THE NATURE OF INDIAN FEDERALISM

A Critique

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Since its adoption in 1787 by U.S. constitution-makers, the federal system has become a popular pattern of governance, and today is a subject of academic study and has practical significance to a far greater extent than ever before. A noted scholar on federalism, Daniel Elazar, has observed that "federal principles and arrangements have become so widespread because they suit the modern temper, and federalism is designed to achieve some degree of political integration based on a combination of self-rule and shared-rule."[1] At present more than 20 countries have a federal system, while another 21 have certain federal arrangements.

The roots of Indian federalism can be traced to the British colonial regime. The unsuccessful working of their unitary system led the British to introduce a federal system during the last eight decades of their rule, and ultimately, "the Act of 1935 served to perpetuate a belief in the inevitability of federalism."[2] The importance of the Act was that the provinces were endowed with a legal personality under a federal scheme.

The Constituent Assembly

Although some members of the constitution-making body did not favor federalism for an independent India, a majority did support it as a suitable model for a continental-size society with wide regional variations. The British influence, experience with the workings of provincial autonomy under the 1935 Act, and the popularity of federalism in the 20th century as a desirable political system for plural societies influenced the framers in favor of federalism.

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1. Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), pp. 83–84.

2. S. P. Aiyar, "The Federal Idea in India," in Aiyar and Usha Mehta, eds. *Essays on Indian Federalism* (Bombay: Allied Publishers, 1965), p. 16.

The objectives resolution, moved by Jawalharlal Nehru in December 1946 in the Constituent Assembly and endorsed by it in January 1947, envisaged a federal system with a semblance of the classical pattern. However, the aftermath of partition, the Kashmir imbroglio, the secessionist threat by the Naga tribals, and the possible emergence of centrifugal forces changed the perception of the framers. Consequently, both the Indian Union Constitution and the Union powers committees chaired by Nehru recommended a centralized federal model. B. R. Ambedkar, chairman of the drafting committee, did not favor federalism in the beginning, and refused to insert the word "federal" as demanded by some members. In November 1948 he said, "what is important is that the use of the word 'union' is deliberate . . . because it is indestructible."[3] What emerged ultimately was a centrally biased federal system "to meet India's peculiar needs."[4]

Many members of the Constituent Assembly vociferously attacked the center-oriented federalism that was adopted. H. V. Kamath characterized it as "a centralized federation with a facade for parliamentary democracy," and Damodar Swarup called it "a unitary Constitution in the name of a federation." K. Hanumanthaiah, who represented the Princely State of Mysore, remarked:

> Here is a Constitution which we say is a federal constitution but which in essence is almost a unitary Constitution. . . . That was not the intention with which we started constitution-making.[5]

Leading scholars on federal government also have not regarded India's system as true federalism. According to Asok Chandra, it is a "unitary constitution," and various foreign scholars have called it a quasi-federation, an administrative federation, organic federalism, and a territorial federation.

Prefectorial Federalism

Under a prefectorial federal system, the federal (central) government has overriding and enormous powers, not only to command and control states or provinces but also to stultify their autonomy and dismiss their governments. In this sense, Indian federalism may be characterized as a prefectorial federal system. An examination of important constitutional provisions substantiate this thesis.

First, under the Indian federal system, the Union is indestructible and the states are destructible. In other words, a "state's" identity can be altered or even obliterated, and 20 acts have been passed by Parliament under Articles 3

3. Constituent Assembly Debates (CAD), vol. 7, p. 43.
4. Granville Austin, *The Constitution of India* (Oxford: Clarendon Press, 1966), p. 186.
5. CAD, vol. 11, p. 616.

and 4 of the Constitution to bring about changes in the areas, boundaries, and names of states.[6] Ascertaining the views of the concerned states by the President is not mandatory because he is competent to fix a time limit within which states must express their opinion. Moreover, Parliament is not bound to accept or act upon the views of the state legislature even if those views are received in time.[7]

Second, through the office of state governor, the central government can control and command the state governments. As nominees of the center, the governors act as its agents to send periodic reports to the President, dismiss unwanted state governments, and reserve state bills for the consideration of the President. Defeated and active politicians, mostly belonging to the central ruling party, have been appointed as governors. From 1947 to 1984, over 60% of governors had taken an active part in politics. In the post-Nehru period, the office of governor has been subjected to political pressure to a greater extent, and the partisan role of many governors has led some state governments to adopt resolutions recommending the abolition of the post.

