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TOWARD MEANINGFUL COMPARABILITY IN COMPARATIVE PUBLIC LAW: A FUNCTIONAL AND CONTEXTUAL APPROACH TO COMPARING CONSTITUTIONAL SYSTEMS

***Prerna Yadav**

Student LL.M. (Master of Laws), Amity Institute of Advance Legal Studies, Amity University, Noida, Uttar Pradesh, India.

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***Corresponding Author: Prerna Yadav**

Student LL.M. (Master of Laws), Amity Institute of Advance Legal Studies, Amity University, Noida, Uttar Pradesh, India.

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ABSTRACT

Comparing constitutions is routine in courts, drafting bodies and classrooms, yet the conditions under which a comparison actually teaches something are seldom stated. This paper asks when two constitutional features can fairly be set side by side. It follows the long argument between functional and contextual schools of comparative law and contends that each supplies what the other lacks. Using doctrinal and comparative methods, it proposes a three-stage comparability test made up of a problem check, a context check and an effects check. The test is then applied to four recurring themes, namely constitutional borrowing, separation of powers, federalism, and judicial review of ordinary laws and constitutional amendments, with primary material drawn from India, the United States and the United Kingdom. The findings show that shared labels mislead, that Indian arrangements are often hybrids and not copies, and that one unverified premise, such as the belief that American states may lawfully secede, can distort an entire comparison. The paper concludes that comparability is earned through reasoning and not assumed from vocabulary, and it recommends the test as a working discipline for students, courts and drafters.

KEYWORDS: Comparative Public Law; Comparability; Functional Method; Contextual Analysis; Constitutional Borrowing; Judicial Review.

1. INTRODUCTION

Very few constitutions are written on a clean slate. India's framers took the structure of government from the Government of India Act 1935, cabinet government from Britain, fundamental rights from the American text and directive principles from Ireland, and Dr. Ambedkar himself described the exercise as a search through every known constitution.¹ Foreign judgments now appear regularly in the reasoning of courts, and drafting bodies study other countries' texts before settling their own. Comparison is therefore part of the working machinery of constitutional law and not merely a scholarly pastime.

That habit carries a cost which is easy to overlook. A rule that succeeds in one country can fail in another, a foreign ruling can be cited without the setting that gave it meaning, and two clauses with near-identical wording can pull in opposite directions. The literature on comparative method is large, but what a student or a judge usually inherits is a debate, functionalists against contextualists, and not a procedure. The outcome in much introductory writing is comparison by label: both countries "have judicial review", both are "federal", and the matter is thought settled.

This paper confines itself to public law and to three systems that are often compared and that differ in useful ways: India, the United States and the United Kingdom. It examines four themes that recur in almost every course on the subject, namely constitutional borrowing, separation of powers, federalism, and judicial review. The approach is doctrinal and comparative, and primary sources, meaning constitutional provisions and leading judgments, are treated as the final check on secondary accounts. Sections 2 to 5 state the problem, questions, objectives and methodology; Section 6 reviews the literature; Section 7 explains the empirical position; Section 8 sets out the test; Section 9 applies it; and Sections 10 and 11 offer critical analysis, findings, suggestions and a conclusion.

2. STATEMENT OF THE PROBLEM

The problem is practical as much as theoretical. Constitutional comparison is widely practised without an agreed test for when two features are comparable, so labels stand in for analysis and errors travel unnoticed from one secondary account to the next. A recurring example in this paper is the assertion, found in teaching literature, that American states may leave the Union whenever they choose.² The United States Supreme Court rejected that view

¹Roopal Sharma, "An Overview of Constitution of India and Preamble" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 59 at 62, 65 (Mind Your Law, Faridabad, 2023).

²Jivisha, "Comparative Federalism between U.S.A and India" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 175 at 175 (Mind Your Law, Faridabad, 2023).

in 1869.³ A comparison built on the mistaken premise reaches wrong conclusions however carefully it is otherwise conducted. What is missing, in short, is a working order of operations that tells a researcher what to ask first, what to verify, and what may fairly be claimed.

3. RESEARCH QUESTIONS

- (1) To what extent can the functional and contextual approaches be combined into one sequential test of comparability for constitutional features?
- (2) How far do India, the United States and the United Kingdom satisfy that test on constitutional borrowing, separation of powers, federalism and judicial review?
- (3) What distortions arise when a comparison omits one stage of the test, and what practices would reduce them?

