

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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Nature of Federalism in India: An Overview

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ABSTRACT

The basic feature of “Federalism” consists in the division of powers between the Union and the Constituting units as well as the local governing bodies functioning within the units. Thus, decentralization power is the basic aspect of federation. The Constitution of India possesses the basic features of a federal system but at the same time unlike other federations of the world, the federal system in India is tilted towards the Centre. Along with this, a considerable amount of power and freedom are accorded to the States their allotted domain. The word “Federation” is nowhere mentioned in the Constitution of India and the federation existing in India is not the result of any agreement between the States and the States have no right to secede from the Union. It is an indestructible Union of destructible units and the Union Parliament is empowered under the Constitution to create new States by separating a territory from existing States, merge two or more states and alter the boundaries or names of the States. But India is a cradle of diverse social, cultural, religious and geographical conditions and so it is not possible for the Union Government to single handedly make laws for all the States keeping in mind their peculiar needs. So the States are also empowered to make laws to suit their social, cultural and geographical needs. In India the federal structure changes into unitary structure to deal with national crisis and to curb separatist tendencies. But at the same time various efforts are also being made to increase cooperation between the Union and the States to make the federal structure function smoothly. Thus, it can be said that India is a cooperative or collaborative federation with a strong Centre to uphold the sovereignty, unity and integrity of the nation.

Keywords: *Federalism, Constitution, Centralizing tendency, Sovereignty, cooperative federalism.*

I. INTRODUCTION

The word “federation” is a derivation from the Latin term “foedus” meaning treaties or agreement.² A Federation may be described as a system of governance which is characterised by the presence of two sets of government- one is the Federal Government at the Centre and the other is the regional governments of the various units composing the Federation. In a federal

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² M. Asad Malik , *Changing Dimension of Federalism in India: An Appraisal*, 2 ILI Law Review, 85, 87(2019)

system of government, the power of governance is bifurcated between the federal and the regional governments. It is based on democratic principles and traditions. Federation is different from confederation which is characterised by the subordination of the central government to the regional government. It is also different from the unitary government where the Central Government or the federal government is superior and powerful while the regional governments are mere subordinate administrative units of the federal government. The most ideal and classic example of federalism can be visualised in the form of United States of America under the Constitution of 1787. Under this constitution the two set of Government were co-equal and supreme. Apart from United States, other examples of federal states are Brazil, Switzerland, Germany, Australia and Argentina. Some Political Scientist even regard the European Union as the as the pioneering example of federalism in a multi-state setting, in a concept termed the federal union of states.³

According to some political scientist the Indian Constitution is also federal. It may be mentioned here that there is a difference of opinion among the constitutional experts about the nature of the Indian Constitution. According to some it is quasi-federal in nature having more unitary than federal features.⁴ While others opine that it is a federal constitution with a special and new characteristics enabling itself to cope with emergent situation in national interest.⁵ Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, observed “I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces(States) nonetheless, it is a Federal Constitution”.⁶

The present federal system of India has its background in the Government of India Act, 1919 and the Government of India Act, 1935 and the Act of 1919 made provisions for the first time for the separation of Central and Provincial subjects making a major shift in the unitary system of Government prevailing at that time.⁷ The Government of India Act, 1935 provided that the Indian Federal State was to consist of British India Provinces and the princely states and it was to be a centralised federation with considerable amount of autonomy for the provinces.⁸ This system was adopted into the Constituion of India, 1950.

In order to understand the true nature of the Constitution of India, it is very essential to analyse

³ John Law, *How Can We Define Federalism?*, 5(3) Perspectives on Federalism, 88, 104(2013)

⁴ J.N. Pandey, *Constitutional Law of India* 17 (Central Law Agency, Allahabad, 52nd ed.2015)

⁵ Ibid.

⁶ Constituent Assembly Debate, Vol. 4,p. 133, Constituent Assembly Debate, Vol. 5, pp.33-36

⁷ Dr. Mukesh Kumar, *Nature of Indian Federalism: An analysis of Historical Basis and Problems*,7(1) IJHSSI, 42, 43(2018)

⁸ Ibid.

the features of a Federal Constitution and to compare those features with our Constitution.

II. FEATURES OF A FEDERAL CONSTITUTION

Prof. K.C. observes that the concept of federalism means the process of division of powers whereby both the federal as well as the regional governments are co-ordinate and independent within their domain without any one being subordinate to the other. Thus, federal principle can be said to be the system which is characterised by the presence of co-ordinate and co-equal authorities which are not subordinate to each other.⁹

(A) Two sets of Government or Dual Polity

A Federation is characterised by the presence of two sets of Government.

