

Quasi-Federal Nature of Indian Constitution – An Empirical View

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Abstract

This paper attempts to study how **in India federal powers** are divested and the imposed **constitutional constraints** within a **quasi federal** setting. Residuary Power i.e. the power to legislate on the areas which do not find mention in any of the three lists under Schedule 7 lies with the Centre. For example, the laws like POTA, TADA which are now included in the Unlawful Activities (Prevention) Act, National Investigation Agency Act under which NIA was set up on the lines of FBI in US, to investigate federal crimes like terrorism is a trans-border phenomenon, so although public order is a state entry, terrorism is a problem which has a magnitude beyond public order, it concerns more with the security of India. Our Constitution contains an inspiring Preamble reflecting the hopes and aspirations of the Indian people, a chapter on Directive Principles of State Policy, indicating the manner in which the people's objectives can be attained by legislative action, with due respect for Fundamental Rights of the citizens, the enforcement of which should only be suspended under compelling necessities. A democratic system such as ours, depends for its success upon a government under the Constitution in accordance with the letter and spirit of the Constitution and as expressed in the laws which must prevail amongst the law abiding people and be enforced, in cases of their infringement by courts armed with adequate power and authority and given the respect due to those through whom the Constitution and the laws speak. This in practice would be the true meaning of the 'Supremacy of the Constitution'. Federal system cannot exist without a written constitution. UK does not have a written constitution and so it is not a federal country.

Key words: residuary power, federal powers, constitutional constraints, quasi federal, India.

Introduction

The States in a federal setup, come together and enter into a treaty and the terms of the treaty are required to be reduced into writing in the form of a written constitution. There is no denying fact that a written Constitution rings stability in the overall governance of the country. If there were no written Constitution defining the scope of the powers of Centre and the States, there will be chaos, misunderstandings and conflicts between the Centre and the States who would seek to cross over each other's line of authority.

Ours being a rigid Constitution, it cannot be amended by the national legislature unilaterally without the participation of the states. In United States, which is a perfect example of classical federalism, no part of the constitution can be amended without the ratification of at least 3/4th of the individual States. Another example, in Switzerland, no amendment can be brought into force unless it is ratified by a popular vote i.e. referendum

as took place recently when the Switzerland decided to hold a referendum to separate from the Britain and people voted NO. Also, in Germany, the states do have a play in the amendment of the constitution but even the German parliament cannot amend so far as the federal features are concerned like division of federation into States or the participation of the States in making amendments in the legislature, these features are exclusively made unamendable because Germany is also a federal country. The examples justify that a rigid constitution is a primary feature of any federal form of government and the same has been incorporated in India too. In India, federal provisions i.e. the provisions which deal with the centre-state relations cannot be amended without it being ratified by at least $\frac{1}{2}$ of the states. For example – When the 121st Constitution Amendment which created the National Judicial Appointment Commission (NJAC) was passed by both the houses of the Parliament with $\frac{2}{3}$ rd (special) majority, it was subsequently sent to the states for ratification after 16 states approved the amendment, it was finally sent to the President for his assent. But before the amendment could become fully effective, it was declared to be unconstitutional by the SC as it violated the independence of judiciary as a basic structure in the Supreme Advocates on Record Association & Anr. V Union of India, also known as the 4th Judge's Case. Another example is that of Kihoto Hollohan vs Zachilhu & Ors where the court invalidated insertion of Para 7 in the 10th Schedule by way of 52nd Constitutional Amendment because Para 7 affected the jurisdiction of state high courts and the amendment was passed simply by both the houses of the parliament and was not sent for the approval of the states, so there was a procedural ultra vires and the SC declared the 52nd Amendment and the 10th Schedule to be unconstitutional to this extent as void. Doctrine of Severability was applied and only Para 7 was severed and remaining were held to be valid.

Division of governmental powers into national and regional governments by the way of 3 lists – the Union, State and the Concurrent lists is provided in the 7th Schedule to the Constitution. Only the Centre deals with the issues mentioned in the Union List, States on the areas mentioned in the State List while the Concurrent List contains areas where both the Center and the State can legislate. This concept of 3 Lists has been adopted from the Canadian Constitution. However, there are certain powers which do not find mention in any of the three lists. These are called residuary powers and lie primarily with the Centre as per Entry 97 of Article 248. The rationale behind the residual power is to enable Parliament to legislate on any subject which is not recognizable at present. Thus, the principle of division of powers which this concept imbibes highlights the federal structure of the Indian Constitution. When the Lokpal Bill was passed by the Parliament, the States opposed, they said that in one legislation you cannot provide both Lokpal and Lokayukta so now the Lokayukta part is removed and there is one provision which states that the States are supposed to make Lokayuktas within 2 years of passage of this Bill because Central Legislation creating Lokayuktas for the States would not have been consistent with the federal policy.

