

Federalism: A concept beyond Division of Powers

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Abstract

Federalism is a concept that includes within itself legal, political, cultural, social and economic dimensions. However, most commentators and academicians have focussed only on the legal and political dimensions of federalism and have thereby restricted the concept of federalism. In this era of globalisation, federalism has evolved beyond mere division of powers and autonomy of Governments, to cooperation and coordination between governments to ensure equitable and sustainable development and welfare of the people of the country. The article focuses on the modern concept of federalism, the cultural, social and economic parlances of federalism and its importance in maintaining the uniqueness and identity of the country in this world.

Introduction

Federalism can be defined as an agreement or understanding that unites separate polities to a united political system so as to maintain its own fundamental political integrity². It is an association that has been formed certain common purposes wherein the member states retain certain level of independence.³ Federalism is to be understood as a concept that is unique and different to each country because the aim and objective that such federal structure intends to achieve within the country differs from one country to another.⁴

In federalism, there is division of powers within the member states of such association. In most cases, it is based on the conclusions of such division of power that various scholars categorise countries as federal, quasi-federal or unitary. However, it is pertinent to note that in such classification of countries into federal and unitary categories, most scholars and academicians ignore the cultural, economic and social responsibilities of federalism. This means that the purposes for which such federation was formed and the factors that affect the existence of such federal unit are often ignored.⁵

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² B.N. Srikrishna, Beyond Federalism, India International Centre Quarterly, Vol. 38, No. 3/4, The Golden Thread: Essays in Honour of C.D. Deshmukh (WINTER 2011 - SPRING 2012), pp. 386, available at <https://www.jstor.org/stable/41803993>.

³ See at, B.N. Srikrishna, Beyond Federalism, India International Centre Quarterly, Vol. 38, No. 3/4, The Golden Thread: Essays in Honour of C.D. Deshmukh (WINTER 2011 - SPRING 2012), pp. 386, available at <https://www.jstor.org/stable/41803993>.

⁴ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, The Indian Journal of Political Science, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 307, available at <https://www.jstor.org/stable/41853856>.

⁵ See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 324-326, available at <https://www.jstor.org/stable/44782476>. Also see at S. P. Aiyer, India's Emerging Co-Operative Federalism, The Indian Journal of Political Science, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 307, available at <https://www.jstor.org/stable/41853856>.

Federalism not only indicates division of powers but also controls the aspects of division of responsibility and the competence to fulfil the responsibility, especially towards people's welfare.⁶ In order to ensure that such responsibilities towards the welfare of the people is fulfilled it is necessary that there exists a relation and an understanding between the member states beyond the water tight compartmentalisation of powers enumerated in the agreement of the federation. This is because with the advent of globalisation and integration of nations and aspects of free trade and barrier less transactions in order to maintain integrity and uniqueness of a federation it is necessary that the powers held by the member states are decentralised and liberalised to attain the common purposes mentioned in the federal agreement.⁷ This leads to the concept of cooperative federalism that ensures that the common purposes enumerated in the federal agreement are met and achieved. Thus, the concept of Federalism is not stagnant and is rather dynamic, if it remains stagnant it would become obsolete.⁸

Concept of Federalism in India

Article 1 of the India Constitution states that India is a Union of States and does not use the word federal, however the various provisions of the Constitution envisage division of powers between the Centre and States. Federalism is a method of dividing powers between general and regional governments in such a way that the two parts of the system are co-ordinate and independent.⁹ This is the essence of federalism, even though the degree of autonomy enjoyed by the States may differ.¹⁰ In India, the Union and the States certainly have their own exclusive spheres of legislative competence. There is also a general opinion by commentators that such division of legislative competence is tilted towards the Union thereby affecting the autonomy of a State and also violating the federal principle. It is due to this reason that Professor Wheare classifies India to be a quasi-federal nation.¹¹

Some of the provisions that tend to magnify the powers of the Union are¹²:

- a. Article 254 (1) provides that in the event of a conflict between a State law and a Union law in the concurrent sphere, the Union law shall prevail.
- b. Article 249 (1) provides that if the Council of State declared by a resolution supported by 2/3 of its members present and voting that it is necessary or expedient the national interest that Parliament should make a law on a subject enumerated in the State list, it would be lawful for Parliament to enact the law which will be in force for the maximum period of one year and would be renewable for another year.

⁶ P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, *Journal of the Indian Law Institute*, Vol. 54, No. 3 (July-September 2012), pp. 324, available at <https://www.jstor.org/stable/44782476>.