In India also there exists two sets of Government- the Union Government at the Centre and the various State Governments at the periphery level. The structural organisation, powers and limits of both the sets of Government is well defined by the Constitution.

(B) Distribution of Powers

In a federal Constitution there exists a clear-cut division of powers between the National or the federal Government and the regional or the State Governments whereby the matters of national importance requiring a uniform policy are assigned to the federal government and those of regional or local importance are assigned to the regional governments.

In India also there is a clear division of powers between the Centre and the States. The Seventh Schedule of the Constitution of India contains the Lists for the division of powers between Centre and the States to avoid conflict of jurisdiction. The Seventh Schedule consists of three lists-

1. The Union Lists

The Union List consists of 97 subjects and the Union Government has exclusive jurisdiction to legislate over those subjects. These are subjects of national importance. Example- Defence of India, Naval, military and air forces and other armed forces of India, Foreign Affairs etc.

2. The State Lists

The State List consists of 66 subjects and the State Governments have exclusive jurisdiction to make laws on the subjects enlisted in the State List. Example: Prisons, Local Government, Public Health and sanitation, Agriculture etc.

⁹ Supra note 4

3. Concurrent List: The Concurrent List consists of 47 subjects. Both Centre and the States have jurisdiction to make legislate on the subjects incorporated in the Concurrent List. Example: Criminal law, Criminal Procedure, Family and Divorce, Bankruptcy and insolvency, Forest, Contempt of court etc.

(C) Supremacy of Constitution

Another essential characteristic of a Federal State is the supremacy of the Constitution and all organs of the government whether at the Centre or at the State derives its powers and authority from the Constitution and is subordinate and controlled by Constitution.¹⁰ Thus it can be said that the Constitution is the supreme law of the land in a Federal State.

In India also, the Constitution is the supreme law of the land. All organs of the Government be it the executive, legislature or the judiciary is subordinate to the Constitution. Any law made by the executive or the legislature which violates the Constitution will be unconstitutional and will not have any effect. Thus, the Constitution is the source of all power in India.

(D) A Written Constitution

A federation is characterised by a written constitution. It may be mentioned here that complicated contracts constitute the basic foundations of a federal constitution and unless such a constitution is written it would be practically impossible to maintain the supremacy of the constitution and would generate conflicts between the various governments constituting the federation.¹¹

India also has a written constitution which is regarded as the longest written constitution in the world. It consists of 25 Parts, 395 Articles and 12 Schedules.

(E) Rigidity

An essential feature of a written constitution is its rigidity which means that the procedure of its amendment must be rigid. This feature is necessary to maintain the supremacy of the constitution. Since the constitution of a country is a permanent document it must be protected against unwarranted amendments either by the Union or the regional governments. So the procedure of its amendment must necessarily rigid.

In India, the procedure for amendment of the Constitution is not extremely flexible and is incorporated in Article 368 of the Constitution of India. Certain provisions of the Constitution can only be amended by a majority of the total membership of both Houses of the Parliament

¹⁰ A.V.Dicey, *An Introduction to the Study of the Law of the Constitution*, 154, (Palgrave Macmillan, ed. 101985)

¹¹ *Supra* note 4 at 18

as well as by a majority of not less than 2/3 rd of the members of that House present and voting.¹² Moreover there are certain other provisions which the special majority as mentioned above as well as ratification by not less than ½ of the States like Election of President of India (Article 54 and 55), Article 73 and 162, Article 368 itself etc.

(F) Independent and Impartial Judiciary

The basic feature of a federation is division of powers between the Union and the regional units and hence there must be an impartial and independent judiciary to maintain the sanctity of the Constitution as well as to maintain the balance between the Union and the States and to resolve conflicts as and when it arises.

The Constitution of India establishes a Supreme Court which acts as the guardian of the Constitution as well as the protector of the rights and freedoms of the people. It is also the interpreter of the Constitution and has the authority to declare any law passed by the executive or the legislature which violates the constitutional provisions as null and void. The judges of the Supreme Court are appointed by a collegium consisting of the Chief Justice of India and four other senior most judges of the Apex Court. This system has been made to maintain the independence of the judiciary as well as to prevent the executive from interfering in the functioning of the judiciary.

