541e-4ec9-8f64-0b63d0605208.pdf> accessed 28 November 2021.

V. Research Questions

1. What are the sources and nature of powers vested in the Executives in the US, UK, and India?
2. What are the commonalities between the powers vested in the Executives on the US, UK, and India?
3. What are the points of distinction between them?

VI. Research Methodology

For this research, the researcher undertakes qualitative legal research. The entire research is purely doctrinal as the study involves a comparative study of traditional Westminster form of Government, Westminster form of Government, and Presidential form of Government for which the author has relied on the qualitative aspect. It is analytic, conceptual, and comparative research by nature as the researcher tries to understand and analyze various forms of government and do a comparative study. The researcher shall use the 4th edition of OSCOLA as a uniform citation method for footnotes and bibliography.



Concept of Executive Powers

A country's constitution is sacrosanct. It must not be disturbed unless required by law, and doing so may result in difficulties. Almost every constitution has been changed at some point to keep up with the times. Executive authority is generally limited in constitutional democracies in three ways: by separation of powers between the union government's executive, legislative, and judicial branches, with the legislature and judiciary able to check the power of the executive branch; by constitutional guarantees of fundamental rights; and by periodic elections. In modern democracies, the administrative authority is generally constituted in one of two ways: parliamentary or presidential.

When comparing the two systems, the parliamentary system is the one in which the majority party in the legislature forms the executive branch of government, led by the Prime Minister. In this system, the executive and the legislative are not separate because both the Prime Minister and cabinet members are selected from parliament, even though the PM is the national leader. In the Presidential system, however, the President is chosen independently of the members of the legislature. In this system, both the legislature and the President have their own power bases and constituencies, which serve to keep each other in check and balance. Both of these systems have advantages and disadvantages, and one cannot completely replace the other.⁹

Under the doctrine of separation of powers, the governance of a state is traditionally divided into three branches each with separate and independent powers and responsibilities: an executive, a legislature, and a judiciary. The distribution of power in this way is intended to prevent any one branch or person from being supreme and to introduce “checks and balances” through which one branch may limit another. According to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of more than one of the branches.

In reality, however, many nations do not strive for a rigid separation of powers, instead of aiming for a compromise in which some duties are shared across state institutions.

⁹ Sahil Arora, ‘Executive Power of the Union and the State’ *Lawctopus* (20 February 2019) <<https://www.lawctopus.com/academike/executive-power-union-state/>> accessed 29 November 2021.

Powers Of The Executive In The US, UK, And India

I. The United States of America

The Executive Branch is led by the POTUS, who also serves as the country's head of state and Commander-in-Chief of the armed forces. The President is in charge of enacting and executing the laws passed by Congress and chooses the leaders of government agencies, including the Cabinet. The Vice President is also a member of the Executive Branch, ready to take over the Presidency if necessary.

The Cabinet and autonomous federal agencies are in charge of enforcing and administering federal legislation daily. The purposes and duties of these departments and agencies are as diverse as those of the Department of Defense and the Environmental Protection Agency, the Social Security Administration, and the Securities and Exchange Commission.

a POTUS

The American Constitution specifies just three requirements for the Presidency: The President should be at least 35 years old, a citizen by the virtue of birth, and have lived in the US for at least 14 years. And, even though millions of Americans vote in presidential elections every four years, the President is not directly elected by the people. Rather, every fourth year, on the first Tuesday after the first Monday in November, the citizens elect the candidates of the Electoral College. These Electors are distributed by population to the 50 states, one for each member of their congressional delegation (with the District of Columbia receiving three votes), and then vote for President. The Electoral College presently has 538 electors.

The powers of the POTUS are as follows¹⁰:

1. Under Art 2 of the American Constitution, POTUS is responsible for the execution and enforcement of the laws created by Congress.
2. POTUS also appoints the heads of more than 50 independent federal commissions, such as the Federal Reserve Board or the Securities and Exchange Commission, as well as federal judges, ambassadors, and other federal offices.

¹⁰ Legal Information Institute, 'Executive Power' <https://www.law.cornell.edu/wex/executive_power> accessed 28 November 2021.

