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2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **Federalism in India and the United States of America-** **A Comparative Analysis**

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## **Introduction**

Democracy can have either a federal power-sharing structure or a unitary power-sharing structure. In simple terms, a federal system of government implies a distribution of powers and responsibilities between the different levels of the hierarchy of the government, typically, a national government and the states government. All the power is concentrated in the central government in a unitary form of government.

The power-sharing in a democracy is relevant as it helps one gain insight into the historical background, the culture, and the diversity in a State. It has been observed that countries with diversity tend to opt for a federal government structure.

K.C. Wheare, the reputed proponent of Federalism, agreed reluctantly in 1945 that in the face of military and financial crises, there was a tendency in Federal nations to concentrate power in the hands of the Central Government increasingly. In many cases, there was sufficient reason to believe that such concentration of power threatened the very fabric of federalism.

The experience of the two world wars had an influential impact on nations across Europe, South America, Asia and Africa. These countries saw federalism as a tool to achieve political unity. This research paper aims to draw a comparative analysis of the principle of federalism in India with the United States of America. K.C. Wheare, the authority on federalism, stated that India is not genuinely federal; instead, it is 'quasi-federal. H.M. Seerwai, the former Attorney General of Maharashtra and a visionary, countered the points made by Wheare and firmly stated that India is indeed a federal state. Through this paper, I shall also conclude whether India is a federal state or not.

## **Theories of Federalism**

It is pertinent also to discuss the theories of federalism to enhance our understanding. There are three main theories of federalism-

- **The Classical theory**

- The classical theory attempts to explain what federalism is. The famous proponents of the theory were Dicey, Bryce and K.C. Wheare, to name a few.
- Wheare developed a test to determine whether a State is federal or not. It involved asking a question- “Does a system of Government embody predominantly a division of power between general and regional authorities, each of which, in its own sphere, is coordinated with the other’s and independent of them? If so, that government is federal.”
- Classical theorists believed that the idea of independence of the different levels of the government was the essential ingredient for a country to be federal.
- The theorists also enumerated the following essential conditions to ensure the independence of each level of the government-
  - A rigid, written constitution
  - An independent judiciary to decide on matters between the different levels of the government.
  - Both levels of the government operate directly on the citizens of the country.
  - Allocation of adequate sources of revenue between the different levels of the government
- **The Origin theory**
  - The origin theory of federalism attempts to characterise federalism in terms of situational elements and forces. It looks at the various circumstances that make the birth of a federation conducive. The origin theory can be better understood through the following theories-
    - The Sociological theory
      - William Livingston is recognised as the originator of this theory. He claimed that the federal nature of society was the reason for the creation of the federal political system.
      - Diversity is an essential ingredient of a federal society, according to Livingston.
      - One of Livingston's most essential conditions is that diversities must be territorially clustered for a union to occur. These differences must neither be so severe that the community is split into independent factions nor should they be suppressed to make room for a unitary administration.
    - The Multiple-factor theory
      - This theory takes into consideration the necessary and sufficient conditions for the birth of the federal system.
      - Wheare gives two ingredients for a federal state-
        - The desire for union and the desire to be distinct and
        - The capacity to manifest the desire
    - The Political theory
      - According to political theory, federalism is a solution to what is essentially and principally a political problem.
      - Since it revolves around power and represents the distribution of political authority, the remedy is political.
- **The Functional theory**
  - The functional theory explains the gap in Origin theory.

- This theory led to the development of ‘dual federalism’, which is founded on two coordinated and independent levels of government in a federation.<sup>1</sup>

Each theory of federalism highlights an essential aspect of the principle. Reading the theories in isolation will give one an incomplete understanding. We must read the three approaches in conjunction to fully grasp the principle of federalism.<sup>2</sup>

## **India**

The Constitution of India divides the legislative power of the State between the Central Government and the State Governments through the Union List (List I), State List (List II) and Concurrent List (List III) provided under Schedule VII.

The Constitution is the source of power for the Central and State Governments. The Centre can legislate for the entire territory of India and the State Governments for their respective states.

A federal union comes into existence in one of the following two ways-

- A voluntary pact between the member states or
- The provinces of a unitary state may evolve into a federal union.

Unitary states chose to reconstitute themselves as a federal union to solve economic, political and social problems.

India had a unitary form of government till 1935. The passage of the Government of India Act, 1935 brought the concept of federalism into India. However, the Act of 1919 introduced decentralisation and devolution of state power. Initially, it was envisaged so as to bring the Indian States under the federal union, the Central government should have only three powers- defence, foreign affairs and communications with the residuary powers being vested in the autonomous states.