In past, several states have demanded that the residuary powers, including those of taxation should be vested with the States. In the defense of this demand, the Centre has time and again pointed to a strong unitary bias of the country's federal structure. The Sarkaria Commission, which submitted its report in 1988 also justified the transfer of the residuary powers to the Concurrent List because it felt, the exercise of such powers by the States would ultimately be subject to the rules of the Union Supremacy which would be in consonance with the Unitary spirit of the Indian Constitution, particularly Articles 256 .

Objective:

This paper intends to explore and analyze the framework in the discourse on **Indian quasi-federalism** by outlining the history of the country's federal structure in four different time periods, from the birth of the Indian republic to these contemporary times.

Quasi-Federal Nature of Indian Constitution

It has been the matter of debate among the scholars that whether the Constitution of India is completely federal or unitary in nature. But actually Indian constitution contains both features of a federal constitution and unitary constitution. But for the very clear picture of this conclusion first of all we have to know that what is the federal constitution and what is unitary constitution. What feature of Indian constitution makes it federal or what features makes it unitary.

In a federal set up there is a two tier of Government with well assigned powers and functions. The Central and the State governments work in coordination and at the same time act independently. The federal polity, in other words, provides a constitutional device for bringing unity in diversity and for the achievement of common national goals.

Prevention as well as amelioration of conflict of the interests of the Centre and the States is an integral part of federalism. This is the reason why the Indian federalism was devised with a strong Centre. The Constitution of India has adopted federal features; though it does not, in fact, claim that it establishes a federation. The question whether the Indian Constitution could be called a federal constitution troubled the minds of the members of the Constituent Assembly. This question cannot be answered without going into the meaning of federalism and the essential features that are evident in federal state.

Federal Features of the Indian Constitution

Constitution is *suprema lex*. Constitution is the supreme law of land in India, law wherein involves rules, regulations, bylaws, notifications, orders, ordinances and even the customs having a force of law. A federal state derives its existence from the Constitution. Every type of power; be it legislative, administrative or judicial, irrespective of it being at the centre or the state level is controlled by and subordinated to, the

Constitution. Article 13(2) states that the State shall not make any law which takes away or abridges any of the rights guaranteed under Part III of the Constitution and to the extent of such contravention, the law being void. Therefore, though in India, the Constitution is considered as supreme but the principle of supremacy of the Constitution is not something to practice or abide by only in theory.

Independent Tribunal which is authorized to resolve disputes between the Centre and the States. As regards India, Supreme Court is the federal tribunal which can dissolve all the disputes between the Centre and the States under Article 131 except the Inter – State Water Disputes for which the parliament is supposed to create an ad-hoc Tribunal to resolve a specific water dispute between 2 states, such as the Kauveri Water Disputes Tribunal which is handling the water dispute between Kerala, Karnataka and Tamil Nadu. This power given to the Central Government to create a separate tribunal is a small but significant unitary feature. Currently there is a Bedgaon Border dispute case pending in SC. It is between Maharashtra and Karnataka wherein Maharashtra claims that the majority of the people in that region are Marathi speaking so the region belongs to Maharashtra while the Karnataka's stand is otherwise. Thus, an independent judicial court is an essential federal feature of the Constitution.

Unitary Features of Indian Constitution

Indian Constitution lays down a dual polity where the Central Government is neither merely the league of States and the States nor the States are the administrative units or agencies of the Central Government because they have their own Constitutional identity. However, there are some strong centralizing tendencies present in the Indian Constitution which confer maximum power to the Central Government. There are historical reasons for this centralization – when the Constitution was made, it was made at the time of partition of the India, so the framers thought that if the Central government was not strong, then India would get fragmented. The Philadelphia Convention which gave rise to the formation of the US Constitution also mentioned the expression Union, which was deliberately mentioned there in order to make it a more perfect Union. Maybe the intention of the Constituent Assembly behind adding the expression Union was that they wanted to give an impression that it was an indestructible Union. They must have feared the Balkanization of the Indian Union. The policy thus adopted by the Constituent Assembly was to have an inbuilt bias in the favor of Centralization i.e. a unitary in spirit.

A typical unitary system is governed constitutionally as one single unit, with one constitutionally created legislature. All power is top down. A unitary state is a sovereign state governed as one single unit in which the central government is supreme and any administrative divisions (sub national units) exercise only powers

that the central government chooses to delegate. These are some unitary features also present in the Indian Constitution which make it ultimately Quasi-Federal in nature –

Article 1 which provides that India i.e. Bharat, shall be a Union of States. It is to be pondered here that the use of the word ‘Union’ was deliberate or not. Because the word ‘Federation’ is nowhere to be mentioned in the Constitution. It was there in the draft Constitution but was subsequently dropped and it was deliberate omission on the part of the drafting committee. The Chairman Dr. Ambedkar, justified this deletion by saying that the addition of the word Federation was not done after the ratification of the States.

