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# A Brief Legal Study in Defining the Concept of Federalism and its Characteristics

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**Abstract**

The research dealt with studying the concept of federalism by defining it jurisprudentially and legally and determining the meanings of federalism according to the concept of some constitutional writers and jurists. The research dealt with identifying the most important characteristics of the legal system of federalism by stating the independence. This research paper reached a set of results, the most important of which is the right to independence of federal jurisdictions, which distinguishes this system from the system of administrative decentralization. The paper also suggested that it is necessary to create a balance between the federal authorities and the regional authorities in order to exclude the tendency to provocation or control on the part of the center or the central government.

**Keywords:** defining, federal, member states, Jurisdictions, government.

## Introduction

The subject of federalism received an abundance of political and legal writings, not all of which were of a sober, objective nature. It can be said that research and study on the subject of federalism is not difficult or arduous given the abundance of references, legal sources, and university theses. Some define federal democracy as "the government of the elite that aims to transform the democracy of a defective political culture into a stable democracy. This tradition includes a statement to the effect that some societies Politics fosters these serious divisions and it is only a joint effort by this elite that can bring clarity to the system (Waldar, 1972).

Therefore, there are certain conditions that must be met for a successful federal democracy: The educated elite has the ability to reconcile general national interests with regional interests. It has the ability to overcome divisions and make a joint effort with the elites of competing regional cultures. To have a commitment to preserving the system and improving its cohesion and stability. Federalism is a political, legal and historical idea and theory. In terms of legal scientific application, it is an internal political constitutional system for several natural persons, and the result was the emergence of several successful applications on all continents of the world (Rabat, 1983).

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The importance of the topic of federalism is highlighted by the fact that it is one of the vital topics that the Arab Library needs at the present time and that it is a system that fulfills the requirements of many peoples and countries that consist of several nationalities or ethnicities, such as Iraq, for example, and the research problem is embodied in defining the concept of federalism and its characteristics and from the modern perspective of the national and international reality, which has differed greatly. About what happened in the past.

Therefore, in preparing this research paper, we will rely on the descriptive approach by defining the concept of federalism and explaining its characteristics, and on the analytical approach by analyzing the elements and foundations of this federalism in order to achieve the purpose of preparing this paper.

Federalism is a complex political assembly whose features must be organized and defined. By a national law so that it is not mixed with anything else and its characteristics are obscured. It may be difficult to define the boundaries of federalism. Therefore, we must clarify what is meant by the term federalism and define it as a federal system.

**Results and Discussion**

**Independence of the Federal Constitution**

The independence of the constitution of the federal state from other constitutions of the other unified state, whether it consists of provinces, states, or regions, as each state in the federal state is denied constitutional independence, meaning that each state has the right to legislate its own constitution in the manner it deems appropriate, and its drafting is undertaken by the constituent authority. Introducing amendments to this constitution. The state also has its own legislative, executive, and judicial system that differs from what exists in another state within the federal state, since the federal union is an internal legal organization, it is established according to the constitution. The constitution of the federal union usually includes the division of powers between the general government and the member regional governments, which requires that this division be precise, fixed, and not subject to disagreement and ambiguity when applied in practice and when governments exercise their powers. It is necessary for this constitution to be in writing, we have no knowledge of any contemporary federalism without a written constitution. Indeed, we find that some of these constitutions have elaborated on the details of the constitutional organization, including the Soviet constitutions issued in 1936 and 1977 and the German Federal Constitution of 1949, the Yugoslav Constitution issued in 1963 and the Indian Constitution issued in 1950. Since the emergence of the first modern federalism in the United States of America in 1787, it was the result of written constitutions (Omar, 2005).

**The Supremacy (priority) of the Federal Constitution**

The constitution in general is the set of main legal rules that determine the status of the state, shows the form of government, and organizes the various authorities in it, in terms of composition and jurisdiction, with an explanation of the extent of the relationship between them, and the position of individuals towards them, and determines the rights and freedoms and duties of the individual, and thus The rules stipulated in the Constitution are considered the first source of legitimacy, and they are the highest legal rules in the state, as in terms of their importance they come at the top of the laws in the state, and other legal rules must be consistent in form and content with the constitutional rules (Helmy, 1964).

The principle of the supremacy of the constitution is one of the recognized principles in constitutional law, whether stipulated in the constitution or not. This supremacy is of two types: substantive (material) supremacy and formal supremacy, as all constitutions of all kinds, whether written or customary, flexible or rigid, enjoy substantive supremacy. The constitutional rules indicate the method of exercising power in the state and determine the philosophy and ideological basis on which the political, economic and social system of the state is based (Laila & Al-Ghazal, 1982).