3. POTUS has the power either to sign the legislation into law or to veto bills enacted by Congress, although Congress may override a veto with a two-thirds vote of both houses. The Executive Branch undertakes diplomacy with foreign countries, and the President has the authority to negotiate and sign treaties that must be ratified by the Senate. The President has the authority to issue executive orders that command executive officials or clarify and expand on existing legislation.
4. POTUS also has the authority to grant pardons and clemencies for federal offenses.
5. POTUS can convene Congress for special sessions.
6. POTUS delivers the State of the Union address annually to a joint session of Congress.
7. Congress has the authority to declare war. As a consequence, the POTUS is unable to declare war without their consent. Presidents, as Commander in Chief of the armed forces, can deploy soldiers to fight without an official declaration of war. The 1973 War Powers Act intended to clarify when and how the President can deploy soldiers to fight by imposing rigorous time periods for reporting to Congress after sending forces to war, among other measures, but it had little impact.
8. During the emergency, the POTUS has nearly unlimited authority to override Congress and execute executive orders. Abraham Lincoln had used an executive order to fight the Civil War, Woodrow Wilson issued multiple ones relating to the United States' engagement in WW I, and Franklin D. Roosevelt used an executive order to sanction Japanese detention camps during WW II.
9. Alongside commanding the armed forces, the POTUS is in charge of U.S. foreign policy. He is responsible for the safety of Americans overseas and foreign nationals in the States through the Departments of State and Department of Defense.

b Vice President

1. The main duty of the Vice President of the United States is to be prepared to take the Presidency at a moment's notice if the President is unable to do so. This can be due to the President's death, resignation, or temporary incapacity, or if the Vice President and a majority of the Cabinet determine that the President is no longer capable of carrying out the functions of the president.
2. The VP also acts as the President of the United States Senate, where he or she votes to break a tie. Except for tie-breaking votes, the Vice President seldom presides over the Senate. Instead, each day, the Senate elects one of its own members, generally a junior member of the dominant party, to preside over the Senate.

3. The duties of the Vice President, outside of those enumerated in the Constitution, are at the discretion of the current President. Each Vice President approaches the role differently — some take on a specific policy portfolio, others serve simply as a top adviser to the President.

c Executive Office of POTUS

This office was created by former POTUS, Franklin D Roosevelt in order to create a body that supports the POTUS to properly govern. The EOP is in charge of a variety of activities, including expressing the President's message to the American people and promoting trade interests overseas. Many of the President's closest advisers have typically been placed in the EOP, which is managed by the White House Chief of Staff. While certain advisers, such as the Director of the Office of Management and Budget, must be confirmed by the Senate, the majority are nominated with complete Presidential discretion.

Since the creation of the EOP, the separate offices that these advisers manage have increased in size and number. Some were created by Congress, while most were created when the President required them – they are continuously altering as each President determines his or her requirements and priorities.

d The Cabinet

The Cabinet is a consultative body comprised of the chiefs of the 15 executive departments. Cabinet members are usually the President's closest confidants because they are appointed by the President and approved by the Senate. They run major federal agencies.

II. The United Kingdom

In what is now the British Constitution, all authority was consolidated in the monarch. Nevertheless, with time, such authorities have been distributed throughout the government. The Glorious Revolution established the essential premise that Parliament, from its seat at Westminster, is supreme over the Monarch in the 17th century, an era of immense constitutional turbulence. The Monarch remains the Head of State, but the monarchy's existence and powers are subject to oversight, and even abolition, by Parliament.¹¹ The executive is made up of the Crown and the UK cabinet-style Government as a whole, including the Prime Minister and

¹¹ Paul Daly, 'Executive Power in the United Kingdom' (2021) Ottawa Faculty of Law <<https://dx.doi.org/10.2139/ssrn.3906218>> accessed 28 November 2021.

Cabinet Ministers. The Cabinet is chosen by the PM and consists of around 20 ministers, most of whom are heads of government departments. Government departments and their agencies, headed by the public service, are in charge of putting government policy into action. Some UK government offices serve the entire country.

