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An Inquiry into the Nature of Indian Federalism

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ABSTRACT

Federalism in India is unique in many ways. This paper starts with a discussion on the key elements of a federal structure. Then it briefly traces the driving forces that led to the formation of Indian federation. Next part deals with the federal features in the Indian Constitution. The paper then sets about to examine provisions of the Indian Constitution and judgments which drift away from a strictly federal system. The following part traces attempts to review and reform Indian federal system. At last, it concludes with author's observations on the nature of Indian federalism.

Keywords: *Federalism, Centre-State Relations, Constitution of India, Distribution of Power, Supreme Court of India*

I. INTRODUCTION

Federalism as a form of constitutional democracy is widely prevalent around the world. It has been defined as the principle of sharing sovereignty between central and state (or provincial) governments and is a recognized solution to the problem of organizing the territorial distribution of power.² Whether a political system is federal or not may generally be tested on the touchstones of duality of government, written constitution, supremacy and rigidity of the constitution and authority of the constitutional courts as final arbiter of the constitutional provisions.³

It is generally accepted that the foundations of polity in India were laid much before Independence. The Constituent Assembly was inclined to form a strong centre with federal features. The context is well summarised⁴ by Michael Burgess in following words:

If we identify the main driving forces that led to the creation of the federation in 1950, the following motives loom large in the mainstream literature:

¹ Author is an Advocate at SSJ Associates and Former Joint Partner at Lakshmikumaran & Sridharan, India.

² Rod Hague and Martin Harrop, *Comparative Government and Politics: An Introduction* 229-230 (Palgrave Macmillan, New York, 6th edn., 2004)

³ Bidyut Chakrabarty and Rajendra Kumar Pandey, *Indian Government and Politics* 40 (Sage, New Delhi, 2008)

⁴ Michael Burgess *Comparative Federalism: Theory and Practice* 89 (Routledge, Oxon, 2006)

1. *The interaction of the British colonial pattern of centralisation and the thinking of the Indian political leadership.*
2. *The British desire to bring together within a single constitutional system the parts of India under indirect rule – the princely states – and those under direct rule – the British provinces with representative institutions.*
3. *The British concern about communal rights and communal status between Hindus and Muslims meant that issues of states' rights were generally subordinated to the larger, more dangerous, challenge of seeking to accommodate Muslim anxieties within a united India.*
4. *The experience of partition in 1947 demonstrated the inherent dangers of separatism to those constructing the constitution and predisposed them to favour centralisation.*
5. *The goals of economic development and modernisation seemed to require a strong central authority capable of directing the economy.*
6. *The existence of a highly centralised, hegemonic mass party and the absence of a strong state and regional parties supported a centralised federal formula.*

The Constitution of India is often characterised, though not without challenge, as a federal constitution - one which provides for a hierarchy of governance, with distribution of powers between the central and the state governments. Notably, the very first article of the Constitution of India characterises India as a 'Union of States'⁵, and not merely as a 'Union'. So long as this Article stands as it is, India must have more than one State.⁶ At the same time, instead of the word 'federation', the word 'Union' was deliberately selected by the Drafting Committee of the Constituent Assembly.⁷ In this context, Dr. Ambedkar, the Chairman of the Drafting Committee, had stated that "although its Constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages. These advantages, he explained in the Constituent Assembly, were to indicate two things, viz., (a) that the Indian federation is not the result of an agreement by the units, and (b) that the component units have no freedom to secede from it.⁸

⁵ The Constitution of India, art. 1

⁶ Mahendra Pal Singh, "The Federal Scheme" in Sujit Choudhry, Madhav Khosla, et.al. (eds.) *The Oxford Handbook of the Indian Constitution* (Oxford UP, Oxford, 2016)

⁷ M.P. Jain, *Indian Constitutional Law* 27 (LexisNexis, Gurgaon, 6th edn., 2013)

⁸ D.D. Basu, *An Introduction to the Constitution of India* 51 (Lexis Nexis, New Delhi 20th edn., 2011)

II. THE FEDERAL FEATURES OF INDIAN CONSTITUTION

As discussed earlier, there ought to be some key features in a political system for it to be characterised as a federal system.