Thus, it can be seen that India possesses all the basic features of a federal state. But if we observe carefully we also find certain features which are not in conformity with the federal principles. It is in this context that some scholars opine that the Indian Constitution is not truly federal because there are certain constitutional provisions which empower the union Government to interfere in the domain of the State Governments making the States subordinate to the Centre. This centralising tendency is against the basic spirit of federalism. In view of such features Prof. K.C. Wheare has characterised Indian Constitution as “Quasi-Federal.” Jennings has described Indian Constitution as, “a federation with a strong centralising tendency.”¹³

Supreme Court of India has also observed in the landmark case, that Indian Constitution is not truly federal in *State of West Bengal v. Union of India*.¹⁴ It was the first historic case to deal with the concept of federalism in India. In this case, the validity of Coal Bearing Areas (Acquisition and Development) was challenged which empowered the Centre to compulsorily

¹² Supra note 4 at 822.

¹³ Sir Ivor Jennings, *Some Characteristics of the Indian Constitution*, 1 (Oxford University Press, 1953).

¹⁴ *State of West Bengal v. Union of India* AIR 1963 SC 1241

acquire certain lands belonging to the State of West Bengal. It was contended by the State that the States were sovereign within their respective spheres. But the Court held that the Centre was empowered to acquire the land and that the Union Act was constitutional. The Court held that the India was not an absolute federal State.

Now in order to truly understand the nature of the Indian Constitution, it is necessary to study those features which are not in conformity with the federal principles or those features which are unitary in nature. Moreover the word “Federation” has nowhere been mentioned in the Constitution of India. Article 1 of the Indian Constitution mentions India as a “union of states.” The federation in India is not the result of any agreement among the States and hence the States have no right to secede from the Union. These non-federal or unitary features of the Indian Constitution are:-

i. Procedure of appointment and position of the Governors in the States

Article 155 of the Constitution of India provides that the Governor of a State who is the constitutional head of the State shall be appointed by the President of India. The Governor is answerable to the President in the performance of his duties. Although the Governor of a State is appointed for a tenure of five years as per Article 156(3) but this is subject to the provisions contained in Article 156 (1) which says that the Governor shall stay in office during the pleasure of the President of India. The Governor is expected to act as an agent of the Centre and is required to submit a report when in his opinion the Government of the State cannot be carried in accordance with the Constitutional provisions and this empowers the Union Government to impose State Emergency under Article 356 of the Constitution. Thus, it is well within the discretion of the presidential power to dismiss the Governor at will when the Governor does not submit to the whims and caprices of the Union Government. It has become a uniform trend for the party in power at the centre to dismiss the Governors appointed by the previous Government and appoint their own Governors. This was seen during the tenure of the UPA Government as well as that of NDA Government. In the landmark and historic case, *B.P.Singhal v. Union of India*,¹⁵ a five judge bench of the Supreme Court hearing a Public Interest Litigation (PIL) which challenged the arbitrary removal of the Governors of Gujarat, Haryana, U.P., and Goa held such removal as illegal and that they be restored to their post to complete the remaining tenure of five years. The Court held that the Governors cannot be removed merely by reason of disagreement with the policies and ideologies of the Centre or

¹⁵ AIR 2010 6 SCC 331.

has lost its confidence.¹⁶

ii. **Reservation of State Bills for Presidential assent**

It may also be mentioned here that under Articles 200 and 288(2) of the Indian Constitution, the Governor of a State shall reserve certain State Bills for the consideration of the President who has the power to veto those State Bills.

Thus, it can be seen that the procedure for appointment of the Governors and the process of reservation of bills passed by the State legislature by the Governor for Presidential assent are basically a unitary feature which makes the Union all powerful and places the states in a subordinate position.

iii. **Single Citizenship**

In other Federations like U.S.A., the citizens enjoy double citizenship i.e. first they are the citizens of their States or Provinces and then they are the citizens of their nation. But in India, there is single citizenship. All citizens are citizens of India. Part II of the Constitution of India consisting of Articles 5-11 contains elaborate provisions relating to citizenship in India.

iv. **Unequal division of power**

Although there is division of powers between the Union and the States in India, this division is not equal and more powers are given to the Union. Unlike other federations, residuary powers are given to the Centre. In this respect India follows the Canadian model of federation. Moreover any law made by the Union must be followed by the States. Article 257¹⁷ provides various circumstances whereby the Centre can exercise control over the States like Centre's power to give directions to the States and the requirement that the States shall exercise their

¹⁶ Supra note 4 at 578.