The policy is developed and implemented by the executive. The executive and legislature are inextricably linked in the United Kingdom and other common law countries. The PM of the UK and the majority of his or her ministries are members of the House of Commons (the PM usually being both heads of the executive branch and leader of the majority party in the legislature). Furthermore, through the ability to make subordinate legislation, Parliament may transfer law-making powers to the Government. Although the legislative and executive are not completely distinct in the UK, the executive's presence in the legislature is scrutinized, with Ministers often coming before and answering questions from Members of Parliament. As a means of checks and balances, the judiciary checks the executive's actions to ensure that they are within its authority. This entails ensuring that the executive only acts where it has the authority to do so and that it does so in conformity with the law. This judicial examination includes ensuring that any legislative activities carried out by the executive (i.e., the creation of subordinate legislation) are within the scope of the authorities given by Parliament. As a result, the courts can call into question the legality of decisions taken by public entities, including government Ministers, through a process called judicial review.¹²

III. India

The President wields executive authority in the Indian government, serving as both the ceremonial head of state and the nation's figurehead. The Indian Constitution, on the other hand, bestows authority and prestige on the post of President without providing the necessary authorities to rule. Instead, the President serves mostly as a ceremonial figure. The Prime Minister wields true executive power. The President is the head of state, but the Prime Minister is the head of government. Only with the Prime Minister's assistance and guidance does the President carry out the real tasks of the government.

a President

The President is indirectly elected for a 5-year term and can be impeached by the Parliament

¹² Law Wales, 'The Three Branches of Government' *Llywodreth Cymru Welsh Government* <<https://law.gov.wales/three-branches-government>> accessed 28 November 2021.

through impeachment procedures. The Constitution also establishes the position of Vice President, who is indirectly elected and serves as head of state in the case of the President's incapacity or demise. A candidate for the position of President of India must be a citizen of India, be at least 35 years old, and fulfill the other criteria required to become a member of the Lok Sabha. At the time of his election, he/she shall not occupy any profit-making post under the Union, State, or local governments, nor should he be a member of either house of Parliament or a state legislature. In addition, the candidate must meet any other requirements imposed by Parliament from time to time.

Powers of the President are:

1. Article 53¹³ deals with the President of India's executive authority. The President's powers are essentially classified into two types: ordinary and emergency powers. The President's ordinary powers are classified as executive, legislative, financial, and judicial. The Union's executive functions are vested in the President.
2. Article 75¹⁴ mandates the Prime Minister to notify the President of any Union Council of Ministers' decisions. According to Article 77, the executive functions of the Union administration must be exercised in the name of the President.
3. The President holds both administrative and military power. The President has the authority to appoint and remove state dignitaries. The President appoints the Prime Minister and, on his advice, the council of ministers, the Attorney-General, Supreme Court and High Court judges, members of special commissions (like the UPSC and the Election Commission), and state governors.
4. The President serves as the Commander in Chief of the Armed Forces. He appoints the Chiefs of the Army, Navy, and Air Force. He has the authority to declare war and make peace. However, he must utilize all of these powers subject to Parliament's approval.
5. The President has the authority to call both houses of Parliament, appoint 12 Rajya Sabha members, address either house or their combined session at any time, and dissolve the Lok Sabha. All money bills that are proposed in Parliament must get the President's approval. When a bill is enacted by Parliament, it can only become an Act with the President's assent. A non-money bill may be withheld or returned by the President for reconsideration by the Parliament. However, if the bill is enacted by both houses, with or without amendments, and returned to the President, the latter is required to sign it.

¹³ The Constitution of India, 1950.

¹⁴ *ibid.*

6. When the Parliament is not in session, the President has the authority to issue ordinances in the interest of the public. Ordinances have the same legal power and effect as laws approved by Parliament. They must, nevertheless, be presented to Parliament within 6 weeks after the day of the reassembling of Parliament. The ordinance will be declared null and void until approved by Parliament.
7. Article 254¹⁵ gives the President the authority to remove contradictions between legislation approved by the Parliament and the state legislatures and the subjects on the Concurrent List.
8. The President of India's judicial powers includes the nomination of SC and HC judges, as well as the authority to give pardon, reprieve, suspension, remission, or reduction of penalty or sentence of the court. These pardoning powers are granted to the President to remove the severe rigidity in criminal laws and to protect individuals on humanitarian grounds. The President also has the authority to request the Supreme Court's guidance on significant constitutional, legal, and diplomatic issues. In 1977, the President sought the Supreme Court's guidance on establishing Special Courts to try the emergency excesses.
9. The President has the authority to proclaim three sorts of emergencies: a) national emergencies resulting from war, external invasion, or armed revolt; b) emergencies resulting from the breakdown of the constitutional machinery in the states; and c) financial emergencies.