Third, under Article 200 of the Constitution, certain bills passed by state legislatures may be reserved by the governors for the consideration of the President of India. A governor's action in this regard has been held to be non-justiciable. Under Article 201, the President may give his assent to such state bills at any time, without time limit, or exercise his veto power over them. Ambedkar's argument that "the States under our Constitution are in no way dependent upon the centre for their legislative or executive authority"[8] is only a federal myth. Granville Austin has rightly pointed out that "in theory Articles 200 and 201 invalidate the division of powers for there is no means of overriding a President's veto in the case of State legislation."[9] This unfederal provision has been used extensively by the Union government and thereby has undermined the legislative autonomy of the states. From 1977 to 1985, some 1,130 state bills were reserved for the President's consideration.[10] For example, the Essential Commodities (Amendment) Bill passed by the Karnataka State Assembly was reserved for presidential consideration on June 28, 1976, and after six years assent was withheld. The Trade Unions (Amendment) Bill of West Bengal was referred to the President on November 10, 1969, and he vetoed it 12 years later, on September 22, 1982. Because of misuse of these provisions on several occasions, the Rajamannar

6. Sarkaria Commission Report on Centre-State Relations, Part 1 (New Delhi: Government of India, 1988), pp. 9 and 73.

7. See Babulal vs. State of Bombay, AIR 1960, S.C. 51 and 52, cited by P. M. Bakshi, *The Constitution of India* (Delhi: Universal Book Traders, 1992), p. 7.

8. CAD, vol. 11, p. 976.

9. Austin, *The Constitution*, p. 207.

10. *The Hindu*, January 11, 1992.

Committee appointed by the DMK government of Tamil Nadu (1969) and the West Bengal government memorandum (1977) strongly pleaded for the deletion of Articles 200 and 201.

Fourth, Articles 248 and 249 give further scope to the Union Parliament to establish its legislative supremacy. Under Article 248, Parliament has residual powers of legislation, and under Article 249 there is a possibility of its "big intrusion" into state legislative jurisdiction in the name of national interest based on a resolution passed by the upper chamber (Council of States). The arguments advanced by some state governments for the abrogation of Article 249 are worthy of consideration. The article short-circuits the amending process prescribed in Article 368 and enables one house to transfer unilaterally any subject from the State List to the Concurrent List. Also, the two-thirds majority in the Council of States may not necessarily reflect the consent of the majority of states through their representatives. Finally, the initial life of the law, though limited to one year, may be extended indefinitely through successive resolutions of the upper house. So far this provision has been invoked in 1950, 1951, and 1986; however, the 1986 resolution passed on August 13 was not put into effect.

Fifth, Article 254(1) empowers the Union Parliament to exercise its "preemptive power" over state legislation if any provision of a law made by the legislature of a state is repugnant to any provision of a law made by Parliament or to any provision of an existing law with respect to matters enumerated in the Concurrent List. In such cases, the parliamentary law shall prevail, whether passed before or after the law enacted by the state legislature, and the state law shall, to the extent of the repugnancy, be void. Although Clause (2) of this article grants the states permission to legislate under the Concurrent List even if some provisions of a law are repugnant to the Union law, the state is subject to two conditions: first, that the state legislation should have received presidential assent, and second, that nothing in this clause shall prevent Parliament from enacting a law with respect to the same matter, including a law adding to, amending, varying, or repealing the state law. Ivor Jennings has argued that Article 254(1) can be applied to the cases of repugnancy between the Union law and the state law in different lists.[11]

Sixth, Articles 256 and 257 place a mandatory duty on the states in regard to exercise of their executive powers.[12] There is no precedent for these provisions in the American, Australian, Canadian, or Swiss federal systems. Article 256 states that the executive power of every state shall be exercised in

11. Ivor Jennings, *Some Characteristics of the Indian Constitution* (London: OUP, 1953), pp. 61–62.

12. Sarkaria Commission Report, p. 105.

such a manner as to ensure compliance with the laws made by Parliament, and if necessary, the central government can give directions to a state for this purpose. Article 257 establishes control of the central government over states in certain matters, and says that the executive power of every state shall be so exercised as not to impede or prejudice the exercise of the center's executive power and that the latter if necessary can give direction for this purpose. Further, the center can direct a state in regard to the construction and maintenance of means of communication declared to be of national or military importance and also in regard to measures to be taken for the protection of railways within the state. As the Rajamannar Committee pointed out, the only condition to be satisfied before the issue of such directions is the unilateral approval of the central government. Article 365 provides a sanction that declares: "where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution." This implies the dismissal of a state government under Article 356 for its noncompliance with central direction.

