

## Is Federalism In Danger Through Central Activism?

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Article One of the Constitution makes India a Union of States. The words of the Article are “India, that is, Bharat, shall be a Union of States”, The key words are, ‘India’, ‘Bharat’, ‘Union’ and ‘States’. Adi Sankara brought us the philosophy of ‘advaitya’, or indivisible, in contrast with ‘dvaitya’ or dual, duality. The Constitution by calling India that is Bharat perhaps recognises duality in all thing. Of course this is dabbling in the field of the metaphysical, but the fact is that in our polity there are almost always two facets, that which is stated and that which is real.

To return to Article One, in the Union that is India if there are no States there is no Union. In the United States of America thirteen separate British American Colonies came together to jointly fight the war of Independence. For this purpose they formed an Union, a federation in which the Colonies voluntarily surrendered some of their powers to the Union while jealously guarding what they did not surrender. Under the U.S. Constitution that which is not surrendered to the Union belongs to the States. Residuary powers in the U.S. vest in the States. In India the Seventh Schedule of the Constitution has three Lists of legislative competency. List One is the Union List in which Parliament has exclusive legislative jurisdiction; List Two is the State List in which the State Legislature has, exclusive jurisdiction; List Three is the Concurrent List in which both Parliament and the State Legislatures have jurisdiction, with the laws of Parliament taking precedence. Under Article 248 all residuary powers vest in the Union.

The India Union really consists of the Provinces of British India, not quite colonies but also not quite States as understood in the present federal context. Their origin lies in British rule as ultimately codified by the Government of India Act 1935. Many of the features of that Act are carried over to our Constitution --- in fact the Act is the basic frame around which the Constitution is woven. It is not as if the Provinces came together to form a Union, for which purpose they surrendered some of their powers to the federation. The division of powers was already done by the Government of India Act, 1935, in section 95 of which one finds an echo of Article 356. Or is it the other way round, with Article 356 echoing section 95 of the Act? Prior to 1935 India was an Unitary State with several federal features, not because federalism was the ruling philosophy but because India was too large to be governed without a high degree of decentralisation of powers and local autonomy. It is in 1935 that this autonomy was enshrined in the Act which was then our Constitution or Basic Law. This has been carried forward, fine tuned and enshrined in our Constitution which has also accommodated the princely states which merged into the Union.

The word federalism does not find any mention at all in the Constitution, except in the Article containing definitions, Article 366, sub-clause (11) of which refers to the Federal Court as constituted under the Government of India. Act 1935 and Article 374, which provides for judges of the Federal Court to be judges of the Supreme Court and for all cases before that court to stand transferred to the Supreme Court. Everywhere the word used is ‘Union’. Is it, therefore, a question of semantics only or are we really a federation? Or is it that we are a Union with federal features without being a true federation?

The Seventh Schedule of the Constitution provides in the Union, State and Concurrent Lists the exclusive jurisdiction of Parliament, the exclusive jurisdiction of State Legislatures and the concurrent jurisdiction of both. List Two of the Seventh Schedule gives autonomy, one can argue sovereignty to the States in the subjects enumerated in the list. Under Article 162 the executive power of the State extends to all matters for which the State Legislature is competent to make laws. Exclusive jurisdiction mandated by the Constitution does give India a strong federal character and, therefore, India can be deemed to be a federation. But it is a federation with very strong centripetal force in which the Centre has a larger role than the States. All federations have this to a greater or lesser degree and even in the United States the exigencies of war, the demands of national security, economic considerations, especially at a time of crisis and the striving for equal opportunity and civil rights have led to increasing federal intervention and enlargement of the role of the federal government. As the world becomes more complex, as modern transport and communications, information technology shrink distances the demand for centralised decision making increases. It is here that in a federation collective decision making through consultation and knowledge sharing has to coexist within decentralised implementation of decisions and an increasing partnership between the Centre, the States, Local Government and the people all become virtually important. A successful federation is one where this is achieved.

