
STORY OF INDIAN FEDERALISM

Garima Raman, LLM, National University of Study and Research in Law (2021)

ABSTRACT:

When constitution makers met in 1946, they were not starting with a clean slate. The antecedents of what shaped India laid in her experience in the 3-4 decades before independence. In the contemporary era no country is completely federal or unitary, they are a hybrid of both. Thus, India has been given many labels, in this paper I have tried to explore those labels. We are a diverse nation, to maintain the unity with diversity a balance has to be struck so that the centre is not that weak which can lead to breaking up of the Country, but at the same time diversity has to be cultivated. Before delving into Judicial Pronouncements, I discussed why federalism is important for our Country's story. Finally, I explore the judicial pronouncements and how they describe the Indian polity.

Keywords: Indian Federalism, S.R. Bommai, Judicial Interpretation

INTRODUCTION:

We are all a product of our pasts, and so was India. When constitution makers met in 1946, they were not starting with a clean slate. The antecedents of what shaped India laid in her experience in the 3-4 decades before independence. Federal polity had been recognised by the then rulers, in Indian Constitutional Reforms (Montegu Chelmsford Report) para 349 and then in Government of India Act 1935 also it was provided for. Indian Constituent Makers after the announcement of 3rd June 1947 substantially modified the Cabinet Mission Plan model though substantially, they also rejected the proposal for a unitary structure in which regional units would function only as agents and delegates of the Centre.

One radical option open to the Constitution makers was the Gandhian model in which village will be the basic and most important unit of the whole system which will be governed by directly elected panchayats with substantial regulative and financial powers.¹ These panchayats would elect taluka and district panchayats; the latter will elect the provincial panchayats and finally the provincial panchayats will elect a national panchayats.² Thus power would then truly be decentralised upto the grass-root levels and transmitted from the bottom to the top and not in the reverse order.³ But the Gandhian Model was never given a serious thought in the Constituent Assembly though as we know to some extent it was incorporated in our Constitution with the introduction of 3 tier structure in the year 1993. B.N. Rau was instructed to prepare a draft constitution on the lines of “a federal structure with a strong Centre.” Dr Rajendra Prasad (the President of the Constituent Assembly) strongly opposed this draft for not mentioning village as the primary unit of the System. The question of Panchayats was raised by many members in the Constituent Assembly and subsequently many amendments were brought to the Draft Constitution prepared by Drafting Committee but nobody offered an alternative full scheme based on Gandhian model.⁴ Decentralisation upto village level was advocated and finally the consensus was that the problem "of village development and renaissance, could be solved by providing for a degree of decentralisation below the level of the provincial governments, while politically, Indian co-

¹ MP Singh, Indian Federalism: Structures and Issues, Cochin University Law Review (1987)

² Ibid

³ Ibid

⁴ Ibid

operative federalism operated from the provincial governments upwards". Accordingly; they ended up by introducing a directive principle in part IV of the Constitution which required the state to "take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government"⁵

India has been in the recent decades termed as a "civilisation state" instead of "nation state." Though the term is of a recent origin our constitution framers were aware of the unique circumstance of our nation which couldn't be equated with that of USA or Switzerland or Canada or Australia. India was a large country with a very very diverse population. So, the task was to blend in the local initiative with the strong central control. India's size and diversity equally prevented the efficient working of a too unified administration and demanded a central authority powerful enough to prevent its administrative structure from disintegrating.⁶

1919 and 1935 apparent devolution of power to the provinces was there but there was no real devolution. The Britishers had always held the power tightly in their hands and the power and authority of local governments were substantially diminished. We had no experience of participation in the working of a federation so we naturally tilted in favour of unitary setup.

WHAT IS FEDERALISM?

Herman Finer had said that "once a general name is given to a number of particular things in order to distinguish them from others, these things acquire a reputation for a discreteness which they do not in fact possess."⁷ This he asserts with the argument that there is in reality little distinction between unitary state and federal state.

In most unitary states the centre relaxes their hold, while in most federal State there is more centralisation than the term Federalism would generally imply. In present times no government is purely unitary or purely federal.

⁵ Ibid

⁶ Granville Austin, "The Indian Constitution Cornerstone of a Nation," Oxford University Press 2018, p. 234

⁷ The theory and practice of Modern Governments, first volume, p.166

Also, we have to keep in mind a distinction between a "federal constitution" and a "federal government." This distinction also enables one to disregard as federal systems several, notably those of certain Latin- American countries, which have at times operated as unitary governments under formally federal constitutions.⁸

K.C. Wheare, a leading exponent of federalism conceded in 1945 that under pressure of war and economic crises the trend in existing federations was towards a concentration of central powers sufficient in some cases to threaten the federal principle⁹

But in 1953, Max Beloff noticed that federalism was enjoying "a widespread popularity such as it had never known before."¹⁰ (A look at the remarkable array of constitutions, enacted and adopted since the end of World War II would show how federalism has been taken to as a means to political unity among the new nations in Europe, South America, Asia and Africa.)