Seventh, Article 355 empowers the central government to intervene in the affairs of states under three circumstances: external aggression, internal disturbance, and when a state government cannot be carried on in accordance with the provisions of the Constitution. According to the Union Home Ministry, the center can use its armed forces *suo motu*, even if there is no request from the state government concerned. In the opinion of the Sarkaria Commission, "a whole range of actions on the part of the Union is possible depending on the circumstances of the case, the nature, the timing and the gravity of internal disturbance."[13]

Eighth, emergency powers of the President contemplated under Articles 352, 356, and 360 can transform the federal system into a unitary system. While a proclamation of national emergency under Article 352 is in operation, the Union Parliament has the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List, under the terms of Clause (1) of Article 250. Moreover, Article 353(a) empowers the Union government to give directions to any state as to the manner in which the executive power is to be exercised during the emergency period. While a proclamation of financial emergency under Article 360 is in operation, Clause (3) of this article empowers the Union government to give directions to any state to observe such canons of financial

13. Ibid., p. 170.

propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

It is the state emergency power or President's Rule provision of Article 356 that empowers the Union government to use it as a bludgeon to threaten or supersede unwanted state governments. Instead of keeping it as a last resort, as visualized by the constitution-makers, to be used as a salvage operation in an ailing state, the Article has been wantonly and brazenly employed for partisan purposes on most occasions. The word "otherwise" in Article 356 gives wide scope to the center to dismiss any state government even without the governor's report. In the opinion of V. R. Krishna Iyer, a former Supreme Court judge, Article 356 is tantamount to "constitutional terrorism." From 1951 to March 1995, it was employed 95 times and resulted in the emasculation and erosion of state autonomy. The Council of States has failed to curb the misuse of this provision as well as preserve the limited autonomy of the states within the existing framework.

Ninth, the provision for All-India Services under Article 312 is another federal aberration. On the basis of the recommendation of the Council of States, the Parliament may by law create All-India Services. At present three such services are working. The Administrative Reforms Commission study team appointed by the Indian government observed:

> In a federal setup to have All-India Service that serves the needs of the States but is controlled ultimately by the Union is an unusual principle. . . . The provisions cut across the true federal principle.[14]

Myron Weiner has rightly pointed out in reference to All-India Services that "their presence results in heightened tension between the centrally appointed officers and the state politicians who often resent the very effort of these officers to resist their pressures."[15] The recommendation of the Rajamannar Committee that Article 312 be amended to omit the provision for creating new All-India Services and the plea of the Left government of West Bengal for their abolition may be justified on the basis of federal perspective.

Tenth, as the principle of an integrated judicial system is embodied in the Constitution, the creation, composition, and jurisdiction of state high courts come within the purview of the Union government. Under Article 222, high court judges may be transferred by the President in consultation with the Chief Justice of India.

Eleventh, the financial relations contemplated in Lists 1 and 2 and Chapters 1 and 2 of Part XII indicate the affluent position of the Union government and mendicant position of the states. The share of taxes levied by the

14. *Report on Centre-State Relationships*, vol. I (Delhi: GOI, 1968), p. 237.

15. Myron Weiner, "Political Development in the Indian States," in Myron Weiner, ed., *State Politics in India* (Princeton, N.J.: Princeton University Press, 1968), p. 22.

Union amounts to about 67% of the total, while only 33% is collected by the states.[16] Corporation tax was excluded from the divisible pool by an amendment to the Finance Act in 1959. The Union government has unrestricted borrowing power subject to limits determined by Parliament under Article 292, but the borrowing powers of the states are limited under Article 293. A state cannot raise loans outside the country, and even within India cannot borrow public funds without the consent of the Union government if in deficit to it.

The recommendations of the Finance Commission appointed under Article 280 are not binding on the Union government, which did not accept some recommendations of the third and the seventh Finance Commissions and did not implement final recommendations of the eighth. On the other hand, the National Planning Commission, which is not a constitutional body, has become very powerful under the ex-officio chairmanship of the Prime Minister. It is the Planning Commission that disburses discretionary grants under Article 282, which has been used extensively for making "plan grants" to the states without reference to the Finance Commission. Plan assistance to states by the center consists of grants and loans in the ratio of 30:70. Non-plan grants under Article 275 can be made only by the Finance Commission, but the Planning Commission controls the determination and allocation of three-fourths of the total grants under this Article.[17] In the process, it has not only become an "economic cabinet" of India but also an "aid-giver" to the states.

