

Constitutionalism in India: A Comparative Study

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Abstract

For genuine democracies, constitutions consist of overarching arrangements that determine the political, legal and social structures by which society is to be governed. Constitutional provisions are therefore considered to be paramount or fundamental law. Under these circumstances, if constitutional law itself is inadequate, the nature of democracy and rule of law within a country is affected. The structure of modern nations has been shaped with government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies and their powers must be separated. In the U.S., the concept of constitutionalism and the written Constitution go hand in hand. Alexander Hamilton, a legal scholar and politician, called for a Constitutional Convention in 1786. In 1787, the Convention took place in Philadelphia with George Washington serving as the President of the same. While the initial purpose was to make changes to the Articles of Confederation, the discussions of the Convention shifted towards the creation of a new constitution. A federation is a state having one central (federal) government acting for the whole country and several state governments existing side by side having control over their areas. Both the governments exercise power over their definite sphere as provided in the Constitutions and does not interfere with each other's functions. Thus in a federation, there is a division of powers between the central (federal) government and state government. Countries like USA, Switzerland, Australia, Canada, etc. have a federal form of government. The salient features of federalism include the existence of dual government at the central and state level, separation of powers, rigid and written constitution, supremacy of the constitution, independence of judiciary, etc. Current article trying a comparative study between Indian Constitutionalism with US.

Keywords: Constitution, Federalism, India, US, principles

Introduction

Federalism is a rule of government which characterizes the connection between Focal Government at the public level and its constituent units at the provincial, state or nearby levels. The standard of government dispenses power and authority between the public and neighborhood legislative units such that every unit is designated a circle of force and authority that no one but it can work out, while the others must be shared.

There are certain similarities as well as differences between American Federalism and Indian Federalism- Both United States and India which are considered as the largest democratic countries in the world are based on federalism in their political structure. The US gained the status of Federal Republic State in the year 1789; whereas India occupied the status of Socialist, Sovereign, Secular, and the Democratic Republic by enacting its Constitution in the year 1950. Thereby both countries had attained dominion status in which

several smaller states got associated with a strong central government which is known as Federal Government in the US and Central Government in India. Thus, both states became Federal Republics. During framing of the Constitution, the drafting committee headed by Dr. Ambedkar, borrowed many features from Constitutions of other countries including US which was adopted in the Indian context. Hence, both U.S and India, even though federal in character have certain similarities as well as differences between them.

Federation is the existence of dual polity. Federalism is a principle of government which defines the relationship between Central Government at the national level and its constituent units at the regional, state or local levels. The principle of government allocates power and authority between the national and local governmental units in a way that each unit is delegated a sphere of power and authority, that only it can exercise, whereas the others have to be shared.

“Federalism has been part of the public discourse in India for many decades, before and after independence in 1947, but it has gained greater importance since the 1990s when the country’s national polity saw the advent of the coalition era.”¹

Prior to the formation of the Constituent Assembly, the Cabinet Mission Plan emphasized on a Central Government with very limited powers to be confined to foreign affairs, defense, and communication. In contrast, the Muslim League and the Indian National Congress did not agree to this. Despite this, the first report of the Constituent Assembly envisaged a weak center upon the encouragement of Cripps and Cabinet Mission Plans.

It was the passing of India Independence Act and the subsequent partition of India which made the Constituent Assembly take up a more unitary version of federalism. Mahatma Gandhi also favored the decentralized structure and preferred a panchayat/village based federation. On the other hand, the then Prime Minister Jawaharlal Nehru and Dr. B.R. Ambedkar were in favor of a unitary system of governance while the Home Minister Sardar Vallabhai Patel also stood for the idea of federalism.

All is well that ends well, and finally a healthy compromise was reached which resulted in a balance of power between the Centre and the State, and India was thus described as ‘Unity of States’ and this unity being indestructible. The structure prescribed for Union as well as State governments with a single citizenship policy rather than dual citizenship.