As already stated India is a highly centripetal federation. Under Article 312 we have All India Services constituted by the Centre, whose officers hold all the senior posts in the Centre and the States. Our judiciary is not divided into State Judges trying cases under State laws and Federal Judges trying cases under federal laws. Right from the court of first instance, civil or criminal, right upto the Supreme Court, all magistrates and judges have jurisdiction to try cases under any law in force in India, State or Federal. The judiciary is a unified hierarchy with the Supreme Court at the Apex. The control over and audit of the funds and accounts of the Central, State and Local Government vest in a single Comptroller and Auditor General, just as conduct of Parliamentary and State Legislature elections is the responsibility of the Election Commission.

The Centre has other levers to assert its superiority over the State, of which finance is a very important one. Under the Constitution, List 1 of the Seventh Schedule enumerates the taxation powers of the Centre. Entries 82 to 92B give the taxation powers of the Centre and these include income tax, custom duties, excise duties on tobacco and goods manufactured or produced in India, corporation tax, taxes on capital value on assets, estate duty on property, terminal tax on goods and passengers carried by rail, sea or air, taxes on stock exchange transactions, taxes on advertisements in newspapers, taxes on sale and purchase of goods in the course of interstate trade, etc. By contrast the States have the power to impose land revenue, taxes on agricultural income, taxes and duties relating to agricultural land, property tax, excise duties on alcoholic liquors, opium and narcotic drugs, electricity tax and duties, taxes on entry of goods, taxes on vehicles subject to concurrent powers vested in Parliament under Entry 35 of List 3, entertainment tax, capitation tax and rates and stamp duty. With a new VAT and GST regime in the offing the discretion to levy taxes will be further reduced. No doubt Part XII of the Constitution in Articles 268, 269, 270, 271 and 272 does provide for distribution of tax revenue between the Union and the States and under Article 280 it is mandatory to constitute a quinquennial Finance Commission. But how much of central taxes will form part of the divisible pool is limited by Article 271 and, therefore, if income tax rates are not increased and instead surcharges are imposed, the State will get no share of this revenue. In other words, if the Centre decides that some revenue should be withheld from the States it can do so and the Finance Commission notwithstanding, the States can do nothing about it.

Another financial lever available to the Centre is the Five-Year Plan and the Annual Plan. The size of the State Plan is very largely dependent on what the State can raise by way of resources, but by withholding central grants or downplaying sectoral requirements the Planning Commission can definitely influence the size of the State Plan. When we add to this the huge sums of money available from the Centre under schemes such as the National Rural Employment Guarantee Scheme (NREGS) and the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) one would get some idea of how the Centre can manipulate things in favour of a State whose government is friendly to the Centre and how it can harass a State whose government is unfriendly. Clearly the financial equations are heavily weighted in favour of the Centre. In a federation of equality the financial arrangement would be such that the Centre can neither discriminate against, nor in favour of any State. This is not the position in India, which is a major complaint of the non UPA ruled States in the country at present.

There are large numbers of irritants which now seem to be plaguing Centre-State relations. During Nehru's time there was homogeneity because the same party ruled both the States and the Centre. In Indira Gandhi's time, thanks to her basically imperious nature and centralisation of powers in the Prime Minister the Centre was totally supreme, State Governors were changed at will and state governments superseded whenever they were found to be inconvenient and the writ of the Centre was supreme and at no time more than during the Emergency. The States were virtually reduced to administrative units which had to obey the orders of the superior government, the Government of India. Federalism virtually died under Indira Gandhi, as did a number of other institutions which are vital for the working of a democracy. On the use of Article 356 the Supreme Court did put a number of restrictions in the S.R. Bommai case, but the real problem is that if the Centre does use Article 356 and destabilises a State Government, by the time judicial remedy can begin to take effect the damage has already been done. Paradoxically it is only when the Centre is weak and the ruling coalition is unstable that the States are relatively safe from whimsical central intervention. A weak Centre is not good for the country because decision making at the national level virtually ceases. Therefore, safeguarding federalism through a weak Centre is far worse than the disease itself. Ideally the constitutional position of a strong Centre presiding over a centripetal policy, but with State Governments which are stable and powerful and act as a check on central whimsicality is the best constitutional and administrative arrangement for India. This is the goal towards which one must progress.

