

COOPERATIVE FEDERALISM¹

VIDHI CENTRE FOR LEGAL POLICY, New Delhi

23 Sept. 2015

Justice BN Srikrishna

The phrase Cooperative Federalism entered the dominant discourse during the 1930s in USA and today in India it is the new buzzword freely bandied about by the cognoscenti, the ignorant, the politicians et al, each ascribing to the concept a different shade of meaning as it suits the occasion. As right thinking persons whose shibboleth is the rule of law, it behoves us to critically analyse the connotative content of this concept and identify its contours. To fruitfully do so, we need to first analyse the concept of federalism as understood elsewhere as contrasted with its understanding in the context of the Indian Constitution.

Federalism is the mode of political association and organization that unites separate polities within a more comprehensive political system in such a way as to allow each to maintain its own fundamental political integrity.² The basis of federalism in political theory is that there is primacy of bargaining between the different polities and there is also negotiated co-operation amongst the different constituents by which each one of them agrees to forego a certain amount of its political sovereignty and its power in a spirit of co-operation so that on account of dispersal of the power centres there is safeguarding of individual and local liberties. The term 'Federal' itself is derived from the Latin word *foedus*, meaning a covenant. By definition, therefore, a federal relationship implies equal partnership between individuals, groups or governments or a co-operative relationship attained as a result of negotiations amongst the equal parties as a basis for power sharing. Federalism is more than simply a structural arrangement. It is a special mode of political and social behaviour as well, involving a commitment to partnership and active co-operation on the part of individuals and institutions that at the same time take pride in preserving their own respective integrities.³

Professor K.C. Wheare defines "federal government" as an association of States, which has been formed for certain common purposes, but in which the member states retain a large measure of their original independence. A federal government exists when the powers of the government are divided substantially according to the principle that there is a single independent authority in respect of some matters and there are

¹ Speech delivered under the aegis of Vidhi at New Delhi on 23rd September 2015

² Federalism: Theory and Application : Daniel J. Elazar, 1995, pg. 1

³ *Ibid*

independent regional authorities for other matters, each set of authorities being co-ordinate and subordinate to the others within their respective spheres.

Federalism is by now widely accepted as one of the forms of political organizations that is strongly inter-linked with democracy. Federalism can exist in the manner of sharing territory, political power and financial resources. In a federal model detailed methodology is worked out in respect of all three facets of federalism.

United States of America is a paradigm of federalism in action. The US Constitution of 1787 was carefully crafted so as to maintain the integrity of each of the States forming the union. The Federalist, an invaluable American book expounding political theory, expatiates on the manner in which the federal system was introduced by the US Constitution. According to The Federalist, there are three basic choices for building a federal system and they would be "by force", "by accident" and "by reflection and choice". When certain territory is acquired by reason of conquest, it would be open to the conquering power to enter into a covenant with the vanquished power for bringing into existence a federal system of governance. It may also happen that such a system may be the result of a historical accident or a conscious decision taken as a result of debate, reflection and informed choice.

A federal democracy implies that the polity is so designed as to ensure that there are appropriate checks and balances so that all institutions are checked and balanced by other institutions, which exercise their constitutional power and are autonomous by themselves. That would be a situation where "*ambition must be made to counteract ambition*"⁴.

In order to ensure the existence of a properly working federalist system, it is essential that there is a written constitution governing the system. The constitution would be the document embodying the fundamental rules which are agreed to *a priori* before bringing the federal system into existence.

Although, the Constitution of the United States which originated the modern type of federation in 1787 is generally believed to be the first federal system, federalism has hoarier history. The ancient Israelite tribes that existed sometime in thirteenth century had a system that could loosely be called a federal system. It is debatable as to whether the system adopted by them was a 'federation' or a 'confederation' as understood by modern day definitions. The early leagues of Greek City States were more of the type of confederations where the ultimate authority and sovereignty rested with the constituent units while the leagues governed to pursue the common purposes for which they were

⁴ Federalist 51, quoted in ibid

formed. Both in the Israelist and Greek federation systems the aim was unification of communal democracies in the larger interest in the realm of defence. Both of them disappeared as a result of conquest by Alexander, and later on, by Rome. The Roman Republic, though it could formally be called federal, had an arrangement that was quite asymmetric. Rome became the federal power and the weaker cities conquered by it were attached to it as loose federal partners, ensuring local autonomy to a certain extent, but not being given full political rights of Roman citizens. Subsequently, when Rome consolidated its powers, although federalism remained on paper, the Roman Empire became a centralized empire.

