

CHANGING DIMENSIONS OF FEDERALISM IN INDIA: AN APPRAISAL

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Abstract

Federalism, in its basic sense means division of legislative and executive power between central government and regional governments so that each government can work independently in its own sphere. In a country like India the importance of federalism is vital because different people from different background and culture live together. Neither it would be possible for a single government to make laws for the whole country nor is it desirable in the interest of the people with varied cultures, language and diverse backgrounds. So, the Central government may make laws for the whole and any part of territory of India and the respective State governments may make and implement the laws according to social, economic and political conditions of the people living in different areas. Federalism in the modern age is a principle of reconciliation between two divergent tendencies, the widening range of common interests and the need for local autonomy. The paper will examine the concept of federalism as well as the changing dimensions of federalism in India. Further, this paper will highlight the needs of the co-operative and collaborative federalism for achieving the constitutional goals.

I Introduction

II Judicial trends towards federalism

III Critical analysis of Indian federalism

IV Challenges to Indian federalism

V Conclusion

I Introduction

FEDERALISM IMPLIES the sharing of constituent and political power, that is, the power to govern at two levels but there may be local governments also within a state. Every federal system requires division of powers between the Union and State Governments and both are independent in their own sphere and not subordinate to one another. To avoid the chaos and conflict between the two competing jurisdictions, the power has been divided between the centre and the States and division of power is one of the most important feature of the federal constitutions. The constitution of India enumerates various items of legislation in three lists:

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Union List, Concurrent List and State List in the VII Schedule of the Constitution.¹ The three legislative lists respectively enumerated the powers vested in the Parliament, the state legislature and to both of them concurrently. However, if a matter was not covered by any of the three Lists that would be treated as a residuary power of the Parliament.² The independent judiciary plays an important role as final interpreter of the Constitution in federal structure and uphold the constitutional values.

Concept of federalism

Federalism constitutes a complex governmental mechanism of a country and under this system there exist simultaneously a central, and state governments. Both the governments derive their power from the constitution.³ In a federal constitution, the powers are divided between Centre and State governments and the Central Government may make laws for the whole country and respective state governments may make for the whole of the state, in such a way, each government is legally independent within its own sphere. Each government has its own area of powers and exercises their powers without being controlled by other governments and in doing so neither is subordinate to the other but both are co-ordinate.⁴ Federal system of government is more common in the world than confederal systems. This system is based upon a compromise between unity and regional diversity, between the need for an effective central power and the need for checks or constraints on that power.⁵

A federal union may be formed in either two principal ways, having regard to the pre-existing condition of the component units, - (i) it may be formed by a voluntary agreement between a member of sovereign and independent states, for the administration of certain affairs of general concern, as in the case of the United States of America or Australia; or (ii) the provinces of unitary state may be transformed into a federal Union, as happened in case of Canada or India.⁶

Historically, the political organization were unitary not federal. But economic, political and social conditions forced the unitary states to enter into association with other states, so that they

¹ M.P. Singh, *V.N. Shukla's Constitution of India* 794 (EBC, 2017).

² *Ibid.*

³ Durga Das Basu, *Comparative Federalism* 5-6 (Wadhwa, Nagpur, 2008).

⁴ K.C. Wheare, *Modern Constitutions* 19 (Oxford University Press, London, 1975).

⁵ Andrew Heywood, *Politics* 167 (Palgrave Macmillan, New York, 2007).

⁶ *Supra* note 3 at 81.

can solve common problems.⁷ First time in 1787, the constitution of United States (US) established a ‘federation’ and concept of federal state emerged in a definite shape. The US is considered as the model of federalism and is known as oldest and most respected member of the family of federal constitutions. Before 1787, US was ‘Confederation’⁸ and it became the ‘Federation’⁹ with the adoption of the Constitution of US in 1787. American constitution divided powers in such a way that the power of general government specified and the residue is left to regional governments.¹⁰ Many other countries subsequently adopted the federal form from America with some variations according to their local needs.¹¹

The English word ‘Federation’ derived from the Latin word “*Foedus*” which means ‘treaties or agreement’ (or referring to an alliance of individuals or groups to promote specific and common interests). Federal states are those states which developed by a treaty or an agreement. It is a system where sovereignty is divided between the core-centre and peripheral-states. On the point of division of powers, federalism can be classified as ‘Centripetal’¹² or ‘Centrifugal’¹³. But Indian federalism is not the result of any agreement or treaty. Federalism is not defined as such and it is true that there exists a certain vagueness and sometime confusion about its meaning. But following are a few definitions of federalism:

According to Livingstone:¹⁴

The essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces, economic, social, political, cultural – that have made the outward forms of federalism necessary

⁷ *Id.* at 4.