The principle of the substantive supremacy of the constitution results in several important consequences, including that the constitutional rules are binding on all state bodies and that any violation of these rules does not have any legal effect because it violates the principle of legality, which means that ordinary laws issued by the legislative authority must be respected and adhered to, and the necessity of those laws being consistent with the constitutional texts. The formal supremacy of the constitution is achieved if the procedures followed in amending it differ from the procedures for amending the ordinary law. These procedures are more difficult and more restrictive than those followed in amending the ordinary law. On this basis, formal supremacy is only achieved with regard to rigid constitutions (Al-Sheiha, 1982).

As for flexible constitutions, they only enjoy substantive supremacy, without formal supremacy. The federal constitution must be the supreme law in the country. This means, as the jurist Wheare says, that the terms of the agreement that establishes the general government and the regional governments and distributes powers between them must be binding on each government. Federation and regional governments, if it is necessary for the government of the Union and the government of the regions to be consistent with each other, then none of them must be from a position that can invalidate the texts of the agreement regarding the powers and position that each of them enjoys and that to the extent that this agreement regulates the relations of those governments and the distribution of

powers among them It must be supreme (Dicey, 1962, p. 144) However, among other matters that do not directly or indirectly affect the mutual relations and the status of the federal government and the regional governments, the supremacy of the constitution is not necessary (Radwan, 1996).

The principle of federal constitutional supremacy has been applied in many different cases, such as Article VI of the American Constitution of 1787, which stipulates that this Constitution and the laws of the United States of America that are issued based on it must be the supreme law of the land and that judges in any state are bound by it. Likewise, the Swiss Constitution received less emphasis because the laws issued by the Federal Legislative Assembly are generally treated as legitimate, but this must be interpreted to mean that the said Assembly has a higher or superior legislative authority than the Constitution because it cannot amend the Constitution (Al-Sheiha, 1982).

**The Stagnation of the Federal Constitution**

We must begin by defining a rigid constitution and distinguishing it from a flexible constitution, and then explain the nature of rigidity, as constitutions are divided in terms of the procedures for amending them followed into rigid constitutions and flexible constitutions. A rigid constitution is a constitution that requires amending or abolishing its provisions special procedures and restrictions that are more severe than the procedures of ordinary legislation. As for the constitution Flexible laws are amended or repealed by the same procedures necessary to amend regular laws (Laila & Al-Ghazal, 1982).

The importance of this division appears when talking about the Constitution's oversight of the laws, as there is no need for constitutional oversight. There is a legislative authority that sets the ordinary law. As for flexible constitutions, there is one authority that has the right to amend the ordinary laws, and there is no room for disagreement between two authorities over it. The flexible constitution has the advantage of keeping pace with development and avoiding... Disadvantages of violence resulting from an attempt to change a certain constitutional rule that does not fit, for example (Radwan, 1996).

As for a rigid constitution, it is difficult to amend its rules, and thus it guarantees a special status among the people, as its provisions have a degree of consistency and stability and are in themselves a factor in obeying them. Therefore, the federal constitution must be rigid because this constitution is responsible for defining the powers of both the Union government and the governments of the member states, and giving room to amend this constitution through the normal methods followed in most member states of the unified states would threaten and affect the competences, powers and independence of the

member states with danger and instability. It may also lead to diminishing its entity. To prevent this, the constitution must have a degree of consistency and stability. This can be achieved in practice by not limiting the authority to amend it individually and independently to the Union government or to the governments of the member states (Omar, 2005).

Some go further that the constitution must either be fixed or subject to change only by a higher body or above the ordinary legislative bodies, whether federal or state legislatures. Others also say that it is essential for the federal government to entrust the power to amend the Constitution, at least to the extent that it relates to the terms and provisions of the Constitution that regulate the positions and powers of the central government and the member governments, either to the federal government or to the regional governments in an exclusive and unilateral manner (Rabat, 1983).

However, if it is assigned individually to any of the parties, this may pave the way for diminishing the powers of the other party. It does not matter from a logical standpoint where the authority to amend the constitution is placed, but it is proven and reasonable in practice to involve both the federal government and the regional governments, either through their governments or their peoples. The United States has embodied this principle in a completely accurate way, as constitutional amendments are proposed here with the approval of a two-thirds majority of both houses of Congress, or by a conference called by Congress at the request of the legislative bodies in two-thirds of the states. Constitutional amendments become effective when they are ratified by the legislative bodies in three-quarters of the states (Waldar, 1972).