The self-governing cities, which developed in Northern Italy and Germany, with leagues of cities, were also established as loose confederations. Those leagues survived only as long as it was in the interest of the rulers to allow them. The provinces of Netherlands had substantial local autonomy under the Roman Empire and turned into an independent confederation sometime in the late 16th century after revolting against the Spanish King. The loose federation of United Provinces of Netherlands came to an end when Napoleon conquered them. After the fall of Napoleon, the Dutch adopted a constitution which preserved the provinces as a part of a unitary decentralized monarchy, which continues to exist even today. After the Second World War the Netherlands and their erstwhile colonies in the Caribbean reconstituted themselves as the kingdom of Netherlands, which though formally a federal system, provides asymmetrical relations between its several constituents.

In the 18th century there was rediscovery of federal theory as a result of the political thinking of Montesquieu and Rousseau. The writings of these two political thinkers contributed in a large measure to the political thinking that went into the designing of federal structure in the United States of America. The Federalist provided an explication of the political theory and extolled the advantages of adoption of the Constitution of 1787.

In the 19th century, Alexis D Tocqueville explained the strength and weaknesses of the American experience on the basis of political theories. The Germanic political theorists also examined the problems of federalism in the Germanic countries and produced their expositions of the difference between *Bundesstaat* and *Staatenbund*. The French tradition spearheaded by Pierre-Joseph Proudhon advocated a more Utopian type of federal theory that would ensure the avoidance of fundamental political conflicts that had emerged in the society during the 19th century.

After the Second World War, new federations were founded and restored in Eastern Europe, like Germany, Austria, and Czechoslovakia. Africa also had its share of federations in Nigeria, Comoros, Ghana, Kenya, Uganda and Tanzania. Asia produced federations in

India, Malaysia, Pakistan and United Arab Emirates, United Arab Republic. Depending on the strength of the political culture and contemporary political climate some of these survived and some died natural death. India is one of those countries in which the Constitution consciously adopts a federal structure, which continues to work till today.

In a truly federal system the constituent polities, by theory, must have substantial influence over the constitutional amendment process. The assumption is that the power exercised by the constituent polities is such that any serious change in the political order can only be made by the decision of the dispersed constituents, which would truly reflect the federal division of powers. This is important both for popular government as well as for protecting the federalism.⁵

Since federalism constitutes a complex governmental mechanism for governance of a country, it must have an inbuilt balance between the forces working for concentration of the power in the centre and for those urging dispersal of such powers amongst the constituents. A truly federal constitution must envisage a clear cut demarcation of the governmental functions and the powers between the centre and the regions as sanctioned under the constitution, which must be a written document laying down the ground rules of sharing power. This gives rise to two issues: (a) that transgression by one level of government into the exclusive domain of the other level of the government would amount to a violation of the Constitution, and (b) any violation of the Constitution would be justiciable and adjudicated by an independent judiciary within the area assigned to it by the Constitution.

The question often debated is whether the Indian Constitution is truly federal in nature. According to Prof. Wheare, in practice the Indian Constitution is only quasi-federal in nature and does not conform to the test of being truly federal in nature. Sir Ivor Jennings, however, takes the view that India is a federation with a strong centralizing policy. D.D. Basu, after a fairly extensive analysis of the judgments of the Supreme Court of India, takes the view that the Indian Constitution is neither purely federal nor purely unitary, but is a combination of both. According to him, it is a union or a composition of a novel type.