In India, there are two governments in existence, the Union Government and the State Government. The two governments do not subordinate with each other rather cooperate with each other while working independently. Though the Indian constitution has the traits of being a federal constitution, in its strict sense, it is not. The presence of features which are necessary for the existence of a federation is quite a unique aspect of Indian Constitution but on the other side, there are provisions which give more power to the Union Government vis-à-vis that of State governments. Henceforth, the Indian Constitutional structure is a quasi-federal structure and it was made like this in the 1935 Act.

This Act laid down the foundations of the federal form of government in India. It provided for the distribution of legislative powers between the Union and the provinces (the structure at that time). These provisions were laid down for promoting harmony and resolving differences between the provinces. The Act further maintained for a sense of cooperative relationships amongst the provinces. Getting into nuances of this Act, Sections 131, 132 and 133 laid down provisions for resolving the water related

¹ Surendra Singh and Satish Misra “Federalism in India: Time for a Rethink?”

disputes. Basically, these provisions dealt with the problems relating to inter Province Rivers and river valleys.

On the other hand, **Section 135 of the 1935 Act** laid down provisions for the creation of councils to deal with the coordination between the various provinces of British India. The need for creating a cooperative relationship between the provinces was felt even before independence. The Indian Constitution has incorporated the principles in a detailed form which were actually laid down under the 1935 Act.

A well designed, and more important, well-functioning system of federal governance, by virtue of its manifold benefits, plays a key role in promoting the stability and prosperity of nations as the heights attained in development by the leading federations of the world – USA, Canada, Australia, and Switzerland – demonstrate. On the other hand, unless carefully crafted, federal systems do not endure as evidenced by the disintegration of many of the federal formations that came into being in the last century, such as Soviet Russia, Yugoslavia, Czechoslovakia, Rhodesia, and Nyasaland².

As earlier stated, the Indian constitution though, claims to be decentralized and federal is somehow too centrist. The Centre functions in a way which does not allow the State's autonomy to function freely in a completely decentralized way. Now, the question arises "Was it intended to be made this way?" This could be highlighted as one of the reasons for India's diminutive growth when compared to China, where complete autonomy to provinces in running their economies has resulted in much higher growth rates.

Similarities between the federalism of US and India

Written Constitution

The Constitution of both US and India is a written Constitution, which provides for a federal political structure where both the governments exercise their respective powers. The Constitutions of both the countries provide for amending the Constitution to meet the changing circumstances and the growing political, economic, social needs and demands political and economic needs and demands of their respective countries.

Bill of Rights and Fundamental Rights

The US Constitution has given its citizens fundamental rights such as the right to equality, freedom, right against exploitation, freedom of religion, cultural and educational rights, right to property, and the right to Constitutional remedies etc. by means of 'The Bill of Rights', Part III of the Indian Constitution guarantees the fundamental rights of the people as given in Articles 14 to 34.

Supremacy of the Federal or Union Government

In both the countries, the federal government works at the centre in which various states have acceded to. In the US, there are 50 states who have associated them to the federal government and in the Indian Union, as many as 29 states and 8 Union territories have accepted this form of government. Both in US and India, states which have accepted the Federal set up have no individual power to separate from the Central Government or the Union Government. While both the Central as well as State Government is empowered to makes laws on subjects given in the concurrent list, the law enacted by the Federal or Union Government will prevail over the law enacted by the states on the same subject in case of dispute. Thus, Federal or Union Government is supreme in the present federal structure.

² Amaresh Bagchi "Fifty Years of Fiscal Federalism in India – An Appraisal"

Separation of powers

Both US and Indian Constitutions provides for separation of powers among three institutions namely executive, legislature and judiciary. Each division is empowered with a separate power. The executive governs the country, the legislature makes laws, and the judiciary ensures justice. President of US is the chief executive head of US, whereas the Union cabinet headed by the Prime Minister is the real chief executive body in India. Both US and India have a ***bicameral legislature***. The upper and the lower houses of US legislature are called as the House of Senate and the House of Representatives respectively, and the Indian Parliament has Lok Sabha and Rajya Sabha as its Lower and Upper house respectively.

Powers of Checks and Balances

Though there is a clear-cut separation of powers between executive, legislature and judiciary in both countries, still there can be overlapping of these powers. There are chances of abuse of power or arbitrariness. Thus, there is a need for a system of ‘checks and balances’ prevalent in both countries.