4. RESEARCH OBJECTIVES

- (1) To examine how the functional and contextual traditions correct one another and to derive a usable test from that relationship.
- (2) To analyse the four selected themes against primary constitutional and judicial material from the three jurisdictions.
- (3) To determine which common comparative claims fail when checked and to propose practices, for courts, drafters and students, that guard against such failures.

5. RESEARCH METHODOLOGY AND HYPOTHESIS

5.1 Methodology

The study is doctrinal and comparative. It reads constitutional texts, statutes and judgments directly and uses academic writing to build the theoretical frame. The three jurisdictions were chosen for the research question and not for convenience. India is the home system; the United States is both a source of several borrowed features and the standard presidential and federal contrast; and the United Kingdom, with its uncodified constitution and fused executive, behaves differently from the other two on each theme, which gives the test something to sort. Secondary teaching material is used only to show how comparisons are commonly framed. Where it states a proposition of law, the proposition is treated as a claim to be verified and not as authority.

³*Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

5.2 Hypothesis

Two constitutional features are meaningfully comparable only to the extent that they answer the same problem, operate under similar enabling conditions and produce similar effects in practice. Where any element is missing, the comparison must be qualified.

6. LITERATURE REVIEW

The functional tradition begins from a presumption. Zweigert and Kötz treat functionality as the basic principle of comparative method and assume that different systems, facing like problems, tend to reach like results by different routes.⁴ The consequence for public law is that a comparison should begin with the task an institution performs, not with its name. Some teaching literature uses "functional" differently, to mean the study of how legal and political systems actually operate, through case studies and observation of officials.⁵ That is closer to law in action than to equivalence, but the two senses are compatible and the test proposed here uses both.

Critics have pressed hard. Michaels observes that the function to be compared is chosen by the researcher and is not simply found in the law.⁶ Legrand argues that legal rules carry cultural meanings which do not travel and that assumed similarity can hide what is distinctive.⁷ Frankenberg warns that comparison can become self-confirming, casting foreign systems as better or worse versions of the researcher's own.⁸

Contextual writers supply the counterweight. Kahn-Freund cautioned that the transfer of a rule depends on how far its political and social setting can be matched.⁹ Tushnet distinguishes functionalist, expressivist and bricoleur uses of foreign material, each of which depends on context in a different way.¹⁰ Scheppele urges the study of constitutions as lived practice.¹¹ Hirschl adds that the selection of cases shapes the conclusions drawn.¹² Pushed to an extreme,

⁴Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 3rd edn., 1998) at 34.

⁵Ram Datt Bhati, "Comparative Public Law: Analyzing Constitutional Structures and Legal Systems" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 9 at 16 (Mind Your Law, Faridabad, 2023).

⁶Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* 339 (Oxford University Press, Oxford, 2006).

⁷Pierre Legrand, "European Legal Systems Are Not Converging" 45 *International and Comparative Law Quarterly* 52 (1996).

⁸Gunter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" 26 *Harvard International Law Journal* 411 (1985).

⁹Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" 37 *Modern Law Review* 1 (1974).

¹⁰Mark Tushnet, "The Possibilities of Comparative Constitutional Law" 108 *Yale Law Journal* 1225 (1999).

¹¹Kim Lane Scheppele, "Constitutional Ethnography: An Introduction" 38 *Law & Society Review* 389 (2004).

¹²Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, Oxford, 2014).

contextualism makes every system unique and comparison pointless, and Jackson resists that outcome by arguing that engagement with foreign law can be instructive even where borrowing would be wrong.¹³

Indian writing on the subject has mostly concentrated on origins and on individual doctrines. Accounts of the Constitution routinely list what was borrowed from where, and student texts on separation of powers, federalism and judicial review usually describe each system in turn. What has been studied, then, is the content of each tradition; what remains unresolved is how a reader moves from separate descriptions to a defensible comparison. This paper addresses that gap by giving the two schools a working order.

7. EMPIRICAL COMPONENT

No survey or interview work was undertaken. The research question concerns how comparative claims should be reasoned and verified, and that is better tested against the published legal record than against opinion, so a questionnaire would have added length without adding evidence. The empirical element is instead a purposive content analysis of leading judgments (from *Marbury v. Madison* in 1803 to *Supreme Court Advocates-on-Record Association v. Union of India* in 2016), each read for what the court actually held and compared with how secondary accounts report it. The population is therefore small and selected by relevance and not sampled at random; the geographical scope is three jurisdictions; and the analysis is qualitative. Its limitation is that the findings illustrate the test and do not establish statistical patterns. A survey of how comparative material is taught would be a natural next study.