Federalism, a mode of political organisation that unites separate states or other polities within an overarching political system in a way that allows each to maintain its own integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasise the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties.

According to Dr Wheare's definition of federalism: 'the general and regional governments of a country shall be independent each of the other within its sphere.'

INDIA'S STATUS: A BRIEF CONTEXT

1919 and 1935 apparent devolution of power to the provinces was there but there was no real devolution. The Britishers had always held the power tightly in their hands and the power and

⁸ The Journal of Politics , Aug., 1947, Vol. 9, No. 3 (Aug., 1947), pp. 453-455 Published by: The University of Chicago Press on behalf of the Southern Political Science Association <<https://www.jstor.org/stable/2125807>>

⁹ Paleker, S. A. "FEDERALISM : A CONCEPTUAL ANALYSIS." The Indian Journal of Political Science, vol. 67, no. 2, 2006, pp. 303–310. JSTOR, www.jstor.org/stable/41856217. Accessed 4 Dec. 2020.

¹⁰ M.Beloff, "The Federal Solution in its Application to Europe, Asia and Africa", Political Studies, 1953, p. 114.

authority of local governments were substantially diminished. We had no experience of participation in the working of a federation so we naturally tilted in favour of unitary setup.

Is India a federal country? According to Dr. Ambedkar the Constitution is a Federal Constitution in as much as it establishes what may be called a Dual Polity (which)...will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution.”

DOES SHE HAVE UNITARY FEATURES?

The foundation for a federal set up was laid in the GOI Act 1935. Though in every respect the distribution of legislative power between the Union and the States envisaged in the 1935 Act has not been adopted in the Constitution the basic framework is the same.

The Constitution incorporates the concept of federalism in various provisions. The provisions which establish the essence of federalism i.e. having States and a center, with a division of functions between them with sanction of the Constitution include, among others, Lists II and III of Seventh Schedule that give plenary powers to the State Legislatures; the authority to Parliament to legislate in a field covered by the State under Article 252 only with the consent of two or more States, with provision for adoption of such legislation by any other State; competence of Parliament to legislate in matters pertaining to the State List, only for a limited period, under Article 249 "in the national interest" and under Article 250 during "emergency"; vesting the President with the power under Article 258(1) to entrust a State Government, with consent of the Governor, functions in relation to matters to which executive power of the Union extends, notwithstanding anything contained in the Constitution; decentralization of power by formation of independent municipalities and Panchayats through 73rd and 74th Amendment; etc.

Part XI of the Constitution entitled “Relations Between the Union and the States.” It is divided into two Chapters: **Legislative Relation**, which establishes the list system and **Administrative Relations**. **The Emergency Provisions** in their entirety bear directly on the distribution of powers; likewise, the provisions for the **distribution of revenue**. Perhaps not usually considered a part of division of powers, although they are important to it, are such provisions as those establishing the limited authority of the upper, ‘federal’ house of the Parliament, the single judicial system, the one

Election Commission with nationwide authority, and the amending process all of which weigh the scales of power in favour of the Union. The distribution of powers under the constitution is not static.¹¹

Article 245 to Article 255 in Part XI of the Constitution deals with the legislative relations between the Centre and the States. The division of functions in India is two-fold: from the point of view of Territory and from the point of view of the subject matter.

TERRITORIAL JURISDICTION TO LEGISLATE

Under ARTICLE 245(1) Parliament may make laws for the whole of India, or a part thereof. Whereas State Legislature may make laws only for the State concerned. A state law is not valid if it purports to affect men and property outside the State. Doctrine of territorial nexus is used to see if a law legislated by state has extraterritorial operation. Acc to the doctrine thr object to which the law applies need not be physically located within the physically located within the territorial boundaries of the state, but it should have a sufficient territorial nexus with the state.

DISTRIBUTION OF LEGISLATIVE POWERS

The Indian Constitution contains a very elaborate scheme of distribution of powers and functions between the Centre and the States under Schedule VII of the Constitution.

THE DIFFERENT LABELS

- 1. Flexible Federation:** “one can therefore safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation.” - B. R. Ambedkar on the provision of Amendment.
- 2. Cooperative Federalism:** Austin and A.H Birch used the term Cooperative federalism for the Indian system. For it is neither purely federal nor purely unitary, but a combination of both. This term emerged in the backdrop of WW2 which is characterised by increasing interdependence of Federal and Regional governments. Acc to Birch cooperative federalism

¹¹ Ibid., p. 241, 242

is distinguished by “the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments, and the fact that the general governments by use conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions.”