India became independent in 1947 and the then Parliament also serving as a constituent assembly adopted a new Constitution, which came into effect on January 26, 1950 establishing the Federal Union of India. The Indian situation is unique with its peculiarities in terms of geographical areas, population and the number of languages spoken across the country. The distribution of power between the Centre and the States under the Indian Constitution owes much to historical and political factors. It also owes

⁵ Ibid,

much to the way in which the British ruled the country and the manner in which the British unified the country under their direct control by integrating the various principalities in the Indian union. Although, it was easy to integrate the areas directly ruled by the British, the treaties of accession signed by different independent rulers led to the integration of different principalities with the country. When the Constitution was adopted in the year 1950, Dr.B.R. Ambedkar, Chairman of the Drafting Committee, and Pandit Jawaharlal Nehru, both colossuses striding the political field, were in favour of adopting a unitary system. Sardar Patel, another strong leader, however, was strongly an advocate of the federal system and played a crucial role in crafting of a federal constitution. The debates in the Constituent Assembly give an *apercu* into the thinking on whether the Indian Constitution should have a State or Central bias.

Answering the criticism of the tilt towards the centre, Shri T.T. Krishnamachari, during debates in the Constituent Assembly on the Draft Constitution, stated as follows:

".....Are we framing a unitary Constitution? Is this Constitution centralizing 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."

Dr. B.R. Ambedkar, speaking in the Constituent Assembly 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 centralization 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."

The Constitution adopted in 1951 classified the States into four categories. Provinces directly ruled by British were classified as Part A States; princely States that had relationship with Government of India under individual treaties were classified as Part B States. Thus we had States of Hyderabad, Mysore, Jammu Kashmir and five newly joined Unions of princely States. Jammu and Kashmir were made subject to special powers given as a result of the accession instrument. The remaining princely States acceding to the Union were grouped as Part C States. The territories ruled by French and Portuguese were later on merged with the Indian Union and became Part D States or Union Territories.

Some hold the view that the federalism in India has developed along asymmetrical lines, arguing that the major asymmetry began between the British India and princely States as terms of accession depended on the bargaining strength. Under the instrument of accession the princely states surrendered whatever sovereignty they possessed to the Indian Union in exchange for concessions, privy purses and certain other privileges.

Because the British in India, and their successors, the Indian National Congress, were in extremely strong bargaining position, it rendered the relationship asymmetrical. In the case of Hyderabad, military force was used against the Nizam to forcibly integrate the then Hyderabad State into the Indian Union and police action resulted in integrating the erstwhile Portuguese territory of Goa into the Indian Union.

Even after independence, whenever there was assimilation of areas into the Indian union and there was reorganization of State boundaries, as a result of the provisions of Article 3 of the Constitution, it became open to the federal Government to define the sub-national territories and their geographical collocation. This was in direct contrast to the true test of federalism where truly sovereign units cede their sovereignty under an accepted principle in exchange for matters explicitly stated in the constitutional document. Hence, it is argued that the arrangement was asymmetric because the original entities were not allowed to retain their identities as before. The asymmetric arrangement was therefore recognition of the different states of institutions and administrative standards in the country. Jammu-Kashmir was a special case and acceded to the Union under special terms as recognized in Article 370 of the Constitution. J & K has been provided with its own Constitution and a special assignment of functional responsibilities and exemptions from several Acts of Parliament. The jurisdiction of the Centre has been restricted to foreign affairs, defence and communication, with the residuary power remaining with the State legislature. This is in stark contrast to the situation obtaining with regard to other States where the Centre's powers and responsibilities are more extensive and the Centre retains the residuary powers.