8. A THREE-STAGE COMPARABILITY TEST

The test asks three questions in a fixed order, and each works as a filter. A comparison that passes all three is strong. One that passes only some can still be valuable, provided it says plainly what it cannot claim.

The problem check asks whether the features answer the same underlying problem. The problem should be framed generally enough for both systems to recognise it, and the researcher should say why that framing was chosen. "How is power shared between central and regional governments?" is a fair question about federalism. "How do states exercise their right to secede?" is not, because it presupposes a right that may not exist.

¹³Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2010).

The context check asks whether the features operate under comparable enabling conditions. Four kinds of question help: historically, what event or fear produced the arrangement; institutionally, which other bodies must function for it to work; politically, who supports it and who resists it; and conceptually, whether the key terms mean the same thing in each system. The aim is not to pile up background but to identify the factors that could change how the feature behaves.

The effects check asks whether the features produce similar results when applied. A constitution may promise a strong court or strong regions while practice delivers something else. Where results diverge, the features are not true equivalents, however well they fared on the first two checks. The outcome should then be reported in one of three ways: equivalence, partial equivalence, or a false friend, meaning a shared name that hides different operation.

9. LEGAL AND JUDICIAL ANALYSIS

9.1 Constitutional borrowing

The usual account of India's borrowings is a table of origins: Britain for the parliamentary executive, the United States for fundamental rights and an independent judiciary, Ireland for directive principles, Australia for the concurrent list, Canada for residuary powers, and the 1935 Act for much of the framework.¹⁴ The table is a helpful first map, and the test shows what it can and cannot say.

On the problem check, many borrowings do answer a shared question. Concurrent and residuary powers both deal with how a federal system should allocate matters the drafters could not list in full. Directive principles answer a different question, namely how a constitution can state social goals without making them directly enforceable. On the context check the picture grows more complicated. Canada, like India, vests residuary power in the centre, which fits the decision to build a strong Union, yet the Indian arrangement was shaped by partition, the integration of the princely states and exceptional diversity, conditions that Canada and Australia did not face. On the effects check the table is silent, and the silence is the lesson. The Irish Constitution places its directive principles expressly beyond the cognisance of the courts,¹⁵ and the Indian text does the same. Yet the Supreme Court has treated the balance between fundamental rights and directive principles as central to the Constitution and has used the latter to give content to the former.¹⁶ Whether the borrowed

¹⁴Sharma, *supra* note 1 at 65.

¹⁵Constitution of Ireland 1937, art. 45; Constitution of India, art. 37.

¹⁶*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

provision does the same work as in Ireland cannot be read from its origin. A borrowing table thus satisfies a light version of the problem check and then stops.

9.2 Separation of powers

Comparisons among the three systems usually start from Montesquieu's idea that legislative, executive and judicial functions should sit in different hands.¹⁷ The question "how is state power divided and checked?" suits all three systems, so the problem check is passed without difficulty.

The context check separates them sharply. The American Constitution vests legislative, executive and judicial power in three different institutions in its first three articles, and the President is elected independently of Congress.¹⁸ In the United Kingdom the executive sits in and answers to the legislature, so fusion is the baseline and restraint comes from convention, courts and statute. The Constitutional Reform Act 2005 removed the Lord Chancellor's judicial functions and led to a separate Supreme Court in 2009, which shows how recent and partial the formal separation is.¹⁹ India took the parliamentary executive from Britain but joined it to a written constitution and a powerful court. The Supreme Court has said that the Constitution does not adopt separation in its rigid American form, though functions are differentiated,²⁰ and it has also held that Parliament may not itself decide a particular election dispute, since that is judicial work.²¹ The distinction between fused and separated systems is likewise drawn in the literature on parliamentary and presidential government.²²

The effects check is where the comparison becomes interesting. On paper a written constitution and an independent judiciary might make India behave like the United States. In practice its executive draws authority from a legislative majority, as in Britain, while its judiciary acts as a forceful check, as in the United States. The judiciary has even taken control of judicial appointments, striking down a constitutional amendment that would have created a commission in which the executive had a say.²³ Neither American nor British practice matches that. India is therefore a hybrid, and to call it simply "American" or "British" on this point would fail the effects check.