After the country was to be partitioned, the Constitution Committee convened on June 5, 1947, and decided that India should be federal with a strong centre. The idea of three lists- Union List, State List and Concurrent List was introduced and the residuary powers were granted to the Union.

The Indian Constitution does not have the words ‘federation’ or ‘federal’ mentioned anywhere. Article 1(1) describes the nation as a union of states. The Union Constitution Committee proposed using the word ‘federation’, but the Drafting Committee of the Constituent Assembly replaced it with ‘union’.

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<sup>1</sup> <https://aryabhattachcollege.ac.in/samplepaper/637215121892375249Federalism%20-%20Conceptual%20analysis.pdf>

<sup>2</sup> S.A. Paleker, Federalism: A Conceptual Analysis, Vol. 67 No. 2 [IJPS] 303, 303-310, APR-JUNE 2006

Indian Constitution has all the federal features- supremacy of the constitution, division of power between the Centre and States, an independent judiciary and rigidity in amending the constitution.

Schedule VII of the Indian Constitution has the three lists which clearly define the legislation making limits of the Centre and the States. Articles 245-255 deal with the distribution of legislative powers, and Articles 256-261 deal with the distribution of administrative powers between the Centre and States.

Decentralization of power is an essential element of federalism. The 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Indian Constitution created the third tier of government- Panchayats and Municipalities. These three levels of governance are unique to the Indian federal structure. The powers and procedure to amend the constitution have been provided under Article 4, the Sixth Schedule and mainly under Article 368. The power to initiate amendment lies with the Centre where the consent of the States is not mandatory. However, Article 368(2) states certain amendments that require ratification by at least half of the States.

The Courts in India are independent of the influence of the Legislature and the Executive, which is an essential feature of federalism. The Supreme Court has had an ambiguous stance on whether the Indian constitution is federal or not. But over time, the judiciary has agreed that the Indian Constitution is indeed federal.<sup>3</sup>

In *Automobile v. State of Rajasthan*<sup>4</sup>, the Supreme Court of India held that the Indian constitution is federal. The Court made two observations to support that claim. Firstly, the distribution of powers between the federal and state governments must exist, which is present in the Indian constitution in the three legislative lists in the Seventh Schedule. Secondly, the usage of the words India is a Union of States in Article 1 indicates that the constituent units of the Indian Union also have certain powers as the Centre itself. This hints at the rigidity of the Indian constitution, a federal feature.

In *Keshavananda Bharati v. State of Kerala*<sup>5</sup>, the Supreme Court held that the federal character of the Indian Constitution formed part of the basic structure of the Indian Constitution.

In *S.R. Bommai v. Union of India*<sup>6</sup>, the nine judges bench asserted that the Indian Constitution is federal. The Court observed a mixture of federal and unitary elements, so it may be described as quasi-federal. The conclusion that the Indian constitution is federal is due to the understanding that even though the constitution provides more power to the Centre, the States are supreme within their spheres.

In *UCO Bank v. Dipak Debbarma*<sup>7</sup>, the Court observed that even though a doctrine of federal supremacy exists, it doesn't mean that the States have no autonomy. The State is supreme in its allotted sphere, which the Centre cannot infringe upon.

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<sup>3</sup> M. Asad Malik, *Changing Dimensions of Federalism in India*, Vol. II [ILILR] 85, 85-101, 2019

<sup>4</sup> AIR 1962 SC 1406

<sup>5</sup> AIR 1973 SC 1461

<sup>6</sup> AIR 1994 SC 1918

<sup>7</sup> (2017) 2 SCC 585

In *Govt. (NCT of Delhi) v. Union of India*<sup>8</sup>, the Court observed that the Union and the States must adopt a collaborative approach to federalism by displaying harmonious co-existence and interdependence. This is very pertinent as the Court introduced cooperation as a tool to ensure the needs and aspirations of the citizens are fulfilled in the best way possible.

### **The U.S.A.**

American colonies became independent in 1776 and formed a confederation. A strong federal government was in-existent, so the states started working against the interests of the Union. The States began coining their currency and erecting trade barriers. The convention in Philadelphia in 1787 aimed at ironing out the issues in the Articles of Confederation and Perpetual Union, which gave birth to a new constitution that has lasted to date.