The American Constitution also stipulates that no amendments may be made within the boundaries of existing states except with the approval of the legislative bodies of the designated states and Congress. As for Switzerland, a proposal for a constitutional amendment is presented by the federal legislative authority, and in some cases by one of the two chambers, or by 50,000 fifty thousand citizens. Whatever the manner in which these amendments are presented, they are not effective unless they are subject to a general referendum unless they are approved by. The majority of voters in the country and the majority of voters in the majority of Swiss cantons (Al-Sheiha, 1982).

In Australia, constitutional amendments are made by both chambers of the federal legislative authority, or in cases by one of the two chambers, by an absolute majority. The amendments are subject to a popular referendum and must obtain the approval of a majority of voters in the country and a majority of voters in the majority of Australian states (Rabat, 1983).

Some constitutions may stipulate that states must participate in amending the constitution, whether in terms of granting them the right to propose an amendment, or the right to ratify the proposed amendment, and states may have these two rights together, as is the case in the United States of America.

As for federal Iraq, the Constitution granted the right to propose an amendment to the President of the Republic, the Council of Ministers together, or (1/5) of the members of the House of Representatives. It would have been more appropriate to grant this right also to a certain number of regions, or governorates not included in a region. On the one hand, On the other hand, the Iraqi Constitution was right when it prohibited amending the powers granted to the regions - which do not fall within the exclusive powers of the federal authority - except after the approval of the legislative authority of that region, and the approval of the majority of its residents through a general referendum (Al-Sheiha, 1982).

We conclude from all of this that constitutional deadlock is a result of the supremacy of the constitution. If the constitution is the highest rule in the state, then this supreme rule must be affected by a change or amendment that can only be carried out by another authority that differs from the normal authorities, by following special and specific procedures or formalities.

**Division of Powers between the Union Government and the Governments of Member States**

What distinguishes the federal system is that the Constitution stipulates the division of powers and competencies between the federal government and the governments of the member states. This is considered the most important issue stipulated in the federal constitution. Rather, this feature is considered the essence of this constitution, and this feature is the most important thing that distinguishes the federal union from administrative decentralized systems in The unified state, where the powers and powers of the decentralized regions of the unified state are not stipulated in the constitution, but rather are delegated by the central authority through ordinary laws, and the difference between the federal states in the distribution of powers is not due only to legal considerations as much as it is due to political circumstances and factors or their political and practical background, each federal state has its own political circumstances and political background that surrounded it at the emergence of the union and how it emerged. If the federal state arises from the agreement of independent states to join each other, this will lead to a narrowing of the powers of the union state. Independent states in the union are usually keen to retain the largest share of independence and powers. It

does not accept many concessions in the field of its independence, and it cedes the least possible amount of necessary powers to the Union State (Al-Bakri, 2011).

In contrast to this, in the event that the federal state emerges from the disintegration of a unified state, then the greatest amount of powers are reserved for the federal government because it had previously combined in its hands all those powers. Whatever the background to the emergence of federal unions, the method of distributing powers between the Union government and the governments of member states does not deviate from the following three methods: -

**First Method:**

According to this method, the Federal Federal Constitution defines the powers and powers of the Union government exclusively, and everything that is not stipulated in the Federal Federal Constitution, i.e. the established powers, Residuary Power, is the jurisdiction of the member states. The United States of America, Switzerland, Australia, Mexico, Argentina, the Soviet Union, and the State Administration Law have adopted this method. Iraqi Government for the year (2004), which stipulates that "all powers do not belong exclusively to the Iraqi Transitional Government and may be exercised by the governments of the region and governorates...".

Likewise, the Permanent Iraqi Constitution of 2005 stipulates, "Everything not stipulated in the exclusive powers of the federal authorities shall be the authority of the regions and governorates not organized in the region, and other powers shared between the federal government and the regions shall have priority over the law of the regions and governorates not organized in the region in a state of a dispute between them". We support this method because it strengthens the powers of state or regional governments at the expense of the union's powers (Al-Zibari, 2009).

**Second Method:**

This method, unlike the first method, requires limiting the powers of the governments of the member regions or states and leaving what is not stipulated, i.e. the remaining powers of the Union government. It follows that the jurisdiction of the state governments is the exception and the Union government is considered the origin (Laila, 1968, p. 132) and this is criticized. The method is that it leads to strengthening the position of the union state, and if the use of this method is exaggerated, it may ultimately lead to the transformation of the federal state into a unified state. Therefore, this method received lukewarm acceptance and was adopted by the Canadian Constitution of 1876, as well as the Constitution of Venezuela issued in 1953 (Asfour, 1954).