¹⁷Deeksha Sood, "Comparative Analysis of USA, UK and India on Separation of Powers" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 117 at 119 (Mind Your Law, Faridabad, 2023).

¹⁸Constitution of the United States, arts. I, II and III; Sood, *supra* note 17 at 124.

¹⁹Constitutional Reform Act 2005 (UK); Sood, *supra* note 17 at 126-129.

²⁰*Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549; Constitution of India, art. 74; Sood, *supra* note 17 at 131-132.

²¹*Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

²²Madhumita Bagchi, "Comparative Governance: Exploring Parliamentary and Presidential Systems" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 232 at 233 (Mind Your Law, Faridabad, 2023).

²³*Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1.

9.3 Federalism

A familiar contrast sets "coming together" federations, such as the United States, against "holding together" federations, such as India.²⁴ Article 1 of the Indian Constitution describes India as a Union of States, and K. C. Wheare's label of quasi-federal, federal in form but unitary in spirit, is often repeated.²⁵ The Supreme Court has also treated federalism as part of the basic structure.²⁶

The problem check is straightforward, since both systems divide authority between national and regional governments. The context check exposes different histories. American states existed before the Union and joined it, and the Tenth Amendment reserves unlisted powers to them. Indian states were formed within one constitutional framework, Parliament may alter their boundaries under Article 3, and residuary power lies with the Union.²⁷ The framers' insistence that the Union is indestructible, though its units are not, reflects the anxieties of that moment.²⁸

The effects check shows why verification matters. If American states could leave at will, the contrast with India's indestructible Union would be stark. But *Texas v. White* held the American Union indissoluble and unilateral secession unconstitutional.²⁹ Once corrected, the contrast changes shape without disappearing: it concerns less a legal right to leave and more the origin of the Union and the constitutional protection of state boundaries and identities. *Bommai* also deserves careful reading. It is sometimes summarised as limiting judicial scrutiny of Article 356 because the matter is political, but the Court held that a proclamation under that Article is open to judicial review while recognising federalism as a basic feature.³⁰ Secondary summaries, in short, need checking against the judgment.

9.4 Judicial review and the basic structure doctrine

In the United States, judicial review is a judge-made doctrine inferred from the constitutional structure in *Marbury v. Madison*.³¹ In India, Article 13 gives it textual footing for ordinary

²⁴Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model" 10 *Journal of Democracy* 19 (1999).

²⁵K. C. Wheare, *Federal Government* (Oxford University Press, London, 4th edn., 1963) at 28; Constitution of India, art. 1; Jivisha, *supra* note 2 at 175.

²⁶*S. R. Bommai v. Union of India*, (1994) 3 SCC 1.

²⁷Constitution of India, arts. 3 and 248, Seventh Schedule, List I, entry 97; *Babulal Parate v. State of Bombay*, AIR 1960 SC 51; Constitution of the United States, amend. X.

²⁸Teena Tanwar, "The Role of Courts in Preserving Federalism" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 215 at 219 (Mind Your Law, Faridabad, 2023), recording Dr. Ambedkar's statement; *Constituent Assembly Debates*, vol. VII, p. 43.

²⁹*Texas v. White*, *supra* note 3.

³⁰*Bommai*, *supra* note 26; cf. Kshitij Yadav, "Judicial Review" in S. K. Bose (ed.), *A Handbook on Comparative Public Law* 135 at 157 (Mind Your Law, Faridabad, 2023) (giving a different account).

³¹*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

laws, and Articles 32 and 226 supply the remedies.³² In the United Kingdom, courts review executive action but cannot strike down an Act of Parliament; under the Human Rights Act 1998 they may only declare a statute incompatible with Convention rights.³³ The problem check, whether courts test laws against a higher norm, is therefore passed by the United States and India but only in a limited sense by the United Kingdom.

The context check shows a further divide, for India's doctrine extends to constitutional amendments. Early decisions held that amendments were not "law" within Article 13.³⁴ Golaknath reversed that,³⁵ and Kesavananda Bharati then settled, by a narrow majority, that Parliament may amend the Constitution but not destroy its basic structure.³⁶ Minerva Mills confirmed that the amending power is itself limited, and later decisions extended review to laws placed beyond challenge and held judicial review itself to be part of the structure.³⁷ American courts have not treated a properly ratified amendment as substantively invalid, so there is no direct counterpart.