In 1789, the USA became a federation which was an entirely novel form of government structure. Confederation, which advocated for a loose union of states, was not a new idea. However, federalism was. Federalism spoke about a two-tier government. The Congress and the Senate provided for equal representation from each State which granted each state an equally powerful voice which would not be the case if representation was based on population.

However, the challenges were far from over. The continued struggles between the Federalists and the Anti-Federalists led to the first Congress putting forth a bill of rights before the States for their consent under the new constitution. The first amendment led to the introduction of a host of new rights like freedom of speech, press and religion, right to a jury trial, right to bear arms etc. The Civil War led to the federal government strengthening its role as the protector of the union. The subsequent industrialization led to the growth of federal power. The experience of the world wars and the emergence strengthened the Congress, the President's Office and the Supreme Court.

Article 1, Section 3(1) of the American Constitution lays down that two senators from each state shall represent each state for a 6-year term, and one-third of them shall face election every two years. With the Seventeenth amendment, the Senators were elected by popular vote instead of selection by the State Legislature. This led to the Senators becoming further independent of the State Legislature's influence; however, they continue to be a strong voice for the States in the national government.

Article 6 of the American Constitution introduces the 'supremacy clause' that makes the constitution and federal laws supreme. Article 1, Section 8 enumerates the legislative powers of Congress. The same provision introduces the 'elasticity clause', which allows Congress to make other laws in the interest of other entries. Congress has used it to expand its influence, primarily to regulate interstate commerce.

The Tenth Amendment to the Constitution gave residuary powers to the States. The Fourteenth

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<sup>8</sup> (2018) 8 SCC 501

Amendment gave the responsibility to the federal government to ensure that the States do not deny citizens due process, privileges and immunities.

The procedure for amending the Constitution is given in Article 5. Congress makes the amendment either when two-thirds of both the Houses find it necessary or upon a proposal of two-thirds of the State Legislatures. For the amendment to be finalized, two-thirds of the States must ratify it. The Supreme Court has played its part in reigning in federal power and, at times, allowing the expansion of federal power, as it deems fit.<sup>9</sup>

### Comparison

Firstly, let us see the similarities between the federal structure of India and the USA.

- Distribution of power- There exists a precise distribution of power between the federal and state governments in both countries. In India, the Seventh Schedule is an example of a clear allocation of legislative power between the Centre and the states when read with Articles 245-255 of the Indian Constitution. Article 1 of the American constitution is also a great example of the distribution of legislative power between the federal government and the states. The Article enumerates Congress's powers, which clearly shows the limit of the Congress to pass laws.
- Independent Judiciary- Both countries have an independent judiciary that is powerful and must interpret the Constitution and safeguard the rights of its citizens. The Supreme Courts in both nations have, on numerous occasions, maintaining the balance of power between the different levels of government. The yardstick for the extent of power has always been the fundamental rights of the citizens.
- Amendment of the Constitution- The American constitution requires the consent of two-thirds of the States for a constitutional amendment to take effect. In India, amendments under Article 368(2) also require the approval of the States.
- Written Constitution- Both nations have a written constitution which is an essential feature of federalism.

Now, let us examine the differences in the federal structure of both nations.

- Residuary power- In India, the residuary power vests in the Union as per Article 246 of the Indian constitution. In the USA, the residuary power vests in the states as per the Tenth amendment to the American constitution.
- Federal structure- The USA is federal in its truest sense. There exists a clear distinction between the Union and the states. The states have their constitutions, and there are clear limitations on federal power in the States. However, in India, the federal structure weighs in favour of the Centre. The emergency provisions are a glaring example of the same.

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<sup>9</sup> Sanford F. Schram, Handbook of Federal Countries, 2005 373-381, McGill-Queen's University Press, 2005

Another example is the doctrine of federal supremacy, where the union law will override state laws.

- Levels of government- The USA has a typical federal structure- two levels of government. In India, there exist three levels of government.

### **Conclusion**

I believe that India is a federal state. There exist provisions where the concentration of power tends to sway towards the Union, but the historical experience of the State also plays an important role. The existence of hostile neighbours like Pakistan and China necessitated a strong Union Government to ensure the security of the State. The judiciary has also viewed the expansion of federal power as a means to further national interests. However, the Supreme Court is the highest authority in the interpretation of the Constitution. The majority judgements have ruled that India has a federal constitution. In *Keshavananda Bharti v. Union of India*, the Supreme Court held federalism to be a part of the basic structure of the Indian constitution; therefore, the Parliament cannot make any amendments that affect the federal spirit.