1. Dual Government

Indian Constitution establishes a dual polity⁹ as it comprises two tiers of government - a Central Government and the State Governments. The States are not empowered to have constitutions of their own. However, in the context of special geographical, demographic or other features of some of the States, there are special provisions applicable only to some specific States, which is why the term asymmetric federalism is sometimes used to describe the system. Parliament has the legislative power to alter State boundaries and the representation of the States in Parliament.

A third layer of government - the local self governments - have also been brought into the schema by the 73rd and the 74th amendments to the Constitution.

2. Distribution of Power

Under a federal arrangement the legislative and executive powers of the state are shared between the central and the regional governments. There are no general guiding principles with respect to sharing of these powers between the central and the regional governments.

(a) Legislative Competence

The Constitution of India provides that the Centre and the State both will have legislative competence¹⁰. The legislative subjects of the union and the state are numerated in the Seventh Schedule of the Constitution. Article 245 prescribes the territorial jurisdiction of the Union Parliament and the State legislatures: the former can make laws for the whole of India or any part of it, while the latter can make laws for the territory of that State or any part of it. The legislative subjects are quite exhaustively enumerated in three lists: List I—Union List; List II—State List; and List III—Concurrent List.

Article 246 of the Constitution lays down the law for the exercise of power over these subjects. Briefly, Parliament has the exclusive power to make laws on any subject included in List I, overriding the powers of the State legislatures to make law on any subject included in List II or List III. Secondly, if a subject is included in List III, Parliament has a power to make law on that subject irrespective of its inclusion in List II. Thirdly, the State legislatures

⁹ *Supra* note 5

¹⁰ *Supra* note 4, Chapter I of Part XI

have the power to make law on any subject included in List II, subject to the condition that that subject or any part of it is not included in List I or List III. The legislative subjects not listed in any of the three lists, that is, the residuary subjects¹¹, have been assigned exclusively to Parliament. For items in List III, if the State law conflicts with the law of Parliament the latter prevails over the former, though with the prior approval of the President, State law may also prevail over the law of Parliament.¹²

Parliament may make law on any subject 'for implementing any treaty, agreement or convention with any country or countries or any decision made at any international conference, association or other body'¹³. There are several other exceptions too to the distribution of power. The working of the Constitution so far, however, establishes that the primary distribution of legislative powers is the norm and the exceptions have been invoked only in limited cases¹⁴.

(b) Executive power

The executive power of the Union and States vests respectively in the President of India and the Governor of every State. The executive power of the Union extends to all those matters on which Parliament has the power to make laws, as well as to matters on which it may exercise such power by virtue of any treaty or agreement. However, the executive power of the Union does not extend to matters included in List III unless otherwise provided in the Constitution or any law of Parliament¹⁵. The executive power of the States extends to matters on which State legislatures have the power to make laws, subject to the condition that on matters in List III it is subject to the Union's power, as mentioned above¹⁶.

3. Supremacy of the Constitution

A common thread among federal systems is the presence of a written constitution that is subject to specific and somewhat rigid amendment procedures. Among other things, the federal principles of dual government and role of an independent judiciary are firmed up in this supreme law of the land. Burgess explains¹⁷ the rationale of a written constitution in the following words:

Federations are not accidents of history; they are the product of

¹¹ *Supra* note 4, entry 97 list 1

¹² *Supra* note 4, art. 254

¹³ *Supra* note 4, art. 253

¹⁴ *Supra* note 5

¹⁵ *Supra* note 4, art. 73

¹⁶ *Supra* note 4, art. 162

¹⁷ *Supra* note 3 at 156

deliberate, conscious and purposive acts of human agency. They are the result of a series of bargains, agreements and compromises emanating from the interaction of political elites. To use Elazar's terminology, they are 'federal covenants' or 'federal compacts' while Riker referred to them as 'rational political bargains'. These covenants, compacts and bargains are binding agreements that enshrine certain values, beliefs, assumptions and expectations that are formally incorporated in written constitutions and represent, so to speak, the birth certificate of the federation.