The President having chief executive power appoints the members of his ‘Kitchen Cabinet’ and he is the Supreme Commander-in-Chief of Army, Navy and the Air Force. He is empowered to appoint the Chief Justice of the Supreme Court of the US. He enters into treaties with other countries. However, his treaties must be approved by the House of Senate. Otherwise, the treaty will not come into force.

Similarly in India, it is the Prime Minister and his cabinet who exercise real power. They can be removed from power by a successful no-confidence motion passed by both houses of parliament. The policy decisions become laws only after obtaining the requisite majority of the parliament. However, the laws enacted by the parliament are subject to the judicial review of the Supreme Court of India.

Thus, the powers of checks and balances have been the efficient method both in the US and in India in protecting the democracy in both countries.

Differences between the federalism of US and India

There are certain differences that exist between the federalism of US and India. These differences have been created by the architects of the Indian Constitution. *The US federalism is very strong and more rigid as envisaged in their Constitution by its leaders. It is more federal than unitary in character. Whereas, India is more unitary than federal and we can even say that it is a quasi-federal state.*

Constitution of US is very rigid than the Indian Constitution

The Constitution of US is very precise and rigid running into only a few pages, whereas the Constitution of India is very bulky containing as many as XXII parts, 395 articles, and ten schedules. Since the US Constitution is very rigid, the provisions meant for amending the Constitution are also very rigid and more formal. The US Constitution has been amended only 27 times. Whereas, the Indian Constitution, which came into force in the year 1950, has so far been amended 94 times. Therefore, it is easy to amend the Indian

US has the Presidential form of Government, India has the Parliamentary form of Government

In the US, the President is the head of the state and so his government is popularly referred as the Presidential form of government. India, on the other hand, has a Parliamentary form of Government as the Prime Minister with his cabinet exercises real power with the President being only a nominal head. The President of US holds office for a period of four years while the Indian Prime Minister holds power for

five years as long as his political party enjoys a majority in the Lok Sabha. While the US follows the bi-party system, India has a multi-party system and a complicated process of election.

Differences in the judicial system between US and India

US being a developed country have an advanced judicial system. The judicial system of India is however rapidly developing. A Judge in the US holds office as long as he is capable of performing his duties. Indian Constitution on the other hand states that a District judge holds his post till the age of 58, a High Court judge holds till the age of 62 and a Supreme court Judge retires at the age of 65.

Difference in citizenship

The Constitution of India recognises single citizenship. On the other hand, USA Constitution provides for a double citizenship that is a US citizen can have citizenship of two countries, USA and some other country.

The Indian Federation ‘Quasi-Federal’

No doubt, India has a political and constitutional structure where federal features are evident. There is sharing of power between the Centre and the States but the Constitution provides Central Government with supreme powers and concentrates administrative and financial powers completely in its hands.³ Seems there was some deficiency which made the constitutional framers incorporate features which worked against the federal principle.

Reiterating some Central Government's powers, it has the power to reorganize the states through parliament; Governors appointed by the Centre can withhold assent to legislation passed by the state; Parliament can override the legislations passed by the states for the reasons of national interest; Governors have a role in the formation of state governments and the Centre is vested with the power to dismiss the state governments under **Article 356**; residuary powers are vested with the Centre and the major taxation powers lie with the Central authority. Fortunately, the reviewing power of judiciary of Centre-State relation exists like that in the federal structure. The bottom-line is that the Indian political system has federal features which are circumscribed with a built-in unitary core.⁴

Former Chief Justice Beg, in *State of Rajasthan v UOI*, 1977 called the Constitution of India as ‘amphibian’. He said that “...If then our Constitution creates a Central Government which is ‘amphibian’, in the sense that it can move either on the federal or on the unitary plane, according to the needs of the situation and circumstances of a case...”.⁵

Similarly in *S.R. Bommai v Union of India*, “pragmatic federalism” was used. Quoting Justice Ahmadi, “...It would thus seem that the Indian Constitution has, in it, not only features of pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strong unitary features...”⁶

The phrase ‘semi-federal’⁷ was used for India in *State of Haryana v. State of Punjab*, whereas in *Shamsher Singh v. State of Punjab*, the constitution was called ‘more unitary than federal.’⁸