Article 371 of the Constitution, accords special powers to North Eastern States as a result of the amendments made to the Constitution, typically at the time of conversion of Union Territory into a State or, as in the case of Sikkim, upon accession to India. These safeguards make special provisions to ensure respect for customary laws, religious and social practices, restrictions on the ownership and transfer of lands and restrictions of non-residents to the State. The State legislatures have been given final control over the changes in these matters.⁶

It has often been suggested that the Indian Constitutions federal structure represents a federal structure of 'Unity in Diversity'. What exactly this means needs critical evaluation. In a truly federal structure, there would be a union or association of States leading to a setting up of a composite institution under which there is a separate and distinct federal government and state governments. This pattern of relationship has not been rigidly defined under the Indian Constitution. On the other hand, the inter se

⁶ Asymmetric Federalism in India; M.Govinda Rao & Nirvikar Singh

relationship obtaining under our Constitution has often been described as "co-operative federalism", with an elastic set of norms, which has often been taken advantage of by the powerful Union Government, according to some.

Federalism in India is built upon the sub-structure of power sharing in a parliamentary democracy and it should ideally involve two basic features, such as, devolution of authority and decentralized administration, both of which were often sacrificed at the altar of strong governance at the Centre. It cannot be gainsaid that from the time when the Constitution was drafted, the concept of unity, rather than individuality, had a marked influence on the drafting. While a truly federal State comprises "*indestructible union of indestructible states*", it is seen that the states have never remained "indestructible" as understood, for the manner in which the states were formed, reformed and re-altered, runs against this tenet. Perhaps the strong influence of Dr.Ambedkar and Jawaharlal Nehru, led to supremacy of the Union over the States in matters that concerned national interest. The pervasive influence of the pre-independence Government of India Act, 1935, with its pattern of distribution of legislative powers, has shaped the drafting of the Constitution. Even under the Constitution, the longest is the List I, the Union List, which comprises items like Defence, Arms and Ammunitions, Foreign affairs, foreign trade, atomic energy, treaties, war-and-peace, electronic communication, currency, coinage, Reserve Bank of India, industries, natural resources, Supreme Court, to name some of the important items. The State List comprises, *inter alia*, public order, police, trade, commerce within the State, agriculture, markets, money lending, land revenue and various taxes. The Concurrent List includes items like preventive detention, transfer of non-agricultural property, contracts, economic and social planning, monopolies, social security, education, labour welfare, factories, press control and electricity, to name some of the important ones. Article 248 read with item 97 of List I confers residuary legislative powers on the Union; a reading of Articles 245 to 255 of the Constitution makes it clear that the Union has larger legislative powers. Even in the matter of executive powers, the Constitution gives ample power to the Central Government to issue directions to the executives in the State Governments and enjoins upon the States not to impede or prejudice the executive power of the Union. It can, therefore, be perhaps justifiably argued that, despite the professed federal form of the Constitution, it is actually unitarism masquerading in federal form.

It is true that the Indian Constitution and its political set up may not conform to the rigid test of a truly federal state. In fact, the Constitution of India does not even mention the word federal or federalism. The reference in the Constitution throughout is to the Union of India and the states and the distribution of their legislative and executive powers as indicated in the constitutional arrangement. This has led some of the thinkers

to describe Indian federalism as “flexible federalism” or “cooperative federalism”. Some of the writers have argued that the failure to rigidly define the boundaries of power sharing between the Union and the States, far from being a flaw, is a virtue of the Indian Constitution. It is suggested that the reason why India has been successful is because the Indian federal system has the important attribute of flexibility. This important feature of the Indian federalism, called by some as “cooperative federalism”, with its formal and informal rules for maintenance of the political system as well as for peaceful change management, has worked well in practice. While the U.S Constitution in its history of 200 plus years of existence, has been amended only 27 times, the Indian Constitution can boast of 94 amendments in the last 60 and odd years. That, is pointed out, as the strength of the system and not its weakness. The 73rd and 74th Constitutional amendments resulting in the creation of a Panchayat Raj or third tier of Government in rural areas and elected urban bodies is held out as an example of such flexibility, which would not have been available under a rigid pattern of sharing of powers.