The Constitution of India is the supreme law of the land which has been so recognised by governments at all levels. All legislations and executive actions of the Union or the State governments must conform to it. It contains provisions, *inter alia*, for dual governments, division of legislative competence and executive powers among Centre and States, powers of judiciary, rules for amending the Constitution and, above all, the emblematic assertion of India being a 'Union of States'.

In *Kesavananda Bharati v. State of Kerala*,¹⁸ the Supreme Court of India propounded the doctrine of basic structure of the Constitution. The doctrine has acted as the impregnable shield against any attempt at subverting the Constitution's soul, so to say, while leaving other parts of it amendable by the Parliament in order to make it propitious for the changing times.¹⁹

Incidentally, federalism is also recognized as a basic structure by the Supreme Court of India. In *S.R. Bommai v. Union of India*²⁰, the Supreme Court, *inter alia*, quashed the decision of the Union government to impose President's rule in few states including Karnataka under Article 356. Justice P.B. Sawant (speaking for himself and Justice Kuldeep Singh) held:

Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric.

States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the Centre.

This momentous judgement had far reaching impact on Centre-state relations. Critiquing the

¹⁸ AIR 1973 SC 1461

¹⁹ *Supra* note 2 at 32

²⁰ AIR 1994 SC 1918

judgement, Sorabjee observed²¹, “*any timorous retreat in future from the robust judicial activism reflected in Bommai will cause serious problems and lead to the pernicious consequence of one or more basic features of the Constitution being invoked to destroy another essential feature, Federalism.*”

4. Supreme Court as the Final Arbiter

Since a constitution is primarily a legal document, it is argued that lawyers should be the final arbiter of it. Besides, judges (the judiciary) are often thought to be the best independent and incorruptible source of experience and wisdom on constitutional matters.²² The Constitution of India confers the power of judicial review on the Supreme Court and the High Courts. These constitutional courts have the binding power to provide an authoritative interpretation of laws, including constitutional law, and to set aside illegal or unconstitutional executive or legislative actions. In doing so, they act as the guardian of the Constitution.

Judicial power in the Indian Constitution is not divided between the Union and the States. The provisions related to the Supreme Court of India are included in Chapter IV, Part V and the same for the High Courts and the subordinate courts are in Chapter V, Part IV. Furthermore, Part XI, which deals with relations between the Union and the States, begins with a provision that empowers Parliament to establish additional courts for the better administration of (only) Union laws.²³ If necessary or expedient in the national interest, Parliament may also provide for the creation of an all-India judicial service for ranks not inferior to that of a district judge.²⁴ Appointment of judges of the Supreme Court and the High Courts is made by the President of India. Union has jurisdiction over the appointment of administrative staff and the budget of the Supreme Court and States have jurisdiction over the same for the High Courts and subordinate courts.

One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Central Acts and State Acts in their respective spheres, it has generally provided for a single integrated system of Courts to administer both Union and State laws.²⁵ The Founding Fathers were committed to ensuring independence of judiciary not just from the other two wings of the State but from local influence. Therefore, the judiciary was envisaged and arranged as unitary rather than federal to exclude the possibility

²¹ Soli J. Sorabjee, “Decision of the Supreme Court in S.R. Bommai v. Union of India: A Critique” (1994) 3 SCC (Jour) 1

²² Ken Newton and Jan W. van Deth, *Foundations of Comparative Politics: Democracies of the Modern World* 49 (Cambridge UP, Cambridge, 2005)

²³ *Supra* note 4, art. 247

²⁴ *Supra* note 4, art. 312

²⁵ “Constitution”, available at: <https://main.sci.gov.in/constitution> (last visited on December 04, 2020)

of local influence.²⁶

Judiciary, with the Supreme Court of India at the helm, zealously guards the Constitution of India, including the scheme of distribution of power between Centre and the States. This jurisdiction of the Supreme Court may be resorted to not only by a person who has been affected by a Union or State law which, according to him, has violated the constitution distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.²⁷