⁸ ‘Confederation’ may be used to describe a form of association between governments whereby they set up a common organization to regulate matters of common concern but retain to themselves, to a greater or less degree, some control over this common organization. A confederation is loose association of two or more sovereign states and it allows the states to secede.

⁹ ‘Federation’ is an intimate legal association between two units i.e. the centre and the states. Centre is only and the states may be any number and it is indissoluble, the states have no right to secede

¹⁰ K.C. Wheare, *Federal Government* 12 (Oxford University Press, London 1945).

¹¹ *Supra* note 3 at 5.

¹² Centripetal federalism means the power has been divided between centre and state and residue power remain with centre. The division of power between centre and state has been done keeping in view the historical, geographical, political and cultural facts, so that the good of common welfare can be achieved through federalism in social-cultural economic spheres.

¹³ In centrifugal federalism, residue power lies with state along with division of power.

¹⁴ Livingstone “A Note on the Nature of Federalism” 67 *Political Science Quarterly* 83-84 (1952), available at: <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj03june09.pdf> (last visited on Aug. 31, 2019).

... The essence 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 of the society are articulated and protected.

Encyclopaedia Britannica defines federalism as:¹⁵

...mode of political organization that unites separate states or other polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties.

According to Prof. Wheare:¹⁶

...the systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Government federal?

According to Dicey:¹⁷

Federalism means the distribution of force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.

Federalism means:¹⁸

A proper respect for state functions, recognition of the fact that the entire country is made up of a Union of separate State governments, and a

¹⁵ As quoted in, *Govt. (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501 at para 92.

¹⁶ K.C. Wheare, *Federal Government* 33 (Oxford University Press, London, 1963).

¹⁷ *Supra* note 3 at 8.

¹⁸ *Younger v. Harris*, 401 U.S. 37 (1971), available at: https://www.ripublication.com/gjps/gjpsv1n1_02.pdf. (last visited on July 10, 2019).

continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Therefore, federalism is not only just a matter of Centre-State relation but also it is a device to ensure participative role of the state in the decision-making process.¹⁹ The essence of a federalism is the existence of the Union and the states and the distribution of powers between them by the written constitution. The government at the Centre and the government in the states share, on an agreed basis, the totality of governmental power without sacrificing their own fundamental political integrity.

Federalism and Indian Constitution

Till 1935, we had unitary system in India, the Government of India Act, 1935 envisaged the federal scheme and first time introduced the federal concept in India and made legal use of the word 'Federation',²⁰ even though, the process of decentralisation and devolution of power had started since the earlier Government of India Act, 1919.²¹ Indian federal system is not a result of any treaty or agreement amongst the constituent units/states. In India, unitary system of government was converted into a federal one by giving certain powers and responsibilities to the states under the constitution. The framers of the Indian constitution aimed at establishing a federal system in India in view of the social diversities and the vast size of the country.²² Fissiparous tendencies²³ are dangerous to the unity of a nation and to override the fissiparous tendencies, the legitimate grievances of the states should be addressed within the framework of the Federal Constitution. "In framing of the Constitution, the Constituent Assembly had many models to draw upon, but it wisely decided to take the Government of India Act, 1935²⁴ as the basis on which the new constitution was to be formed."²⁵

¹⁹ Kaleeswaram Raj, Federalism in judicial appointments *The Hindu*, Sept. 17, 2014.

²⁰ Available at: www.lawyersclubindia.com (last visited on July 10, 2019).

²¹ The Government of India Act, 1919 introduced the diarchy or dual government. See, M.P. Singh, *Outlines of Indian Legal and Constitutional History* 169 (Wadhwa and Co, Nagpur, 2003).

²² Pratiyogita Darpan, *Indian Polity*, 76 (2003). For solution of constitutional problem of multi-racial, multi-lingual and multi-communal country like India with a vast area and a huge population, federalism was only natural choice. Also see, M.V. Pylee, *Constitutional Government in India* 29 (S. Chand & Company, New Delhi, 2011).

²³ Causing division or fragmenting something.

²⁴ Broadly modelled on the pattern of The British North America Act, now Canada constitution Act, 1867.