3. **Asymmetrical Federalism:** a federal structure where powers and functions are not equally shared between the union and the states
4. **Pragmatic Federalism:** The concept of pragmatic federalism is self explanatory. It is a form of federalism which incorporates the traits and attributes of sensibility and realism. Pragmatic federalism, for achieving the constitutional goals, leans on the principle of permissible practicability.

The expression 'pragmatic federalism' in the Indian context has been used by Justice A.M. Ahmadi in *S.R. Bommai* (supra) wherein he observes: “It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of Governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain Constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Government in emergency situations, vide Articles 352 to 360 of the Constitution.”

5. **Quasi Federal:** by K.C. Wheare. “Indian Union is a unitary state with subsidiary federal features rather than a federal state with subsidiary unitary features.” In the case of *State of Karnataka v. Union of India and Anr.* [1978]2SCR1, Justice Untwalia (speaking for Justice Singhal, Justice Jaswant Singh and for himself), observed as follows: Strictly speaking, our Constitution is not of a federal character where separate, independent and sovereign State could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of that reason that sometimes it has been characterised as quasi-federal in nature.

JUDICIAL INTERPRETATIONS

The nature of Federalism in Indian Constitution is no longer *res integra*. There can be no quarrel with the proposition that Indian model is broadly based on federal form of governance.¹²

According to Article 1, India is a “Union” of states. In ***State of West Bengal v Committee for Protection of Democratic Rights, West Bengal*** (2010) SC 571 Union of states means Federation of States.

In ***Ram Jawaya Kapur v State of Punjab*** (AIR1955 SC 549) it was held that the federal principle or doctrine of separation of powers is not incorporated in the Indian Constitution in its absolute rigidity, but the functions of different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another.

In ***State of West Bengal v Union of India*** (AIR 1963 SC 1241) it was held that Indian Constitution is not truly federal and States are not sovereign. The exercise of powers, legislative and executive, in the allotted fields is hedged in by the numerous restrictions, so that the powers of the States are not co ordinate with the Union and are not in many respects independent. The Political sovereignty is distributed between the Union of India and the States with greater weightage in favour of the Union. It was held that even though there is a distribution of powers but distribution of powers is not always an index of political sovereignty. (The power of the Union to legislate in respect of property situated in the States even if the States are regarded qua the Union as sovereign, remain unrestricted. The right of the Centre to require the province to part with property for the effective performance of central functions cannot be considered as detracting from provincial autonomy)

In re: Under Article 143, Constitution of India (Special Reference No. 1 of 1964) AIR 1965 SC 745 (Paragraph 39 at 762), this Court ruled thus:

In dealing with this question, it is necessary to bear in mind one fundamental feature of a Federal Constitution. In England, Parliament is sovereign; and in the words of Dicey, the three

¹² Kuldeep Nair v Union of India (2006)

distinguishing features of the principle of Parliamentary Sovereignty are that Parliament has the right to make or unmake any law whatever; that no person or body is recognised by the law of England as having a right to over-ride or set aside the legislation of Parliament, and that the right or power of Parliament extends to every part of the Queen's dominions (1). On the other hand, the essential characteristic of federalism is "the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other". The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the Constitution by the ordinary process of federal or State legislation (2). Thus, the dominant characteristic of the British Constitution cannot be claimed by a Federal Constitution like ours.

In ***S. R. Bommai v Union of India*** (AIR 1994 SC 1918) a Constitution Bench comprising 9 Judges of this Court considered the nature of federalism under the Constitution of India. Justice A.M. Ahmadi, in Paragraph 23 of his judgment observed as under:

... the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VII Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution. Said Prof. **K. C. Wheare** in his work 'Federal Government:

What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament'.

Thus, in the United States, the sovereign States enjoy their own separate existence which cannot

be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc. and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi- federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

Justice K. Ramaswami in Paragraph 247 and 248 of his separate Judgment in the same case observed as under:

Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by Parliament. Neither the relative importance of the legislative entries in Schedule VII, Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.

The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution.

Justice B.P. Jeevan Reddy, writing separate Judgment (for himself and on behalf of S.C. Agrawal, J.) concluded in Paragraph 276 thus:

The fact that under the scheme of our Constitution, greater power is conferred upon the center vis-à-vis the States does not mean that States are mere appendages of the center. Within the sphere allotted to them, States are supreme. The center cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States....must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities. ...enough to note that our Constitution has certainly a bias towards center vis-à-vis the *States (Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* [1963]1SCR491. It is equally necessary to emphasise that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation.

In paragraph 98, **Sawant, J.** proceeded to observe as under:

In this connection, we may also refer to what **Dr Ambedkar** had to say while answering the debate in the Constituent Assembly in the context of the very Articles 355, 356 and 357.... He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution where under the center has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good Government of the State.

In Paragraph 106, his following observations are relevant:

Thus, the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356 is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else.