III. THE LESS FEDERAL FEATURES OF INDIAN CONSTITUTION

1. Power of Parliament to alter States

The Constitution of India does not guarantee to the States any territorial integrity within the Union and empowers the Parliament, to a near exclusion of state legislatures, to violate the State boundaries and even decide their nomenclature.²⁸ States only have the entitlement to be consulted by the President. In *Babulal Parate v. State of Bombay*²⁹, the Supreme Court held that the State legislatures have a right under Article 3 only to express their views, not to make modifications³⁰. The position was reiterated in *Pradeep Chaudhary v. Union of India*³¹.

2. Federal to Unitary Switch in Emergency

The emergency provisions provides a simple way of transforming the normal federal fabric into an almost unitary system so as to meet national emergencies effectively.³² While a Proclamation of Emergency is in operation, Parliament has been vested with the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List³³.

State Governments are mandated to ensure compliance of Central laws³⁴ and to facilitate executive actions of the Central Government³⁵. Union Government is empowered to issue directions to State Governments to ensure such compliance. President has the power to assume legislative and executive control over the State by a Proclamation upon being

²⁶ *Supra* note 5

²⁷ *Supra* note 7 at 53

²⁸ *Supra* note 4, art. 3

²⁹ AIR 1960 SC 51

³⁰ *Supra* note 5

³¹ (2009) 12 SCC 248

³² *Supra* note 6 at 28

³³ *Supra* note 4, art. 250

³⁴ *Supra* note 4, art. 256

³⁵ *Supra* note 4, art. 257

satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.³⁶

3. The not-so-federal Council of States

The bicameral Indian Parliament's so-called house of elders - the Council of States or the Rajya Sabha - is envisaged in the Constitution as a central legislative body with representatives of the States and of the Union territories³⁷. To quote a booklet³⁸ published by the Rajya Sabha Secretariat:

Another significant role of the Rajya Sabha was guided by the need for giving a representation to the states in the federal legislature. Rajya Sabha is a federal Chamber where the representatives of each state are elected by the elected members of the Legislative Assembly of the state. As a federal Chamber, it has been assigned some special powers, impacting the federal interests. The Rajya Sabha being the representative forum of the states, endeavours to remain ever concerned and sensitive to the aspirations of the states. In the process, it strengthens the country's federal fabric and promotes national integration.

However, unlike the Senate in United States, the Council of States in India does not give equal representation to all States. While Uttar Pradesh has been allotted as many as 31 seats, almost all the states of the North East have been allotted only one seat per state³⁹. This greatly undermines the federal nature of the Indian Parliament. D.D. Basu⁴⁰ notes, "in view of such composition of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under our Constitution. He further adds, "*nor can our Council of States be correctly described as a federal Chamber insofar as it contains a nominated element of 12 members as against 238 representatives of the States and Union Territories.*"

The question whether the Council of States was truly representative of states and union territories so as to be the true guardian of the state interests was also debated before the Supreme Court of India in *Kuldip Nayar v. Union of India*⁴¹. The petitioner had challenged an amendment in the Representation of the People Act, 1951 which removed the requirement

³⁶ *Supra* note 4, art. 356

³⁷ *Supra* note 4, art. 80(1)(b)

³⁸ Rajya Sabha Secretariat, "Second Chamber in Indian Parliament : Role and Status of Rajya Sabha" 6 (The Library, Reference, Research, Documentation and Information Service, August 2009)

³⁹ *Supra* note 4, Fourth sch.

⁴⁰ *Supra* note 7 at 57

⁴¹ AIR 2006 SC 3127

of a Council of States' member to be a resident of the State he or she represented, the so-called residency or domicile requirement. The Court did not accept the challenge and upheld the impugned provision. Court noted the marked contrast between the Indian Constitution and constitutions of United States and Canada about the constitutional mandate of the residency requirement which was absent in case of India⁴².