³ Prakash Karat “Federalism and the political system in India”

⁴ Prakash Karat “Federalism and the political system in India”

⁵ *State of Rajasthan v Union of India* (1977) 3 SCC 592

⁶ *S R Bommai v Union of India* AIR 1994 SC 191

⁷ *State of Haryana v. State of Punjab*

⁸ *Shamsher Singh & Anr v. State Of Punjab* 1974 AIR 2192

Another case on this issue is that of *State of West Bengal V. Union of India*. This case dealt with the issue of the exercise of sovereign powers by the Indian states. The Supreme Court, in this case, held that the Indian Constitution does not promote a principle of absolute federalism. The court further outlined four characteristics highlighting the fact that the Indian Constitution is not a “traditional federal Constitution”.⁹

Firstly, being that there is no provision of separate Constitutions for each State as required in a federal state. The Constitution of India is the supreme document, which governs all the states.

Secondly, the Constitution can be altered only by the Union Parliament; whereas the States have no power to alter it.

Thirdly, in contradiction to a federal Constitution, the Indian Constitution renders supreme power upon the Courts to invalidate any action which violates the Constitution.

Fourthly, the distribution of powers facilitates local governance by the states and national policies by the Centre.

The Supreme Court further held that both the legislative and executive power of the States is subject to the respective supreme powers of the Union meaning that Centre is the ultimate authority for any issue. The political sovereignty is unevenly distributed between the Union and the States with greater weightage in favor of the Union. Another reason which militates against the theory of the supremacy of States is that there is no concept of dual citizenship in India. The learned judges finally concluded that the structure of India as provided by the Constitution is centralized, with the States occupying a secondary position vis-à-vis the Centre.

Conversely, Justice Subba Rao was of the view that under the scheme of the Indian Constitution, sovereign powers are distributed between the Union and the States according to their respective spheres. The legislative field of the union legislature is much wide-ranging than that of the State legislative assemblies; the laws passed by the Parliament should, therefore, have an upper hand over the State laws in case of any conflict. In a few cases of legislation where inter-State disputes are involved, the sanction of the President is made mandatory for the validity of those laws.

Further, every State has its judiciary with the State High Court at the apex. This particular thing in his opinion of the learned judge does not affect the federal principle. He while arguing this gave the parallel of Australia. In Australia, appeals against certain decisions of the High Courts of the Commonwealth of Australia lie with the Privy Council. Thus the Indian federation cannot be negated on this account. In financial matters, the Union has more resources at its disposal as compared to the states. Thus, the Union being in charge of the purse strings can always persuade the States to abide by its advice.

The powers vested in the union in case of national emergencies, internal disturbance or external aggression, financial crisis, and failure of the Constitutional machinery of the State are all extraordinary powers in the nature of safety valves to protect the country's future. The power granted to the Union to alter the boundaries of the States is also an extraordinary power to meet future contingencies. In their respective spheres, both executive and legislative, the States are supreme. In a nutshell, Justice Subba Rao argued that the Union has a bigger role to play when compared to states and therefore, the Union powers have to supersede the State's.

This minority view provided by Justice Subba Rao, in this case, had consistency with the federal scheme under the Indian Constitution. The Indian Constitution undoubtedly accepts the federal concept and

⁹ *State of West Bengal v. Union of India* 1963 AIR 1241

distributes the sovereign powers between the coordinate Constitutional entities, namely, the Union and the States.

India, like Canada, constitutes an asymmetrical federation in the sense that some states have constitutionally guaranteed prerogatives setting them apart from the other states of the federation. However, in the case of India, rather unlike Canada, the affording of special status to a group or territorial entity never came easy.¹⁰ Article 370 expresses special provisions for the state of Jammu and Kashmir with respect to the rest of India as per its *instrument of accession*.

Also, there are special provisions for the states of Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland and Sikkim as per their accession or state-hood deals as laid down in Article 371A-I. President's rule is another important thing to be listed here where the Central Government (through its appointed Governor) takes control of the State's administration for certain months when no party can form a government in the state or in case there is a violent disturbance in the state. Also, **Article 3** articulates that the Parliament can change the name, area or boundary of a State without the consent of the State concerned. Thus the States in India do not enjoy the right to territorial Inviolability.