¹⁷ Article 257 of the Constitution of India - Control of the Union over States in certain cases:

(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance: Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

executive power in such a way as not to obstruct the executive powers of the Union.

v. Unified or Integrated Judicial system

India has a unified and integrated judicial system in the country and the Hon'ble Supreme Court is the apex court of India and all other courts in the country are subordinate to the Supreme Court. The Supreme Court is a court of record and has the power to punish for its contempt.¹⁸ The laws made by the Supreme Court are binding on all other courts in India.¹⁹

vi. Power of the Parliament to legislate in the national interest

Under Article 249 the Parliament is empowered to make laws on subjects enumerated in the State List if the Rajya Sabha passes a resolution by 2/3rd majority that such a law is necessary for national interest.

vii. Power of the Parliament to form new States and alter boundaries of existing States

Under Article 3 of the Constitution of India, the Parliament by a simple majority may form new states by separating it from another state, alter the boundaries or names of the existing states and merge two or more states. The Constitution only makes formal obligation for the Centre to consult the concerned State when taking any such step. An example for this could be found when the State of Telengana was carved out of Andhra Pradesh and this move was vehemently opposed by a resolution in the Andhra Pradesh State Legislative Assembly. Similarly other States were also formed such as Chhattisgarh, Uttarkhand and Jharkhand. Even Uttaranchal was renamed as Uttarakhand in 2007. The abolition of Article 370 by the NDA Government on August 5, 2019 and re-organisation of Jammu & Kashmir into an Union Territory has attracted the focus of the nation upon Article 3 of the Constitution. This brings to our mind the famous statement made by the Chairman of the Drafting Committee of the Indian Constitution, Dr. B.R. Ambedkar who observed, "India is an indestructible union of destructible states."

viii. Emergency Provisions

Whenever a proclamation of emergency is made under article 352 the normal distribution of power is altered and federal structure changes into a unitary structure. During emergency the Parliament becomes empowered to make laws on subjects mentioned in the State Lists and the Centre becomes empowered to give directions to any State as to the manner in which the executive power of the concerned State is to be exercised by it. Moreover the President by

¹⁸ Article 129 of the Constitution of India, "The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

¹⁹ Article 141, "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

order may direct for direct for the alteration or modification of the provision under Articles 278-279 which deals with the distribution of revenues between Union and the States. Similarly if the President of India is satisfied upon the report of the Governor of a State that there is a breakdown of constitutional machineries in the concerned State and it cannot be carried on in accordance with the constitutional provision, the President is empowered to impose State Emergency under Article 356 of the Constitution. This brings the downfall of a constitutionally elected State Government and Legislature of the State is dissolved and President assumes all the functions of the State Government. Ever since the commencement of the Constitution of India, Article 356 has been imposed more than hundred times and mostly it was politically misused. It has also been seen that the former Prime Minister of India Mrs. Indira Gandhi imposed President's Rule under Article 356 in several States for about 39 times during the period 1966-1977 and similar practice was also followed by the Janata Party led Government at the centre in 1977 to dismiss nine Congress ruled State Governments. President's Rule under Article 356 was imposed 27 times between 1991 and 2010. It was only used nine times in 1991 and 1992. Following the Supreme Court's seminal decision in the *S.R. Bommai case*²⁰ in 1994, the indiscriminate usage of Article 356 was substantially reduced. It was used five times between 2011 and 2016, including five times after the BJP took power in 2014.

III. CO-OPERATIVE FEDERALISM IN INDIA

Thus after analysing both the federal as well as unitary features of the Indian Constitution it can be seen that the Constitution of India is neither truly federal nor truly unitary. That is why some scholars termed it as "federal in form but unitary in spirit." At the same time it must be mentioned here that co-operation between the Union and the States is key to the success on any federal structure and in India too there are many instrumentalities which has been established to boost cooperation between the Union and the States. They may be mentioned as follows:-

(A) 7th Schedule

The 7th Schedule makes clear cut division of power between the Union and the States to avoid friction and to make the functioning of federalism smooth in India.

(B) Integrated Judicial System

The Indian Constitution establishes an integrated judicial system with Supreme Court at the Apex to check the constitutionality of both Central and State laws as well as to resolve conflicts between Union and States under its original jurisdiction.

²⁰ S.R. Bommai v. Union of India (1994) 3 SCC 1

(C) All India Services

The provisions incorporated in Article 312 to establish All India Services is another unifying instrument for cooperative federalism in the Country.

(D) Inter-State Council

Under Article 263 the President of India is empowered to establish Inter-State Council to boost cooperation between the Union and the States. It has been established to investigate and discuss subjects of common interest between the Union and the States.

(E) Full Faith and Credit Clause

Article 261 of the Constitution provides that all the public Acts, records and judicial proceedings of the Union and the States shall be accorded full credit throughout the territory of India.²¹

(F) NITI AYOOG

The replacement of Planning Commission and the formation of NITI AYOOG (National Institution for Transforming India) by the NDA led Narendra Modi Government is itself an initiative to boost and improve cooperation between the Union and the States, to provide best technical advice to both the Union and the States and to ingrain best practices and policies in the country from worldwide ensuring that India becomes an active player in the global world.