4. Balance of Legislative Competence in favour of Centre

Though the Constitution of India provides that the Centre and the State both will have legislative competence, there indeed is a strong bias towards the Centre in the same. In *State of West Bengal v. Union of India*⁴³, while deciding on a challenged to Coal Bearing Areas (Acquisition and Development) Act, 1957, which authorised the Union to acquire land vested in any State, Supreme Court undertook a detailed review of the federal scheme and concluded that it weighed clearly in favour of parliamentary supremacy⁴⁴. Notably, the provision vesting the substantive power on Parliament⁴⁵ to legislate on items included in the Union List starts with a non-obstante clause (which is employed in statutes to give wide import to a provision), and has no limitations whatsoever. On the contrary, the provision vesting the substantive power on State legislatures⁴⁶ to legislate on items included in the State List begins with the limiting expression 'subject to' - an expression mentioned no less than a dozen times in the State List too. Moreover, if the Council of States so approves by a special majority, Parliament is also empowered to legislate, in national interest, with respect to (a) a matter in the State List⁴⁷ and (b) creation of one or more all-India services (including judicial service)⁴⁸.

On matters included in Concurrent List⁴⁹, the general rule is that a State law repugnant to a Central law will be void. Only exception is the case when such a State law has received the assent of the President, in which case the State law prevails in that State although it is repugnant to a pre-existing Central law. Even in the case of such an exception, Parliament reserves the right to amend, vary or repeal the repugnant State law any time, without reference to State.

With regard to distribution of powers, not only the Union List is the most populous, the

⁴² *Supra* note 5

⁴³ AIR 1963 SC 1241

⁴⁴ *Supra* note 5

⁴⁵ *Supra* note 4, art. 246(1)

⁴⁶ *Supra* note 4, art. 246(3)

⁴⁷ *Supra* note 4, art. 249

⁴⁸ *Supra* note 4, art. 312

⁴⁹ *Supra* note 4, art. 254

residuary powers of legislation have also been exclusively vested with the Parliament, not just by a specific Article⁵⁰, but also by way of an entry in the Union List⁵¹. Singh⁵² notes that in *Union of India v. Harbhajan Singh Dhillon*⁵³, the Supreme Court held that any doubt on the interpretation of Entry 97 was ‘removed by the wide terms of Article 248’. This was reiterated in *Sat Pal & Co v Lt Governor of Delhi*⁵⁴.

The Supreme Court of India, in applying the doctrines of harmonious construction and repugnancy has also shown a somewhat centrist bias while resolving a conflict between the lists. For instance, in *Gujarat University v. Krishna Ranganath Mudholkar*⁵⁵, the Court, while applying the doctrine of harmonious construction, held that the imposition by a university of a local language as the medium of instruction relying on a State Act was unauthorised in view of overlapping provisions of Union List and State List:

Use of the expression “subject to” in Item 11 of List II of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures. In Hingir Rampur Coal Company v. State of Orissa [(1961) 2 SCR 537] this Court in considering the import of the expression “subject to” used in an entry in List II, in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression “subject to” in an entry in List II, the power is taken away from the State Legislature. ... In Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II.

Similarly, in *Zaveribhai Amaldas v. State of Bombay*⁵⁶, the Court, while applying the doctrine of repugnancy, held that a later Parliamentary amendment in 1950 of Essential Supplies (Temporary Powers) Act, 1946 impliedly repealed the Bombay Act No. XXXVI of 1947 on the same subject matter in view of the power of the Parliament under the proviso to Article 254(2).