Article 2 and 3 of the Constitution, give the power to the Parliament to redraw the political map of India; to create and abolish the states, change the boundaries of the States or even change their names and this can be achieved by simple legislation by way of simple majority in the Parliament and the Constitution only provides for consultation by the Centre of the concerned State. For eg – when Andhra Pradesh was divided recently into Telangana, Andhra Pradesh Assembly had passed a resolution opposing the step irrespective of that the Central Government went on with the separation. So, what the provision provides is consultation of the State Assemblies and not concurrence and the President can only prescribe a time frame within which the State Assembly has to take a call on the proposal of separation of the State or to merge 2 or more State. Also are the examples of Uttarakhand, Jharkhand and Chattisgarh. In 2007 also, the name of Uttaranchal was changed to Uttarakhand. And this was achieved without amending the Constitution. So, the Central government has upper hand so far as the creation or abolition of the States concerned.

Appointment of the Governors of various States is done by the Centre. Governor is the constitutional head of the State and at the same time he is also the representative of the Centre. Central government is duty bound under Article 355 to ensure that there is no failure of constitutional machinery in the State and the states are protected from internal disturbance and external aggression and war. So, in order to enforce that duty, the Central government has power under Article 356 to impose Presidential rule and it is the duty of the governor who has to make a report to the Centre about the failure of constitutional machinery of the State for political or any other reasons. Governor unlike President enjoys some discretionary powers i.e. he can withhold a bill for the consideration of the President. Governor is supposed to be apolitical but is ironically removed on political grounds. The Sarkaria Commission which studied the Centre-State Relations made certain recommendations because there was no effective consultation with the central government with the Chief Ministers of the States when the Governors are appointed, so it was recommended that the Governors should be some eminent person from some walk of life.

In **Rameshwar Prasad v Union of India**, popularly known as Bihar Assembly Dissolution Case where SC raised questions as to the impartiality of the Governor Bhuta Singh because there was a President's Rule imposed in Bihar after the elections because no political party was in the position to form the government but when there was a possibility of formation of government led by JDU led by Nitish Kumar, the Governor sent a report to the Centre that the Assembly should be dissolved. The centre did not apply its mind to the recommendation and it was hurriedly accepted and the Assembly was declared as dissolved the very other day and the SC said that the Governor did not act as per his duties. So, the Governor is not supposed to be an agent of the ruling party in the Centre. SC declared the dissolution of the Assembly as unconstitutional.

In **B.P. Singhal v Union of India**, SC held that a Governor cannot be removed by the Central government on the grounds that he is not in sync with the policies of the Central government or the ideology of ruling party. This cannot be the reason behind the Central government to sack the Governor and would be considered as arbitrary or mala fide.

Thus, this power to appoint Governors who would be the head of the respective States, is an important unitary feature of the Indian Constitution.

Constitutional provisions and Bias for the Centre, Federal powers and constitutional constraints

The Constitution of India has established a Single and Uniform Citizenship for the whole of the country. In a federal State like the United States of America there is dual citizenship where a citizen firstly owes allegiance to the States and secondly to the union. But in case of India though it is a Federal State there is single citizenship. It implies that all Indian citizens owe allegiance to the Indian Union. Any citizen, irrespective of his birth or residence, is entitled to enjoy civil and political rights throughout India in all States and Union Territories. The Indian Constitution does not recognize State citizenship and as such there is no distinction between the citizens of two or more States, the only exception being the State of Jammu and Kashmir. No one other than a permanent resident of Kashmir can acquire landed property in Kashmir; but it is a purely temporary provision to be abolished when Kashmir is fully integrated to the Indian Union. The claim of Fundamental Rights is common to all citizens.

Conclusion

According to KC Wheare, in practice, the Constitution of India is quasi-federal in nature and not strictly federal. In words of D.D. Basu, the Constitution of India is neither purely federal nor unitary, but it is a combination of both. Throughout the Constitution, emphasis is laid on the fact that India is a single united nation. India is described as a Union of States constituted into sovereign, secular, socialist and democratic republic. In **State of West Bengal v Union of India**, the apex court held that decentralization of authority in

India was primarily to facilitate smooth governance of a large nation and therefore, it contains many centralizing features also. Indian Constitution is not a 'traditional federal constitution.' In *S.R. Bommai v Union of India*, Justice Ahmadi opined that the essence of federation is the existence of distribution of power between the Union and the States. However, the absence of the terms 'federal' or 'federation' and the presence of unitary features such as residuary powers, single citizenship, integrated judiciary, etc can help us conclude that the Constitution of India is more 'quasi federal' than 'federal' or 'unitary'. Similar was held in the case of *Sat Pal v State of Punjab*.

The Chairman of Drafting Committee, Dr. Ambedkar had thus rightly said that, "Our Constitution would be both unitary as well as federal according to the requirements of time and circumstances". The Drafting Committee wanted to clarify that though India was a federation, it was not the result of any voluntary agreement between the States. Though the country is divided into many States, it is basically for administrative purposes which do not in any way affect its functioning as an integrated unit.

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