Although, the political wisdom of cooperative federalism has been much appreciated, with regard to fiscal issues, the Indian federation has both vertical imbalance and horizontal imbalance. Vertical imbalance means the imbalance faced by the relative levels of Government in their relative ability to raise revenues vis-a-vis their expenditures. The vertical imbalance is said to be more acute in the case of the Indian federation because the taxation powers of the Union are overwhelming as compared to those of the States. The Union Government has power to tax corporate income, personal income, foreign trade, manufacture and services sectors as well as on major mineral resources. The States have a smaller taxing ability to raise taxes on income from land, sales on goods and other local taxes, such as, property tax. The horizontal imbalance refers to the ability of the States to raise the revenues for meeting their expenditures. The ratio between the highest and the lowest per capita income is estimated to be 5: 1. Ironically, the poorest States are also the biggest in population and that compounds the problem of horizontal equalization. Of course, the constitutional machinery evolved by Article 280 is formation of an independent constitutional body called the Finance Commission appointed every five years which reports to the President of India and is charged with the distribution of financial resources between the Union and the States. The Commission is charged with a duty to evolving the principles on which grants-in-aid of the revenues are made from the consolidated funds of India and the measures needed to augment the consolidated of a State to supplement the resources of the entities in the Panchayat Raj⁷.

⁷ The Recent Evolution of Indian Federalism; Vijay Kelkar, Address to the IRDC, Ottawa, March 2010

Several judgments of the Supreme Court have discoursed on the nature of federalism and whether the Indian polity conforms to it. Any discussion on Indian federalism would be incomplete without a reference to some of the judgments.

In *State of Rajasthan Vs Union of India and Ors* ⁸., the Supreme Court went on to consider the concept of federalism in theory and the extent to which our Constitution conforms to it. In the judgment, the Learned Chief Justice went on to say:

"

59.[O]ur Constitution creates a Central Government which is "amphibian", in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case.....,"

It was pointed out by the court that Articles 350, 355 and 356 derogate from the strict constitutional principle of federalism, but that such departure from the constitutional principle of federalism is permitted by the Constitution because of the extraordinary situation arising out of threat to the continued existence of constitutional democratic Government. Though, Article 356, Clause (1) authorizes serious inroad into the principle of federalism enacted in the Constitution, that is permitted because, in the subjective satisfaction of the President, a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. Quoting Dr.Ambedkar, the court opined that the Constitution permitted such departure so that it can move from a federal to unitary plane, as the situation requires. ⁹

The Supreme Court analysed Article 248 of the Constitution which vests Parliament with exclusive power to legislate with respect to matters not enumerated in either the concurrent or State list and opined that this was an indication that under our Constitution, the "residuary power" is vested with Parliament. In addition, Parliament has over-riding powers of legislating even for matters in the State list for limited durations if the Council of States by resolution supported by not less than two thirds of its members declared that it is necessary to do so in national interest or during the continuance of a proclamation of emergency (Articles 249 and 250). Inconsistency between laws made by the Parliament and a State legislature on an item found in a concurrent list, is to be resolved in favour of the law made by Parliament (Article 254). Far reaching powers, contained in Articles 352-360 in Part XVIII of the Constitution, enable the President to suspend not only the enforcement of fundamental rights of citizens, and their operation as fetters on legislative

⁸ (1977) 3 SCC 592

⁹ ibid

powers but also the functions of the State legislature which can be assumed by Parliament and of State Governments which can be taken over by the President. As the Constitution stands at present, the exercise of the emergency powers, can completely remove even the semblance of a federal structure in our Constitution for the duration of an emergency.¹⁰.

In the words of Dr. Ambedkar, one of the prime architects of our Constitution, ours is "a Dual Polity", meaning a Republic "both unitary as well as federal" according to the needs of the time and circumstances. This "Dual Polity" of ours is a product of historical accidents. A genuine federation is a combination of political units which adhere rather tenaciously to the exclusion of the Central authority from strictly demarcated spheres of State action, but there is a Central or Federal "Government". The extent of Federalism set up depends upon the extent of demarcation in the executive, legislative and judicial spheres. In a truly Federal Constitution this demarcation is carefully crafted in a comprehensive and detailed manner, clearly specifying the limits.