State of Haryana v. State of Punjab (AIR 2002 SC 685): A semi-Federal system of Government has been adopted under the Indian Constitution.

In *Kuldip Nayar v. Union of India* (AIR 2006 SC 3127) it was held that though the federal principle is dominant in our Constitution and that principle is one of its basic features, but it is also equally true that federalism leans in favour of a strong Centre or “unitary power.” Our Constitution does not cease to be a federal Constitution simply because a Rajya Sabha Member does not “ordinarily reside” in the State from which he is elected.

In this case CAD was also discussed. *Answering the criticism of the tilt towards the center, Shri T.T. Krishnamachari, during debates in the Constituent Assembly on the Draft Constitution, had stated as follows:*

Sir, I would like to go into a few fundamental objections because as I said it **would not be right for us to leave this criticism uncontroverted. Let me take up a matter which is perhaps partly theoretical but one which has a validity so far as the average man in this country is concerned. Are we framing a unitary Constitution? Is this Constitution centralising power in Delhi? Is there any way provided by means of which the position of people in various areas could be safeguarded, their voices heard in regard to matters of their local administration?** I think it is a very big charge to make that this Constitution is not a federal Constitution, and that it is a unitary one. We should not forget that this question that the Indian Constitution should be a federal one has been settled by our Leader who is no more with us, in the Round Table Conference in London eighteen years back.

I would ask my honourable friend to **apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by the superior unit.** The important words are 'must not be completely circumscribed', which envisages some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our **Constitution is a federal Constitution. I urge that our Constitution is one in**

which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere.

In this context, Dr. B.R. Ambedkar, speaking in the Constituent Assembly had explained the position in the following words:

There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralisation and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the center and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the legislative and executive authority is partitioned between the center and the States not by any law to be made by the center but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the center for their legislative or executive authority. The center and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the center too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the center and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the center and the Units by the Constitution. This is the principle embodied in our Constitution.

CONCLUSION

INDIAN FEDERALISM: INDESTRUCTIBLE UNION WITH DESTRUCTIBLE UNITS.

Does presence of emergency provisions make India a unitary govt?

Acc to V.N.Shukla emergency provisions which come into operation only on the happening of specific contingencies, do not modify or destroy the federal system.

After going through these conflicting judgements and view I conclude the concept federalism like many other concepts in the social sciences, is without a universally accepted definition.

Test devised by **KC Wheare** to determine whether a country is federal or not

"The test which I apply for Federal Government is then simply this. Does a system of Government embody predominantly a division of power between general and regional authorities, each of which, in its own sphere, is coordinate with the other 's and independent of them? If so, that government is federal."¹³

H.M. Seervai in his commentary Constitutional Law of India (3rd edition, p.166) has summed up the federal nature of our Constitution by observing that the federal principle is dominant in our Constitution and the principle of Federalism has not been watered down for the following reasons:

1. Parliament's power to alter the boundaries of States without their consent is a breach of the federal principle, but in fact it is not Parliament which has, on its own, altered the boundaries of States. By extra Constitutional agitation, the States have forced Parliament to alter the boundaries of States. In practice therefore the federal principle has not been violated.
2. The allocation of the residuary power of legislation to Parliament is irrelevant for determining the federal nature of a constitution.
3. Internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our Constitution possesses that feature. (Under list II of Schedule VII exclusive power of Legislation is conferred on the States. Thus, emphasising the Federal nature of our Constitution)¹
4. A 352 enactment of emergency power arising from war or external aggression which threatens the security of the country merely recognises de jure what happens de facto in great federal countries like USA and Canada. Also, the amendment introduced by 44th Amendment

¹³ K.C. Wheare, Federal Government, Fourth ed. Oxford, 1963, p.33

have reduced to a considerable extent the chances of such abuse. (Opportunity of judicial review has also been provided.)

5. A 355 imposing a duty on the Union to protect a State against external aggression and internal disorder are not inconsistent with the federal principle. The war power belongs to the Union in all Federal Governments, and therefore the defence of a State against external aggression is essential in any Federal Government.

6. Article 356 (read with Article 355) which provides for the failure of Constitutional machinery was based on Article 4, Section 4 of the US Constitution and is not inconsistent with Federal principle. These provisions were meant to be of last resort but have been gravely abused. Also, since the Doctrine of Political Question does not apply in India Courts can now take a more active part in preventing a Mala fide or improper exercise of the power to impose a President's Rule, unfettered by the American doctrine of the political question.

Unlike the US system which is presidential and whose federal features arose out of the failure of the Articles of Confederation (1777), India can be said to be parliamentary federalism or executive-federalism since the executive is anchored in the legislature.

But what are we is as ongoing story. Because Indian Polity, like our Constitution is like a living being and its nature keeps on changing with the changing needs of the society.