The Seventh Schedule of the Constitution indicates that distribution is one sided and is heavily in the favor of Centre. Union list contains the largest number of most important subjects. For example, almost all the tax subjects are in the Union list (except the Sales Tax). Another related provision is **Article 248** which states that any subject that does not belong to the Concurrent and State lists, belongs to the Residuary List and it belongs to Central Government.

Article 312 talks about provides for the creation of All India Services (who can function both as Central and State Services). The All India Services officers are recruited, trained and appointed by the Centre but they largely function under the State Government. It is they who largely control the administration of State. The State government cannot take disciplinary action against officers, except transfer. Any other action take removal from service or reduction in rank can only be controlled by the Central Government. **Article 356** lays down that during President Rule, the Parliament is authorized to legislate on one or more subjects of State list for the State's concerned. The law thus made under President Rule continues to be in force.

Provisions regarding Emergency are again of utmost importance. Article 352 talks about the proclamation of National Emergency. It says that when the national security of India or any part of its territory is threatened by war or external aggression or armed rebellion, the President can declare National Emergency.¹¹ (44th Amendment Act) In case of national emergency the distribution of power is suspended and constitution functions as if it is a Unitary Constitution.

Another Emergency provision is **Article 360** and talks about Financial Emergency of Centre over the country. When the Financial Emergency is in force, the distribution of the financial resources between the Centre and State can be suspended by Centre and all the financial resources can be used by Centre to meet the emergency situation.

Digressing a bit from the general federalism is the concept of Cooperative federalism, which is another class of a federal structure. This concept originated in the Australian Constitution as there existed a felt need for a change from competitive to the cooperative relationship in the working of the federal constitution. This modern view of federation regards federation as a functional arrangement rather than a mere division of powers between Centre and State. Cooperative federalism suggests that the Centre and

¹⁰ <http://www.halfmantr.com/display-polity/161-indian-federalism>

¹¹ <http://sanamurtaza.blogspot.in/2011/08/cooperative-federalism.html>

the States share a horizontal relationship and not the one in which one is over & above the other. There are three factors through which this trend is promoted, namely:

1. The exigencies of war when for national survival, national efforts take precedence over fine points of Centre-state division of powers;
2. Technological advances mean making of communication faster;
3. The emergence of the concept of the social welfare state in response to public demands for various social services involving huge outlays which the governments of the units could not meet by themselves out of their own resources.¹²

This concept helps the federal structure, with its divided jurisdiction to act in harmony. This basically promotes cooperation by minimizing tension among the various constituent governments of the federal union to pool their resources in order to achieve the desired results. In India, there are some constitutional mechanisms as also some extra-constitutional mechanisms to foster the spirit of Cooperative Federalism. The constitution makers might have deliberately provided for such features in the constitution in order to ensure the smooth working of the government.

Conclusion

Thus, it can be concluded that there are certain features of federalism which are common to both India and the USA. On the other hand, India and the USA differ in many aspects related to the federal character of their Constitution. However, both the US and the Indian Federalism despite having limitations are by and large successful. The union government appointed the Sarkaria Commission in 1983 to examine and review the working of the Indian Federalism, but this Commission didn't make any useful recommendations for structuring the Indian federalism in a proper manner. The Union government also took in a very easy approach some of the recommendations made by this commission. This shows that even though our constitution is said to be federal, but this overemphasis on the power of the federal government makes incapable of dealing effectively with socioeconomic challenges and strengthening national unity. Hence, it is appropriate to restructure Indian Federalism to make it more effective and promote the Centre- state relationship.

The Indian Constitution is a constitution sui generis. On one hand, the constitution contains features which are of high importance for a federal arrangement, at the same time it contains provisions which fight for a strong Centre, thus making it quasi-federal in nature. The fact to be appreciated here is that these dual federalism provisions were deliberately incorporated to best fit a polyglot country like India.

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¹² Surendra Singh and Satish Misra "Federalism in India: Time for a Relook?"

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