Our country's history shows that, it was really the British who succeeded in giving reality to the objective of establishing a unity of India politically and administratively. Even they preserved a duality of systems of Government. There was a British India under the Governor General presiding over the destinies of the various provinces under Governors as Imperial sub-agents, but all acting on behalf of an Emperor whose government ruled from Westminster and Whitehall. And, there were other parts of the country, ruled by Indian Princes owing allegiance to a foreign Emperor to whose authority they paid homage by acknowledging his sovereignty or the paramountcy exercised through his Viceroy. These two parts were sought to be knitted together into a federal polity by the Government of India Act of 1935. Federal principles, including a Federal Court, were embodied in it so as to bring together and co-ordinate two different types of political systems and sets of authorities. But, after the Constitution of the Indian Republic, came the gradual disappearance of Princely States and a unification of India in a single polity with duality of agencies of Government only for the purposes of their more effective and efficient operations under a Central direction. The duality or duplication of organs of government on the Central and State levels did not reflect a truly federal demarcation of powers based on any separatist sentiments that could threaten the sovereignty and integrity of the Indian Republic to which members of our Constituent Assembly seemed ardently devoted, particularly after the unfortunate division of the country with disastrous results.

¹⁰ ibid

Our Constitution exudes a pragmatic approach to Federalism while distributing legislative powers between the Parliament and State Legislatures, with a concurrent field also, indicating the spheres of Governmental powers of State and Central Governments overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and investing in the Central Govt., the executive power of appointing State Governors, and Chief Justices and Judges of High Courts, powers of giving appropriate directions to the State Governments, and of even displacing the State Legislatures and Governments in exceptional circumstances or emergencies of not very clearly defined ambits or characters. No other "federation" in the world has exactly similar unitary features. It is open to debate whether such a system can legitimately be called "federal" in *stricto sensu* by application of political theory. The function of "supervision" is certainly that of the Central Government with all that it implies.

Through the Constitution runs an overall rein in the hands of the Centre in both the fields. The Parliament has the exclusive authority to legislate on matters enumerated in List I. So has the state legislature the exclusive legislative power with respect to the various entries in List II. Both have concurrent powers in regard to the entries in List III. The residuary power in accordance with Article 248 and Entry 97 of List I, lies with the Central Parliament. It has a predominant role to play with respect to matters in the concurrent list as is clear from Article 254. Article 249 confers power on Parliament to legislate with respect to a matter in the State List, in the national interest. When a proclamation of emergency is in operation as provided for in Article 250, the Parliament has the power to legislate with respect to any matter in the State List. Some inroads into the State's exclusive legislative field by the Centre is allowed under circumstances mentioned in Articles 252 and 253. As provided for in Article 254 in some situations, the State is under an obligation to reserve a Bill for the consideration of the President and receive his assent before being made into a law.

"It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". declares Article 355. In the eventuality of a failure of the constitutional machinery in states, provision has been made in Article 356 for the centre to assume legislative and executive powers, though not the powers vested in the High Court of a State. The effect of proclamation of emergency under Article 352 is to enlarge the executive power of the Union and extend it to the giving of direction to any state as to the manner in which the executive power thereof is to be exercised as provided for in Article 353.

The administrative relations between the Centre and the States are largely governed by the provisions of Chapter II of Part XI of the Constitution. Article 256 provides that the "*the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State*". Significantly, it has further been stated therein that "*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 accessory for that purpose.*" The control of the Union over the States in certain cases has been provided for in Article 257.

The following characteristics and features of our Constitution indubitably demonstrate the weak character of our federal structure and the controlling hand of the centre on States in certain matters:

(a) The Governor of a State is appointed by the President and holds office at his pleasure. Only in some matters he has got a discretionary power but in all others the State administration is carried on by him or in his name by or with the aid and advice of the Ministers. Every action, even of an individual Minister, is the action of the whole Council and is governed by the theory of joint and collective responsibility. But the Governor is there, as the head of the State, the Executive and the Legislature, to report to the centre about the administration of the State.