⁵⁰ *Supra* note 4, art. 248

⁵¹ *Supra* note 4, Seventh sch., list I—Union List, entry 97

⁵² *Supra* note 5

⁵³ (1971) 2 SCC 779

⁵⁴ (1979) 4 SCC 232

⁵⁵ AIR 1963 SC 703

⁵⁶ AIR 1954 SC 752

IV. REVIEW OF THE INDIAN FEDERAL STRUCTURE

The federal structure of India has been reviewed on few occasions for examining its appropriateness and for suggesting improvements. The Administrative Reforms Commission examined the Centre-State relations in 1960s and recommended⁵⁷ *inter alia* that “no Constitutional amendment is necessary for ensuring proper and harmonious relations between the Centre and the States, inasmuch as the provisions of the Constitution governing Centre-State relations are adequate for the purpose of meeting any situation or resolving any problems that may arise in this field.”

In 1983, Government of India constituted a Commission under Justice R.S. Sarkaria to review the working of the existing arrangements between the Union and the States in the changed socio-economic scenario. It subsequently introduced two more members, namely Shri B. Sivaraman and Dr. S.R. Sen as members of the said Commission. The Commission, which came to be known as the Sarkaria Commission, submitted its voluminous report in January 1988 after detailed deliberations. The Commission while commenting on the working of the Constitution, noted⁵⁸ that ‘its fundamental scheme and provisions had withstood reasonably well the inevitable stresses and strains of the movement of a heterogenous society towards its development goals’ and any drastic changes in the basic character of the Constitution were not required. The Commission did recommend few amendments to the Constitution (such as on appointment of Governors, proper and efficacious use of power to impose President’s rule in States, *et al*) and stressed on greater decentralisation of power. It also recommended establishment of a standing Inter-Governmental Council with a comprehensive charter and National Economic and Development Council having a nexus with the Planning Commission. The Commission’s recommendations led to creation of the Inter State Council and introduction of local self government as the third tier.

In 2007, Government of India constituted another Commission under the Chairmanship of Justice Madan Mohan Punchhi to look into the new issues of Centre-State relations keeping in view the changes that had taken place in the polity and economy of India since the Sarkaria Commission. The five-member Commission submitted its seven-volume report in 2010. It *inter alia* noted⁵⁹ that “the Indian Constitution allows enough flexibility to accommodate regional identities and sectarian and even separatist movements as long as they abide by the

⁵⁷ Government of India, “Report on Centre-State Relationships” 45 (Administrative Reforms Commission, June, 1969)

⁵⁸ Government of India, “Report of the Commission On Centre-State Relations” (January 1988)

⁵⁹ Government of India, “Report of the Commission On Centre-State Relations” (March 2010)

Constitutional parameters. Unity in diversity is a beautiful concept difficult to practice in a federal arrangement; nevertheless the experience of 60 years of the Republic is proof of strong foundations and sound understanding of the idea that is INDIA.”

V. CONCLUSION

For a large and diverse democracy like India, Federalism provides a realistic framework for holding together the people who vastly differ by descent, language, religion and culture.⁶⁰ The Founding Fathers had envisaged a variant of federalism for India which, on the one hand, addressed the need to have a strong, unified, sovereign republic and, on the other, met the regional aspirations of the vast country spreading from the Himalayas to the Indian Ocean. As Jain notes, “the Indian Constitution-makers were swayed not by any theoretical or *a priori*, but by pragmatic considerations in designing federalism”⁶¹. The people of India, the ultimate source for the validity of the Constitution of India⁶², have shown an abiding faith in the Constitutional scheme, which is reflected in their progressively rising participation in the electoral process over the years. Moreover, it has not only offered a framework to transform dissent into cooperation but has also helped minimize the dominance of the majority controlling the Centre and provided space for different groups and communities to share power⁶³. In conclusion, the unique Indian variant of federalism, well-guarded by its doctrinaire constitutional courts, has stood the test of time.

⁶⁰ *Supra* note 3 at 230-231

⁶¹ *Supra* note 6 at 28

⁶² *Supra* note 6 at 16

⁶³ Gurpreet Mahajan, “Federal accommodation of ethnocultural identities in India” 92 in Baogang He, Brian Galligan, *et. al.* (eds.) *Federalism in Asia* (Edward Elgar, Cheltenham and Northampton, 2007)