b Prime Minister

The Union Council of Ministers, with the Prime Minister as its head, has true executive power under the constitution. The President is required to act on the advice of the Council of Ministers, which is accountable in the true sense of the word to the Lok Sabha rather than the President. On the Prime Minister's suggestion, the President appoints the other members of the Council of Ministers. A minister can be appointed from either house and has the right to speak and participate in the proceedings of the other house, but he can only vote in the house to which he belongs. Even though a person is not a member of either house of Parliament, he can be appointed as a minister if he is elected or nominated to either house within 6 months.¹⁶

¹⁵ *ibid.*

¹⁶ IGNOU The People's University, 'Unit 11: Executive' <http://gdcganderbal.edu.in/Files/a8029a93-30ad-4933-a19a-59136f648471/Link/unit-11_e5dcc836-541e-4ec9-8f64-0b63d0605208.pdf> accessed 28 November 2021.

Comparative Analysis of Powers of the Executive in US, UK, and India

1. The USA follows a Presidential form of Government, whereas India and the UK follows a Westminster form of Government. The Westminster style is also known as the Parliamentary form of Government. Although both India and UK follow the Parliamentary style, India does not follow a strict traditional Parliamentary form and slight hints of Presidential form can be seen. While the Indian Head of the State, i.e., the President is elected, the British Head of the State is the Monarch and enjoys a hereditary position. The British system is founded on the idea of Parliamentary sovereignty. In India, the Parliament is not supreme and has limited and restricted powers as a result of a written Constitution, a federal system, judicial review, and FRs.
2. In America, the POTUS is responsible for the execution and enforcement of the laws and when it comes to India and UK, it is the job of the PMs to come up with laws with the goal of enacting the legislative agenda of their political party.
3. More powers are vested on the President in the Presidential form of government. Power to sign or veto bills are vested on the President of the US but in case of India, President is more like a nominal head of the state who works as per the advice of the Council of Ministers which is headed by the Prime Minister. This reflects that the major powers lie in the hands of the Prime Minister
4. In the UK and India, PM is the head of the Government and leads the Executive. But in the Parliamentary form of government, President is the State Head.
5. UK, being a constitutional monarch, the supreme command authority of the armed forces has been vested in the monarch. In India and UK, such powers have been vested on the Prime Minister and the President, respectively. In terms of authority to declare a war, such powers are vested with the President in case of US and India. Although Crown is the commander in chief of the armed forces, the UK Constitutional Convention requires that the declaration of war or commitment of British armed forces should be authorized by the Prime Minister on the behalf of the Crown.
6. Each wing of the cabinet is headed by a cabinet minister and the executive authority is vested over the entire council of ministers. The executive is responsible to the Parliament. Both in UK and India, they are removed by a no confidence motion. In UK, whenever the cabinet loses its confidence, it resigns or advises the monarch to dissolve the House of Commons. On the other hand, Executive office of the POTUS is headed by advisors who are nominated with

complete Presidential discretion, except of few advisors who are required to be confirmed by the senate.

7. In USA as well as India, various powers have been vested on the President and Prime Minister, respectively, during the period of emergency. They can execute executive order which will be followed in the Country during such a period. However, such orders cannot be in violation of FRs.



Conclusion

It is plausible for different nations with the same type of government to not function in the identical way and will have distinct characteristics. For example, the United Kingdom adheres to the traditional Westminster form of government, but India adheres to the Westminster form while incorporating some powers and functions from the Presidential form of government.

There are no straitjacket criteria for determining which type of government is ideal. The various kinds of governments must be thoroughly researched and analysed in order to determine certain fundamental characteristics. The choice of government is a critical one, and it must be approached with caution. The study of various forms gives benefit as well as drawbacks, which aid in guaranteeing that the country understands what they are consenting for. The events and conditions that exist in a country also influence the kind of governance that is chosen.

Although the basic goal of separation of powers is to ensure that each organ of the state (Legislative, Executive, and Judiciary) works separately and without interference in their respective domains, several provisions provide the Executive a broad range of powers. For example, as stated in the Indian constitution, the Executive has a significant responsibility in all 3 domains. However, its performance in the other 2 domains demonstrate its dominance over the other organs, as in the Judiciary, even after the final decision of the Supreme Court, the President has the power to grant pardon to the convicted, demonstrating the supremacy of the Executive over the Judiciary. In the legislative domain, all bills require the President's assent to be converted into acts, and certain acts require his prior approval to be presented in parliament. These powers assigned to the Executive by our Constitution indicates the supremacy of the Executive in our country.