(b) Entry 45 in List III of the Seventh Schedule empowers Parliament to legislate on the subject of "*inquiries...for the purpose of any of the matters specified in List II*" also besides List III, and List I as mentioned in Entry 94 of that List. The constituent power of amendment of the Constitution lies with the Parliament under Article 368 providing for concurrence by half the number of the States in certain matters.

(c) Article 2 empowers Parliament by law to admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

(d) Parliament is also empowered by Article 3 to make law for the formation of new States and alteration of areas, boundaries of names of existing States.

Such is the nature of our federal structure. 11

In State of West Bengal v. Union of India¹² the majority judgment delivered by B. P. Sinha, C.J., while analysing the character and nature of our federal structure, observed (vide p.397):

"The exercise of powers legislative and executive in the allotted fields is hedged in by numerous restrictions, so that the powers of the States are not coordinate with the Union and are not in many respects independent".....[t]he political sovereignty is distributed between, as we will presently demonstrate, the Union of India and the States with greater weightage in favour of the Union".

The political development of British India took the form of dismantling a unitary Constitution and introducing a federal scheme through Devolution Rules and the Government of India Act, 1935. Our Constitution accepted a federal scheme, though limited in extent, having regard to the regional interests, resources, language and other diversities existing in the vast sub-continent. These facts have been taken into account by the Constitution makers and a limited Federalism was imbued in the Constitution by Article 1 itself providing that India shall be a Union of States.

In the distribution of powers between the Union and the States there is a strong bias in favour of the Union. Though there is a division of powers between the Union and the States, there is provision for control by the Union Government both over the administration and legislation of the State.

In Kuldip Nayar and Ors. v. Union of India and Ors¹³ the Supreme Court summarised the Constitutional status and observed:

"71. But then, India is not a federal State in the traditional sense of the term. There can be no doubt as to the fact, and this is of utmost significance for purposes at hand, that in the context of India, the principle of Federalism is not territory related. This is evident from the fact that India is not a true federation formed by agreement between various States and territorially it is open to the Central Government under Article 3 of the Constitution, not only to change the boundaries, but even to extinguish a State- State of West Bengal v. Union of India (1964) 1 SCR 371. Further, when it comes to exercising powers, they are weighed heavily in favour of

¹² [1964] 1 SCR 371

¹⁴ ibid

the center, so much so that various descriptions have been used to describe India such as a pseudo-federation or quasi-federation in an amphibian form, etc."

In *S.R. Bommai and Ors. v. Union of India and Ors*¹⁴ the court, however, warned:

"The fact that under the scheme of our Constitution, greater power is conferred upon the center vis-a-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..... 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-'-vis the States....."

In *State of Karnataka v. Union of India and Anr*¹⁵., 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 characterized as quasi-federal in nature".

In *S. R. Bommai and Ors. v. Union of India and Ors*¹⁶. , 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

¹⁴ (1994) 3 SCC 1

¹⁵

¹⁶ supra

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.

In *ITC Ltd. v. Agricultural Produce Market Committee and Ors*¹⁷., this Court ruled thus:

The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles.

In *State of West Bengal v. Kesoram Industries Ltd. and Ors*¹⁸, decided by a Constitution bench comprising 5 Judges, the majority judgment in Paragraph 50 observed as under:

Our Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong center.....True, 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 under

¹⁷

¹⁸

Indian Constitution leans in favour of a strong center, a feature that militates against the concept of strong federalism.

The Commission on Inter-State Relations (Sarkaria Commission), in its Report has specifically said that the Constitution as emerged from the Constituent Assembly in 1949, has important federal features but it cannot be federal in the classical sense. It was not the result of an agreement to join the federation, unlike the United States.