²⁵ H.M. Seervai, *Constitutional Law of India* (Vol.I) 286 (Universal Law Publishing, New Delhi, 2008).

The Indian Constitution was framed by the Constituent Assembly according to Cabinet Mission Plan and its first meeting was held on December 9, 1946 and the framers used the term federal in their speeches. In view of the external conditions as well as the vastness of the country and its heterogeneous elements, there was consensus in the Constituent Assembly that a unitary system was not only undesirable, but unworkable. Therefore, India was going to have a federal constitution.²⁶ In order to bring the Indian States under the federal scheme, it was also announced that the Union should have only those three powers of defence, foreign affairs and communications, which had been conceded by the Cabinet Mission Plan, and the states of the federation shall be autonomous units, having all residuary powers.²⁷ The Mountbatten Plan of the June 3, 1947 announced partition of the country and a separate Constituent Assembly for the proposed state of Pakistan.²⁸ After the decision to partition the country was announced, immediately, the Union constitution Committee met on the June 5, 1947 and decided that the constitution of India should be federal with a strong centre.²⁹ It was also decided that there should be three legislative lists and residue was left unenumerated, should go to the union and not to states and it was affirmed by the Constituent Assembly and implemented by the Union Powers Committee.³⁰

The words ‘federation’ and ‘federal’³¹ do not appear in any article of the constitution of India. The framers used the word ‘union.’ Article 1(1) of the constitution describes: “*India, that is Bharat, shall be a Union of States.*”³² The Union Constitution Committee had used the word ‘federation’ but the Drafting Committee of the Constituent Assembly substituted it with the word ‘Union’.³³ Moving the Draft constitution for the consideration of the Constituent Assembly on November 4, 1948, B.R. Ambedkar, Chairman of the Drafting Committee

²⁶ XI, *Constituent Assembly Debates*, 657-58.

²⁷ I, *Constituent Assembly Debates*, 57-58

²⁸ *Supra* note 22 at 6.

²⁹ *Supra* note 26.

³⁰ *Supra* note 3 at 117.

³¹ The term ‘federal’ complicates the matter as it involves various facets such as political federalism, institutional federalism and fiscal federalism etc. See, <https://www.thestatesman.com/supplements/law/cbi-police-face-off-our-tryst-with-federalism-1502732236.html> (last visited on July 3, 2019).

³² Chief Justice RS French, *Federalism in The Supreme Court of India and the High Court of Australia*, available at: <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj03june09.pdf> (last visited on Oct. 31, 2019).

³³ VII, *Constituent Assembly Debates*, 33.

explained the significance of the use of the expression “Union”³⁴ instead of the expression “Federation”:³⁵

It is true that South Africa which is a unitary State is described as a Union. But Canada which is a Federation is also called a Union. Thus, the description of India as a Union, though its constitution is federal, does no violence to usage. But what is important is that the use of the word “Union” is deliberate. I do not know why the word “Union” was used in the Canadian constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation or to dispute.

Use of word ‘Union of States’ and not the ‘Federal of Federation’ connotes a unique distinctive character and nature of the Indian constitution. The expression ‘federal’ was avoided due to historic, cultural, social and political experiences.³⁶ B.R. Ambedkar had no misgivings about the federal nature of the constitution. He stated in the Constituent Assembly:³⁷

The basic principle of Federation is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the constitution itself The chief mark of federalism as said

³⁴ It may be noted that the word Union was employed by Stafford Cripps in his proposals and was also used in the Cabinet Mission Plan. The word Union is not decisive of any characteristics.

³⁵ *Supra note 32* at 43. Also see, *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, AIR 2008 SC 1892.

³⁶ Satish Chandra Srivastava, *Nature of Federalism in India* 45 (July 2010).

³⁷ Brij Kishor Sharma, *Introduction to constitution of India* 40 (PHI, Delhi, 2011).

lies in the partition of the legislative and executive authority between the Centre and the Units of the constitution. This is the principle embodied in our constitution. There can be no mistake about it.

Rajendra Prasad said on this question: ³⁸

[P]ersonally, I do not attach any importance to the label which may be attributed to it – whether you call it a federal constitution or a unitary constitution or by any other name. It makes no difference so long as the constitution serves our purpose.

Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the constitution³⁹, division of power between the Union and the state governments,⁴⁰ existence of an independent judiciary and a rigid procedure for amendment of the constitution. It establishes a dual polity, with clearly defined sphere of authority between the Union and the states, to be exercised in fields assigned to them. There is an independent judiciary to determine the issues between the Union and the States, or between one state and another.⁴¹ Andrew Heywood said: “The federal systems give regional and local interests a constitutionally guaranteed political voice. The states exercise a range of autonomous powers and enjoy some measure of representation in central government through Council of States.”⁴² Every federal system requires division of powers between the Union and state governments. It is prescribed in our Constitution by part XI along with VII schedule.⁴³ While

³⁸ H.R. Khanna, *The Making of India's constitution* 85 (Eastern Book Company, Lucknow, 1981).

³⁹ In *Special Reference No.1 of 1964 UP Assembly Case*, AIR 1965 SC 745. The court observed: “The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity.”

⁴⁰ Part XI deals with the Relations between the Union and the States; Ch. I of Part XI deals with Legislative Relations and distribution of Legislative Powers while Ch. II deals with Administrative Relations 'between the Union and the States. The distribution of powers between the Union and the States can be discerned from the various provisions of the constitution. A machinery is also provided for, for settling their disputes in the constitution.

⁴¹ Justice V. Dhanapal, “Basic Structure of the Indian constitution - An Analysis” 8 *SCC (J) 2* (2014).

⁴² *Supra* note 5 at 168.

⁴³ There is a three-fold distribution of legislative powers between the Union and the States, made by the three Lists (Union list, State list and Concurrent list) in the Seventh Schedule of the constitution.

articles 245 to 255 deal with distribution of legislative powers, the distribution of administrative powers is dealt with in articles 256 to 261 of the Constitution.⁴⁴

Decentralisation in administration is the core objectives of federalism and power is divided between the Centre and the states, but by 73rd and 74th constitutional amendments, another level has been created *viz.*, Panchayats and Municipalities. This may be regarded as a third tier of government. So, in India we have three levels of government and it is considered novel form of federation unknown to other countries in the world.⁴⁵ Therefore, we can say that the Indian federalism is unique in nature and offered a possible solution to a number of problems. It has been tailored according to specific needs of the country.

II Judicial trends towards federalism

Independent judiciary is one the essential feature of federalism, if any government transgresses its limit assigned by the constitution, the Court has power to interpret every word. The Supreme Court has delivered many judgments on federalism, but its stand on federalism has been inconsistent.

In the *Automobile Transport v. State of Rajasthan*,⁴⁶ case while the seven judges' bench of Supreme Court interpreted the impact of article 301 of the Constitution said that Indian constitution is a federal constitution and observed:⁴⁷

The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The constitution itself says by Art. 1 that India is a Union of States and in interpreting the constitution one must keep in view the essential structure of a federal or quasi-federal constitution, namely, that the units of the Union have also certain powers as has the Union itself.

⁴⁴ *Supra* note 40.

⁴⁵ *Supra* note 37 at 42.

⁴⁶ AIR 1962 SC 1406.

⁴⁷ *Id.* at 1415-16.

In *State of West Bengal v. Union of India*,⁴⁸ the Union Government enacted the Coal Bearing Areas (Acquisition and Development) Act, 1957 and acquired certain coal mines which vested in the state. The state government challenged the law in the court on the ground that Parliament is not competent to make law and to authorised the Union to acquire land which is vested in a state. The state contended that: (i) Indian constitution is federal, (ii) states shared sovereignty with the centre and (iii) centre has no power to acquire state properties. The majority of the Supreme Court rejected all three contentions and held that the Union was entitled to acquire the coal mines vested in the state of West Bengal. The Chief Justice Sinha said that:⁴⁹

.....A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate constitution by which it is governed in all matters except those surrendered to the Union, and the constitution of the Union primarily operates upon the administration of the units. Our constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union.

“States do not have the right to secede from the Union in India. That conclusion rested on the proposition that the States were created by the Union, as distinct from the position in Australia and the United States where the States were the federation's constituent elements formed out of the pre-federation colonies whose delegates drafted the constitution.”⁵⁰

The majority judgment was disappointing with respect to federalism because the court did not consider the Indian Constitution as a federal constitution. But Justice Subba Rao in his dissenting opinion held that Indian constitution is a federal Constitution. In later judgments, the Supreme Court has categorically held that Indian Constitution is a federal constitution. In *Keshavanada Bharti v. State of Kerala*,⁵¹ Sikri C.J. and other judges of the full bench considered the federal

⁴⁸ AIR 1963 SC 1241.