**Third Method:**

According to this method, the Federal Constitution defines the powers of each of the Union government and the governments of the member regions or states, exclusively for each of them. This method is faulted in that the legislator, no matter how precise and broad-minded, cannot limit all the powers that are given and granted. For both the Union government and the governments of the member regions or states, Germany and India have taken this approach, as new powers appear that were not stipulated in the Constitution. The problem then arises of determining who can exercise them, and this requires the establishment of a specific body for the purpose of determining jurisdiction. In matters not mentioned in the constitution (Al-Bakri, 2011).

Also, this restriction may in the future become inconsistent with the general interest of the country and the emergence of future constitutional disputes if circumstances arise and develop such that some of the issues within the jurisdiction of the states in the Federal Constitution become issues of common national importance that require inclusion within the jurisdiction of the Union State (Asfour, 1954).

Here the problem arises of resolving the conflict between the authorities of the regions or states and the authorities of the Union. This problem can be solved in one of two ways:

1- By resorting to the Federal Constitutional Court or using.

2- The right to self-determination.

**The Existence of a Federal Constitutional Court**

The federal constitution includes the distribution of powers and competencies between the federal government and the regional governments, which necessitates the need for each of them to exercise its powers and competencies specified under the provisions of the constitution and not to overstep the powers of others. On the practical side, this will lead to the emergence of constitutional disputes, as multiple bodies are responsible for legislating laws - the legislative authority. Federalism, and the legislative authorities in the states - and given the frequent state interference in regulating the affairs of citizens by issuing many laws, this may lead to the emergence of laws that explicitly or implicitly violate the federal constitution, so the need for a constitutional supreme court - becomes an urgent necessity in the federal state where it will carry out main tasks:

The first: is to settle disputes that arise between the federal government and state governments. The second is to prevent regional and federal legislative authorities from enacting laws that contradict the federal constitution. The third: The Constitutional Court, within the limits of exercising its powers, interprets the

constitution, provided that this is necessary to decide the constitutional issue before it, and is observed in the field of judicial oversight, where the Federal Supreme Court is considered the final or supreme interpreter of the Constitution. Fourth: It settles disputes that arise in the region, state, or member state resulting from the application of laws issued by the federal authorities (within the limits of the exclusive powers granted by the Constitution to the federal authority) when they are applied in the regions, and the governorates that are not organized in the region. As well as decisions, regulations and instructions issued in accordance with or in accordance with the requirements of federal laws (Laila, 1968).

It must be noted here that the criterion of the federal system does not lie in the mere division of powers between the federal government and the regional governments only, but rather that the application and change of this division must not be entrusted either to the federal government alone or to the regional governments alone, based on these considerations and starting points stemming from the federal principle and for the purpose of To embody the wisdom desired from its application, the need calls for a neutral constitutional institution with broad legal capabilities and powers that guarantee its independence to decide such disputes. The Supreme Constitutional Court undertakes the task of interpreting the provisions of the Federal Constitution and resolving constitutional disputes that arise from practical application between the Union government and the governments of member states or between One or more governments and other Member States (Shafiq, 1981).

Ray goes further by saying that the Supreme Court, and he is talking about the US Supreme Court, was not limited to its mission only to resolving the legal problems between the federal government and the states, which appear in the practical application of the Constitution, but rather that the presence of this court is considered one of the basic factors in developing the relationship between the two parties and to devise new provisions, especially in cases not addressed in the Constitution (Latif, 1976).

Thus, the mission of the Supreme Constitutional Court goes in two directions:

1- Resolving disputes related to powers and competencies that may arise between the central government and regional governments or between one regional government and another.

2- Preventing regional legislative authorities from enacting legislation that violates the federal constitution.

3- Interpreting ambiguous constitutional texts, provided that the constitutional issue is presented to it.

4- It settles disputes that arise from the application of federal decisions in the region, state, or member state.

**Dual Legislative Authority in the Federal State**

The federal state has a main constitution that applies to all its regions. This constitution is usually the one that restricts the state constitutions, as it contains the broad outlines of the federal state system that the states may not violate or deviate from. The federal state is characterized by having a single international personality, and the federal government enjoys external sovereignty without other regions of the federal state. The two chambers enact laws in accordance with the powers granted by the Federal Constitution (Al-Zibari, 2009).

There is also one executive authority that administers in one of three methods, either the direct, indirect, or mixed administration method through which federal laws are applied. It is noted here that the two-chamber method is compatible with the nature of the political legal formation of the federal state. It is called the Upper House, and it represents the member cantons, states, or provinces. In the Union, while the Lower House, or the People's Assembly, or the House of Representatives, which represents all the people of the country and according to the proportion of the population, claims that the method of electing the Lower House leads to a difference in the number of representatives of one member state from another (Al-Chalabi, 1999).