The pragmatic approach to federalism in India, that was appreciated by saying: '*an ounce of practice is worth more than a pound of theory*'¹⁹ was dismissed as having an 'an anti-intellectual tone'²⁰. The claim that Indian federalism is a paradigm of its 'Unity in Diversity' was dismissed as being 'more like an attempt to promote unity in the Indian diversity than to document it' on the ground that communal, regional and caste tensions continue to haunt Indian politics.²¹ Issues like unequal size of the States, disparities in economic and social development between and within regions, and management of natural resources amid growing inter-dependence continue to hamper the vision of 'Unity in Diversity'. The candid admission of the Prime Minister at the ICF meet that there has been distortion of the national vision and collective purpose by narrow political considerations based on regional or sectional loyalties and ideologies, must be an eye opener to all of us who pride ourselves on the country's pragmatic approach to Federalism. It has been pointed out that examples of chauvinism, domestic insurgencies, social tensions, and federal disputes undermine the claims of success of India's federal democracy in adopting an inclusive polity. It has been suggested that India's political system remains vulnerable and there must be caution exercised against complacency in dealing with the diverse aspirations of the people.²²

The Indian success story has no dearth of its critics. The Republic of India is '*an ungainly, unlikely, inelegant concatenation of differences*' that, decades after its foundation, still exists as a political entity, says a critic.²³

¹⁹ Fali S. Nariman, *Federalism in India – Emerging Trends and the Way Forward* 20

²⁰ "Thank You India": Lessons from the 14th International Conference on Federalism, New Delhi, 5-7 November 2007, Malcolm MacLaren,

²¹ Ibid, 117

²² Ibid 119-120

²³ Sunil Khilnani, *The Idea of India* 179(2nd ed 2003), quoted in FN 35 ibid

Interestingly, even the critics of the Indian system have a grudging admiration for it when they say: "*In short, the country poses an incomparable fact pattern, which has been addressed largely by unconventional means and with widely unexpected success.*"²⁴ Arguably, India's experience is so significant that the nature of diversity, democracy and federalism themselves should be rethought.²⁵

Over the last 61 years the country's federalism has been subjected to great stresses and strains. The pressures of political, social, economic and cultural forces have buffeted the federal structure severely, bringing about a paradigm shift in the Indian federal concept. There have been growing demands that the extant federal structure needs far reaching changes to make it truly federal. Abolition of Article 356, appointment of State Governors with the consent of the States, ensuring security of tenure for State Governors, revamping the role of the Finance Commission, restructuring the powers of allocation of finance of the Finance Commission and creation of smaller states, are some of the demands made from time to time.

The growth of mass and local politicization has thrown up a challenge to the very concept of federalism in India. The competition for scarce resources has spawned acrimonious disputes amongst States and between States and the Centre. The Constitutional machinery is finding it increasingly difficult to satisfactorily resolve such disputes within a reasonable time frame. Increasing militancy and insurgency in Kashmir and the North East and elsewhere, have rendered it difficult for the government at the Centre to maintain control except by use of armed forces. The strident demands for protection of local languages and culture, and the demands for creation of more States, even by dissecting the ones formed on the basis of common language and culture, are creating problems that defy easy solution. The very concept and political theory of federalism is poised to be tested by fire in the current turbulent times.

Federalism can only work when there is a strong sense of unity underlying the diverse constituents. Even when the constituents of the federation continue to protect their interests, there must be an underlying will to subordinate one's short term interest to the long term interest of the country, if federalism has to succeed. An irrepressible sense of national integrity must dominate to make federalism work. As the Mahabharata says:

"परस्परविरोधे च वयं पञ्च च ते शतं । अन्यैः साकं विरोधे तु वयं पंचाधिकं शतं॥" ('When we have disputes among us, we are five ad they are hundred; when we have disputes with outsiders, we

²⁴ Ibid, p.121

²⁵ Ibid 125

are a hundred and five'). Unless we can reverberate Allama Iqbal's "*Hindi hain hum, vatan hai Hindosthan hamara*", and voluntarily subordinate all local dissensions, disputes and differences to the country's interests, we shall have proved right the critics of our experiment in federalism. We need to look and think beyond federalism towards the larger interests of the country, which lies in cooperative federalism. That, more than the machinery provided in the Constitution, would enable us to revive and abidingly re-establish the true spirit of federalism.