⁷ See at, Amaresh Bagchi, Globalisation and Federalism: Uneasy Partners? *Economic and Political Weekly*, Vol. 43, No. 38 (Sep. 20 - 26, 2008), pp. 41-43, available at <https://www.jstor.org/stable/40277975>.

⁸ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, *The Indian Journal of Political Science*, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 310, available at <https://www.jstor.org/stable/41853856>.

⁹ S.P. Aiyer, India's Emerging Co-Operative Federalism, *The Indian Journal of Political Science*, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 308, available at <https://www.jstor.org/stable/41853856>.

¹⁰ *Id.*

¹¹ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, *The Indian Journal of Political Science*, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 308-310, available at <https://www.jstor.org/stable/41853856>.

¹² Constitution of India, 1950.

- c. Article 257 states that the executive power of every State shall be so exercised as not to impede the executive power of the Union and for this the Union Government is empowered to issue directives to the States (Arts. 256, 257, 353, 360). Obviously, failure to comply with these directives can bring on the wrath of the Union executive through the operation of Article 356 - the emergency power.¹³
- d. Article 3 empowers the Union Government to increase or diminish the area of any State without regard to the opinion of the State.

These provisions have been highlighted by various scholars and commentators to destroy the federal character; however it is pertinent to note that these characteristics only alter the federal principle and does not destroy the federal character of the country. The concept of federalism is unique to each country and the ideals and objectives that the federal agreement i.e. the Constitution seeks to achieve.

Globalisation and Federalism in India

The concept of federalism includes within itself social, cultural and economic responsibilities and should not be restricted to political or legal dimensions. Therefore, federalism, along with the division of powers vests upon the Union Government and the States divided responsibilities and welfare of the society.¹⁴ With the advent of globalisation the ambit of such responsibilities has widened and the water tight rules of federalism would not cater to the changing ambit of responsibilities.¹⁵ It is therefore pertinent that the Union Government and State Governments cooperate with each other in order to ensure that the objectives and goals laid down in the Constitution are fulfilled. This leads to decentralisation and liberalisation of powers of the Union Government and State Governments thereby diluting the water tight compartment laid down by the federal structure of the Constitution of India.

Further, with globalisation, the goal of federalism has evolved from keeping intact the unity of vast and ethno-linguistically diverse nation to creating a nation with uniform regional development and welfare.¹⁶ This means that the Union Government and the State Governments must use their powers enumerated under the Constitution to achieve the goal of sustainable and equitable development while keeping in mind the global standards and trends of free trade and barrier free commerce.

These effects of globalisation has created an effect on every country's federal structure including that of United States and Australia that claim themselves to be the prime

¹³ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, The Indian Journal of Political Science, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 309, available at <https://www.jstor.org/stable/41853856>.

¹⁴ See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 324-326, available at <https://www.jstor.org/stable/44782476>.

¹⁵ See at, Amaresh Bagchi, Globalisation and Federalism: Uneasy Partners? Economic and Political Weekly, Vol. 43, No. 38 (Sep. 20 - 26, 2008), pp. 41-43, available at <https://www.jstor.org/stable/40277975>

¹⁶ See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 326, available at <https://www.jstor.org/stable/44782476>.

examples of a federal structure.¹⁷ It is necessary that the goals of the federal principle are altered to ensure global recognition as well as achieve the goals enumerated in the written federal agreement. This leads to the concept of cooperative federalism between member states of a federal agreement to cooperate and coordinate with each other to strive to accomplish the goals of the federation rather than engaging in a competitive federalism that would undermine the powers of the member states of the federal agreement.

The same idea of cooperative federalism can be seen incorporated in the Indian context. For example, the Consumer Protection Act, 1986 as well as the Consumer Protection Act, 2019 deal with the rights of consumer with regard to online as well as offline transactions against product liability, unfair trade practices etc. however, with regard to implementation of the same, the Central Government as well as State Governments are given the power to set up the National Consumer Redressal Forum and the State Consumer Redressal Forum and the District Redressal Forum respectively. This clearly shows that even though the legislation is passed by the Union Government with its power enumerated under the Seventh Schedule, List I, in order for proper implementation of such enactment it is necessary that the State Governments cooperate with the Union Government. If the State Governments refuse to cooperate with the Union Government it would lead to an internal conflict which would lead to breakdown of constitutional machinery and recourse would have to be taken to Article 356 of the Constitution. But if there arises a situation when more than one State, revolts and refuses to implement laws passed by the Union Government the powers of the Union Government would be meaningless and would have to consider the will of the States. This was the situation when the Union Government tried to impose Hindi as language upon the State of Madras (as it was referred to then).¹⁸ Thus, it is clear that cooperative federalism is the answer to ensure effective implementation of the various legislations, rules and regulations that are passed by the Union and State Governments.¹⁹

Similarly, various centrally sponsored welfare and health schemes are implemented with the help of State Governments and local governments such as Municipalities and Panchayats.²⁰ This clearly shows that the water-tight division of powers in the Constitution is diluted and there is clear decentralisation and liberalisation of powers in order to achieve the goals of better standard of living and welfare of the people.