The effects check asks what this means in practice. Indian courts review both statutes and amendments, which gives them a role that American courts do not have. The honest conclusion is partial equivalence: similar function for ordinary laws, divergence for amendments, and limited equivalence in Britain. That is more accurate than saying all three systems "have judicial review". The doctrine has also travelled onward, as the Bangladesh Supreme Court's adoption of a comparable limit shows.³⁸

10. CRITICAL ANALYSIS

Why does the law operate this way? Largely because of history. India's federal design reflects partition and integration, its hybrid executive reflects a colonial inheritance of parliamentary practice combined with a new written constitution, and its expansive judicial review reflects the experience of amendments used to defeat judicial decisions. The effects check is what brings these causes into view, because it forces the researcher to ask what a rule does and not merely where it came from.

³²Constitution of India, arts. 13, 32 and 226; Yadav, *supra* note 30 at 136-137.

³³Human Rights Act 1998 (UK), s. 4; Sood, *supra* note 17 at 128.

³⁴*Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

³⁵*I. C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

³⁶*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

³⁷*Minerva Mills*, *supra* note 16; *I. R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

³⁸*Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1.

The analysis also exposes inconsistencies in common accounts. Separation of powers is often taught as a doctrine India shares with the United States, although the Supreme Court itself has said otherwise. Federalism is described through an American right of secession that never existed. Bommai is summarised in ways that understate what it decided. These are not trivial slips, since each changes the conclusion drawn. They also suggest a structural cause: descriptions of each system are written separately and joined afterwards, so nobody is positioned to test the joins.

The test has its own weaknesses. The problem check inherits Michaels's point that framing is a choice, and a researcher may frame the question to suit a desired answer. The effects check depends on reliable evidence of practice, which is often thin. And Hirschl's warning applies with force: India, the United States and the United Kingdom share a common-law heritage and much legal vocabulary, so results drawn from them may not hold for civil-law or non-Western systems.³⁹ The test disciplines comparison but does not settle questions of value, such as which arrangement is better. For India, the practical lesson is that borrowed institutions should be assessed by their local performance and not by pedigree.

11. FINDINGS, SUGGESTIONS AND CONCLUSION

11.1 Findings

In response to the first question, the functional and contextual traditions can be sequenced: function supplies a shared question, context tests whether the features grow from similar soil, and effects test whether they behave alike. In response to the second, the four themes yield the following results.

Theme	Problem check	Context check	Effects check
Borrowing	Partly shared; directive principles answer a different question	Shaped by partition, princely states and the 1935 Act	Not visible in a table of origins; depends on judicial treatment
Separation of powers	Shared	Separated (US), fused (UK), mixed (India)	India is a hybrid: majority-backed executive, forceful court
Federalism	Shared	US states pre-date the Union; Indian states formed within one framework	Secession barred in both; difference lies in origin and protection of states

³⁹Hirschl, *supra* note 12.

Theme	Problem check	Context check	Effects check
Judicial review	Shared (limited in UK)	US judge-made; India textual plus basic structure	Partial equivalence: alike for statutes, different for amendments

In response to the third, omitting a stage produces predictable errors: skipping context yields false equivalence from shared labels, skipping effects yields comparisons of text and not of practice, and skipping verification against primary sources lets a single mistaken premise survive.

11.2 Suggestions

- (1) Courts that cite foreign decisions should state the problem the foreign rule addresses, the conditions in which it operates and, where known, its observed effects, so that foreign law is used as evidence and not as authority.
- (2) Drafting bodies should record the problem a borrowed provision is meant to solve and review its performance after a fixed period.
- (3) Teaching materials should add an effects column to every table of origins and should cite primary sources for propositions of law.
- (4) Researchers should justify their choice of jurisdictions and describe hybrids as hybrids, naming their components.

11.3 CONCLUSION

This paper began by asking what entitles us to place two constitutional systems side by side. Its answer is that comparability is earned in three steps: a shared problem, similar enabling conditions and similar effects. When a feature meets all three, the comparison is strong; when it meets only one or two, it can still teach, provided it says what it cannot claim. Applying the test to borrowing, separation of powers, federalism and judicial review produced richer and more accurate results than label-based comparison, and the secession example showed how one unchecked assumption can alter a conclusion. Meaningful comparability is, in the end, the habit of asking one more question before reaching a conclusion.

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