In the United States any law which affects the interests of the States must have the support of the Senate, which is the guardian of the rights of the States in the federal set up. Regardless of the size of the State it sends two representatives to the Senate. In India the Council of States has 238 representatives of States and Union Territories but because the number of members from each State is dependent on the size of the State Assembly, the more populous States have more number of members and the less populous States are marginalised. The method of election being indirect and the total electorate for each State being the Legislature of the State, the decision of the Council of the States is a reflection of the political equation within each State Assembly. The members, therefore, are representatives of political parties rather than of the State from which they are elected. To that extent there is no difference in the working of the House of People and the Council of States because members of both Houses answer to a whip. That is certainly not true of the Congress of the United States of America. The Council of States has no veto powers in the matter of legislation even if it adversely affects the interests of a State. It is only under Article 249 that Parliament acquires the powers to legislate with respect to a matter in the State List in the national interest, provided that the Council of States so resolves. Because members of the Council of States answer a whip the members of that House will, even in a matter governed by Article 249, vote not in the interest of the State or States but as per the diktat of the ruling party. At the level of Parliament, therefore, the States have no guardians to safeguard their interests and, therefore,

there is a growing distrust between State Governments, Central Government and legislation enacted by Parliament. The result is that many State Governments resolve not to enforce a law of Parliament. For example in the matter of the Food Safety and Standards Act both Madhya Pradesh and West Bengal have said that they would not strictly enforce this law. Only a weak Centre can tolerate this.

When it comes to matters of national security the situation becomes more serious. Every time when a break-down of law and order takes place State Governments do go running to the Centre for help. The Naxalite movement which has seriously affected the administration of about 160 districts in the country is one example where the affected States are clamouring for central assistance and central forces. When terrorists struck Bombay in 2008 the Maharashtra Government went running for help to the Centre. When natural calamities strike the States want central intervention. At that time no one cries about such intervention weakening federalism. However, when the Centre decides to set up a National Counter Terrorism Centre and tries to arm it with the authority to intervene immediately on receipt of credible information and to neutralise a terrorist attack which is building up, the States cry foul. It is a fact that police is entirely a State subject and police action is the responsibility of the State Governments. With the police throughout India at senior levels being manned by the very IPS officers who also serve the Central Government it is strange that the Centre obviously does not trust the State police and wants to retain powers of direct intervention. This is strongly resented by the States. By failing to take States into confidence and by trying to push through certain measures which have been initiated at central level the Centre has aggravated the situation and created a bogey of federalism in danger versus national integrity in danger. Under Article 355 it is the duty of the Union to protect the States against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. Surely the Centre must have the wherewithals to perform its duty under Article 355. We do need a serious dialogue between the Centre and the States on Article 355 versus Entries 1 and 2 of List 2 of the Seventh Schedule of the Constitution (Police) and to see to what extent the power to strike against terrorists on receipt of credible information is available to a Central authority without this being construed as an attack on the rights of the States. It is in this behalf that the Interstate Council must be activated so that all matters relating to Centre-State relationships can be viewed through the prism of public interest and solutions arrived at which would enable the Centre to discharge its constitutional obligations without the States feeling that this is an encroachment on their rights. In other words, what this federation needs is a clear-cut understanding of what federalism means under Indian circumstances and how we can create that machinery which ensures smooth relations between the Centre and States without conflict.

Broadly speaking it is not federalism which is under attack but rather individual State Governments and the Centre itself which are under threat because the two opposing parties will not talk to each other, will not create an environment of trust and will insist on trying to score brownie points against each other. In case there is no consensus the Centre must use its authority to decide an issue and then ensure that all States fall in line. Here defiance by one or more States should not be tolerated and, if need be, coercive powers be used to call recalcitrant States to account. Right now federalism is not in danger through Central activism. The fact is that the Centre, by failing to assert itself is failing in its duty and this can be fatal because as satraps break away the Centre itself would wither away. What price then this Union of States?

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