Further, federalism in its initial form, only based on the idea of division of powers can be considered an accidental success, because of the political dimension to the same, wherein the political party at the centre has a majority rule in most of the States of the country. In

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¹⁸ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, *The Indian Journal of Political Science*, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 311, available at <https://www.jstor.org/stable/41853856>.

¹⁹ See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, *Journal of the Indian Law Institute*, Vol. 54, No. 3 (July-September 2012), pp. 326-328, available at <https://www.jstor.org/stable/44782476>.

²⁰ See at, S. P. Aiyer, India's Emerging Co-Operative Federalism, *The Indian Journal of Political Science*, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 311, available at <https://www.jstor.org/stable/41853856>.

such situations, federalism in its basic sense can be considered a success in order to keep unity within the country, but the realm of federalism is beyond ensuring unity within the member states of the federal agreement.²¹ Fiscal policy is another aspect that determines the functioning of federalism because implementation of the various legislations requires funds which is generated from taxes and other such fiscal measures.²² It is in situations such as these that the political dimension of federalism plays an important role because the Union Government plays an important role in the distribution of funds to the States in India. A different political party from that of the Union Government ruling in the State might lead to friction between the Governments leading to situation of competitive federalism which results in unequal developments of certain areas of the country.

Thus, globalisation has played an important role in the dynamic change of the concept of federalism and has rendered the rustic legal dimension of federalism obsolete.

Conclusion

Thus, it is necessary to look at the concept of federalism beyond the realm of division of powers and classification based on powers. Federalism in this era should focus not just in mere integration and unity of the nation but should rather become dynamic and adaptive to accommodate the challenges posed by the global world with regard to sustainable development, clean environment and equitable distribution of rights and welfare of the people. Thus, the dynamic concept of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities are articulated and protected.²³ Professor Wheare and most commentators have looked into the concept of federalism only in legal dimension thereby ignored the holistic approach to the concept of federalism that goes beyond division of powers.²⁴ In order to determine whether a country is federal or not it is necessary to ensure that there exists intergovernmental cooperation and division of responsibilities which ensures equitable development and welfare of the people. Federalism is now used

²¹ See at, B.N. Srikrishna, Beyond Federalism, India International Centre Quarterly, Vol. 38, No. 3/4, The Golden Thread: Essays in Honour of C.D. Deshmukh (WINTER 2011 - SPRING 2012), pp. 386, available at <https://www.jstor.org/stable/41803993>. Also see S. P. Aiyer, India's Emerging Co-Operative Federalism, The Indian Journal of Political Science, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 312, available at <https://www.jstor.org/stable/41853856>.

²² See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 326-331, available at <https://www.jstor.org/stable/44782476>. Also see S. P. Aiyer, India's Emerging Co-Operative Federalism, The Indian Journal of Political Science, Vol. 21, No. 4 (Oct.-Dec. 1960), pp. 310-314, available at <https://www.jstor.org/stable/41853856>.

²³ See at, Amaresh Bagchi, Globalisation and Federalism: Uneasy Partners? Economic and Political Weekly, Vol. 43, No. 38 (Sep. 20 - 26, 2008), pp. 41-43, available at <https://www.jstor.org/stable/40277975>.

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as a tool in most federal nations to ensure strong commitment to fundamental human rights and welfare.²⁵

India can be considered as a nation truly federal in nature as the governments cooperate and work with each other to ensure that the various fundamental rights and directive principles of state policy are implemented. India has a unique form of federalism that goes beyond the structural division of powers and concentrates more cooperative federalism between the governments to achieve the goals and objectives laid down in the Constitution.

²⁵ See at, P. Ishwara Bhat, Why And How Federalism Matters In Elimination Of Disparities And promotion Of Equal Opportunities For Positive Rights, Liberties And Welfare?, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 326-328, available at <https://www.jstor.org/stable/44782476>.