Here we find that the member states of the Union are mostly represented equally in the Supreme Council. This dual organization came to justify the concerns of the small states with a sparse population density, which are represented by a small number of members from the House of Representatives, and which fear becoming a victim of the dominance of the large states. This legislative arrangement also it can provide an appropriate opportunity for small member states to effectively highlight their interests and ideas in situations where regional interests differ on foreign policy issues, economic matters and other topics (Mawlud, 2000).

Some object to considering dual legislative authority as an essential distinguishing feature of the federal state, saying that there are some federal states such as Pakistan and Cameroon that do not lead to the establishment of dual legislative authority, and the second chamber still does not actually exist in Yugoslavia. This objection cannot be accepted because the vast majority of federal states and all ancient federations adopted the duality of legislative authority on the one hand (Riker, 2011).

On the other hand, the wisdom of adopting this system in the federal state is to achieve the principle of participation of member states in the federal

authorities. This principle does not exist in the unified states that resorted to the two-chamber system. The permanent Iraqi constitution of 2005 followed the parliamentary system, as Article 1 of the constitution stipulates The Permanent Declaration of 2005 stipulates that "the Republic of Iraq is one independent, fully sovereign state with a democratic republican, representative (parliamentary) system of government, and this constitution is a guarantor of the unity of Iraq." (Hamawandi, 1990).

**The Inability of Member States to Nullify and Secede**

One of the basic issues that raises questions in the federal system is whether member states have the right to nullify federal laws or decide unilaterally to secede from the union. The roots of the issue of nullifying federal laws go back to the United States, and in particular to the precedent taken by the state of South Carolina in 1832 by abolishing some federal laws related to tariffs, under the pretext that Congress had exceeded its authority stipulated in the Federal Constitution, which paved the way for any state to consider those laws null and void. This was met with the conflict between the federal authorities on the one hand and the authorities of the state of South Carolina and the rest of the southern states on the other hand received a strong echo from constitutional jurists specializing in political science on both sides (Nasr, 1975).

The Supreme Constitutional Court issued its decisive decision in 1868 in this area, according to the Constitution: "The union is considered inseparable and that it is composed of inseparable states, and that the only way in which the states can secede or the union can separate one The mandates are through a draft to amend the Constitution, and to the extent it concerns expulsion, the approval of the relevant state constitutes its right to an equal vote in the Senate (Mitri, 2017).

The jurist Wheare refuses to confirm that unilateral secession is contrary to or contradictory to the federal principle. He asserts that nullification is contrary to federalism because nullification leads to the Union government becoming an agent for the governments of the member states, while secession does not lead to that. Wheare warns of the civil risks resulting from adopting the right of secession or expulsion, including that it leads to the weakness of the government because it places a weapon of political coercion in the hands of the government, which may use it to achieve its goals. The weak regional government may be threatened with expulsion if it does not respond to the demands of the strong federal government, and that the latter It may be weakened and coerced by the threat of secession by disgruntled or fallen regional governments (Al-Dosky, 2010).

The Universal Declaration of Human Rights states in articles 8 and 10 of the Declaration that everyone has the right to have recourse to national courts for

redress and to have his case heard by independent and impartial courts (Al Wahshat et al., 2024)

We agree with Dr. Muhammad Omar Mouloud that nullification is inconsistent with the federal system and with the principle of sovereignty in the federal state, but secession is not considered such. However, we believe that it is necessary to regulate the conditions for using the right of secession in the federal constitution to achieve balance and preserve the rights of both parties, provided that it does not this right is permitted to be used by member state governments, however, and whenever they wish (Al-Bakri, 2011).

**Conclusion**

It has been proven through practical application that the federal system is the best for multi-national states as well as single-national states that suffer from political, economic, and social crises. Deepening the concept of the federal state, defining its nature and essence, and clarifying its powers is evidence of the success and operation of the federal system in the world.

Independence in federal jurisdictions is what distinguishes this system from administrative decentralization, as they are jurisdictions that cannot be withdrawn from the hands of the administrative unit without its approval, as undertaking such action on the part of the central authority constitutes a violation of the founding contract.

It is necessary for the state that operates under the federal system to reconcile and harmonize the essence of the union in federalism with the essence of autonomy in order to ensure the success of the federal experiment. The necessity of creating a balance between the federal authorities and the regional authorities in order to eliminate the tendency of provocation or control on the part of the center or the central government. This requires increasing awareness and political and social education, whether at the level of political leaders or at the popular level.

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