Out of the 61 subjects found in the state list today, only about 15 are related to development. The states have to spend huge amounts of money on the welfare of backward castes, rural development, health, education, women, child development, agriculture, irrigation, road construction, and so on, and they do not have adequate financial resources to carry out development programs effectively. If the Union government is "affluent," the states are "effluents" under the present Indian federal system.

It may also be pointed out here that, in the name of national interest, more and more industries have been brought under the jurisdiction of the Union. Although industries are included in entry 24 on the State List, they are subject to the provisions of entries 7 and 52 on the Union List. Parliament enacted the Industries (Development and Regulations) Act in 1951, specifying those industries that are to be controlled by the Union in the public interest. The Union's invasion in this field has been well brought out by N. A. Palkhivala:

16. R. J. Chellaiah, "The Economic and Equity Aspects of the Distribution of Financial Resources between the Centre and the States in India," paper presented at a national seminar held in Bangalore, August 1983, pp. 40–41.

17. Ramanand Thakur: *Finance Commissions and Centre-State Relations in India* (New Delhi: Deep & Deep, 1989), pp. 37, 197.

> Without any amendment to the Constitution, "industry" has been nefariously transformed into a Union subject. Today, 93% of organised industries in terms of the value of output have been brought under the bailiwick of the Union. Even items like razor blades, paper, gum, matchsticks, household electrical appliances, cosmetics, soaps, and other toilet requisites, fabrics and footwear, pressure cookers, cutlery, steel furniture, zip fasteners, hurricane lanterns, bicycles, T.V. sets, agricultural implements have all been brought under the centre's control. . . . Overcentralisation has been one of the main reasons for our poor rate of economic growth which is one of the lowest in the world.[18]

Twelfth, in the matter of constitutional amendment, the Indian states cannot take formal initiative nor have effective participation. Article 368 confers unlimited amendment power on Parliament. The post-mortem role of states in amendment procedures pertaining to some constitutional provisions signifies their subordinate position. Because of its supreme power in this matter, the Union government has taken five entries away from the State List. Entry 36 was deleted by the 7th Amendment Act of 1956, and under the 42nd Amendment Act of 1976, entries 11, 19, 20, and 29 were taken away. Consequently, the number of entries on the State List has been reduced from 66 to 61. Although item 33 was removed from the Union List by the 7th Amendment Act, three new items—92A, 2A, and 92B—were added to this list by the 6th (1956), 42nd, and 46th (1982) amendment acts. As a result, the number of entries in the Union List has gone up to 99.

Conclusion

The theory and practice of Indian federalism substantiate the thesis that the Union government functions under a prefectorial federalism that gives it a commanding position and overriding powers. The existence of states and the very survival of their elected governments is dependent upon the will of the Union government. The single Constitution for the whole country (except Jammu and Kashmir), the unilateral power of Parliament to amend it, the provision for supersession of state governments and centrally appointed state governors, the discretionary powers of governors to reserve state bills for consideration of the President and his veto power over such bills, the affluence of the Union government, the vertical planning system, and the centralized party system have been mainly responsible for the aberration, distortion, and perversion of Indian federalism.

During the period of one-party rule (Congress dominance) from 1951 to 1967, center-state differences, if any, were resolved within the party. Jayaprakash Narayan observed:

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18. N. A. Palkhivala, "Centre-State Relations: A Broad Perspective," paper presented at the Bangalore seminar, pp. 3–4.

> Center-State relations were mainly a reflection of relations between the State branches of the Congress party and Central leadership. The federal structure never had a chance to operate. . . . If a particular state succeeded in enlarging its autonomy, it was because the local Congress leadership was in a position to browbeat the High Command.[19]

The breakdown of Congress dominance in 1967 led to the emergence of strong regional parties and the formation of non-Congress governments in some states. Since 1967, center-state relations and state autonomy have become the cardinal issues of Indian federalism. The Union government was compelled to appoint the Sarkaria Commission in 1983 to examine and review the workings of Indian federalism, but the Commission's report did not make radical recommendations for restructuring the federal system. Moreover, the Union government has not been very serious in implementing the important suggestions the Commission did make to strengthen center-state cooperation. An overcentralized federal system is incapable of dealing effectively with socioeconomic challenges and strengthening national unity. Hence, it is appropriate to restructure Indian federalism to make it more effective and promote center-state partnership.

19. Cited in K. L. Kamal and Ralph C. Meyer, *Democratic Politics in India* (New Delhi: Vikas, 1977), p. 53.