IV. COOPERATION BETWEEN THE UNION AND THE STATES DURING THE OUTBREAK OF COVID-19

During the outbreak of the pandemic COVID-19 which is still tormenting the nation causing huge casualties in terms of life of the people, there was clear evidence of cooperation between the Union and the States. Like a strong Union committed towards the protection of the life of all citizens belonging to various States, the NDA Government under the leadership of Narendra Modi imposed a countrywide lockdown under the Disaster Management Act, 2005. Even before the national lockdown by the Central Government, several States had imposed various restrictions under the Epidemic Diseases Act, 1897 to counter the pandemic. Although differences of politically motivated difference of opinion were reported between the Union and the States, the national safety was given paramount importance and the Centre assured all

²¹ Article 261 of the Constitution of India, “(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law Disputes relating to Waters

possible assistance to the State Governments and the States also followed the guidelines of the Centre.

V. COMMITTEES, RESOLUTIONS AND MEMORANDUM FORMED FOR RECOMMENDATIONS REGARDING THE CENTRE – STATE RELATIONS

The nature of the Constitution of a nation whether it is federal or unitary or quasi-federal depends upon the nature of relation between the Union and the States. No federation can function smoothly without the cooperation and assistance of the States and India is not an exception to this. In order to recommend guidelines for effecting cooperation and coordination between the Union and the States various Committees were formed such as Rajamannar Committee (1969), Anandpur Sahib Resolution (1973), Sarkaria Commission (1983) and MM Punchhi Commission (2007). These Commissions made several important recommendation for improving the centre-state relation. It was also recommended by the Administrative Reforms Commission that the Centre should not interfere in the areas which are reserved for the States. The Committee also recommended that certain criteria should be made for the exercise of the discretionary powers by the Governors of the State.

VI. CONCLUSION

The most distinguishing feature of the Constitution of India is that although federalism forms a part of the basic structure of the Constitution, it has a centralising tendency or acquires a unitary feature during the national crisis. This is primarily due to the fact that Indian federation is not the result of any agreement between the constituent States and has no right to secede from the Union and hence it requires a strong Union to protect the nation against fragmentation. Moreover the various States are unequal and divergent socially, culturally, economically as well as in many other respects so it is very essential to have a strong Centre to keep the nation unified in the interest of sovereignty, unity and integrity of the nation. But at the same time various efforts and initiatives are being continuously being made to enhance cooperative federalism in India and to give more powers to the States in their allotted areas. Since there are various diversities in different parts of the country it is not possible for the Union Government to make laws keeping in mind all these diversities. So the States should be given more powers to make laws suited to their specific needs.

On 17th June, 2018 at the NITI Aayog's Fourth Governing Council Meeting, the Prime Minister of India, Shri Narendra Modi spoke about the significance of NITI Aayog as a great instrument to enhance cooperative federalism in the country, stressing on the importance of strong centre-

state cooperation for national development and growth.²² Thus it can be said that India is a cooperative and collaborative federalism with a strong centralising tendency to uphold the sovereignty, integrity and security of the nation.

The problems and challenges facing the federal structure in our nation is not centralising tendency but over-centralisation. India is a land of multiparty politics where along with the national political parties, there exists numerous regional parties focussing on local or regional interest in States. One party may be at the centre and various other parties may be ruling the states and there may be difference in their political ideologies. Both the national as well as the various state governments should rise above narrow political gains and respecting the constitutional mandate cooperate with each other at all levels and settle all disputes amicably with unbiased and healthy discussions and conversations. The instrument of President's Rule under Article 356 should only be sparingly used as the weapon of the last resort in national interest. The State Governments should be taken into confidence by the Centre in making important decision makings for the nation. The British concept of "Doctrine of Pleasure" embodied in the Constitution needs to be reconsidered in 21st century India to give more powers and dignity to the post of Governors of the State. Efforts should be made to give the post of Governor a fixed tenure rather than leaving this constitutional post at the mercy of the pleasure of the President. The States should be given more freedom in their respective fields and at the same time the states should also rise above narrow political interest and respect the democratically elected national government and the Constitution. India is an unique union of composite States and it is undoubtedly federal with unique safeguards to for enforcing national unity and growth.²³ In fine it must be remembered that it is only through cooperation and collaboration between the Union and the States and as well as various states and local bodies that the federalism in India can function smoothly and combat various national crisis whether it be internal unrest or external aggression or the deadly pandemic COVID-19.

²² www.niti.gov.in

²³ *Supra* note 4 at 22