⁴⁹ *Ibid.*

⁵⁰ Parthasarathy, “Federalism and constitutions Processes in India” in Copland, Rickard (eds), *Federalism: Comparative Perspectives from India and Australia*, 284-285 (1999).

⁵¹ AIR 1973 SC 1461.

character of the constitution as a basic feature of our constitution. In *State of Rajasthan v. Union of India*,⁵² Beg, J. observed:⁵³

In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.

In *State of Karnataka v. Union of India*,⁵⁴ the majority judgment⁵⁵ was not in support of federal structure as such but Kailasam, J. (Minority View) held:⁵⁶

In the distribution of powers, it is clear there is strong tilt in favour of the Union. According to the constitution, the Union can assume powers of the State Government by taking over the State Administration under certain contingencies provided for in the constitution. But the Union Government cannot claim any power which is not vested in it under the provisions of the constitution. There is no overriding power with the Union Government. It cannot deal with the State Government as its delegate, for the source of power for the Union as well as the State, is the constitution and the Union Government cannot claim any powers over the State which are not found in the constitution.

⁵² AIR 1977 SC 1361.

⁵³ *Id.*, at 1382

⁵⁴ AIR 1978 SC 68.

⁵⁵ *Ibid.* 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". Further the court said:

"Even majority of Judges who decided the Keshvanand Bharati's case have not treated "federalism" as part of the basic structure of the Constitution and none of them has discussed the extent of the "federal" part of this structure. It is not enough to point out art. 1 of the Constitution-to emphasise that our Republic is a "Union" of States The constitution itself does not use the word "federation" at all."

⁵⁶ *Id.* at 161.

In *S.R. Bommai v. Union of India*,⁵⁷ a nine judge bench has clearly enunciated that Indian Constitution is federal.⁵⁸ The court held that:⁵⁹

.....The constitution provide the more power to Central government but the state is also supreme within its spheres”...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 *Kuldip Nayar v. Union of India*,⁶⁰ the Parliament in 2003 amended the Representative of People Act, 1951 wherein it deleted the requirement of “domicile” in the State concerned for getting elected to the Council of States. The issue in this case was: Whether 2003 amendment Act violated the principle of Federalism, a basic structure of the constitution? The petitioner contended that the impugned amendment to section 3 of the Representative of People Act 1951 offended the principle of federalism.⁶¹ The court rejected the petitioner’s contention and held:⁶²

⁵⁷ AIR 1994 SC 1918.

⁵⁸ *Ibid.* The court said: “Federalism is a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies.”

⁵⁹ *Ibid.* The court described that “the essence of federalism, therefore, is distribution of the power of the State among its coordinate bodies. Each is organised and controlled by the constitution. The division of power between the Union and the States is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule of law requires that there should be a responsible Government.”

⁶⁰ AIR 2006 SC 3127.

⁶¹ *Ibid.* “It seeks to change the character of republic which is the foundation of our democracy and that it distorts the balance of power between the Union and the States and is, therefore, violative of the provisions of the constitution. It was urged by the counsel that the Council of States is a House of Parliament constituted to provide representation of various States and Union Territories; that its members have to represent the people of different States to enable them to legislate after understanding their problems; that the nomenclature “Council of States” indicates the federal character of the House and a representative who is not ordinarily resident and who does not belong to the State concerned cannot effectively represent the State.”

⁶² *Ibid.* The court, while dealing with the question of state domicile for elections to the Rajya Sabha, opined that “it is true that the federal principle is dominant in our constitution and the said principle is one of its basic features but it is equally true that federalism under the Indian constitution leans in favour of a strong Centre, a feature that

...India is a federal state of its kind and it is no part of federal principle that representatives of state must belong to that state. Hence, if Indian Parliament in its wisdom had chosen not to require residential qualification, it would definitely not violate basic feature of federalism.

In *State of West Bengal v. The Committee for Protection of Democratic Rights, West Bengal*,⁶³ in this case in exercise of power under article 226 of the constitution, the high court handed over the investigation to CBI. Feeling aggrieved by this order, state government filed SLP in Supreme Court. The state questioned the jurisdiction of high court, the counsel appeared on behalf of the state argued that it is violation of federal structure because CBI is a central agency and cannot investigate without the consent of state. The question before the apex court was, “whether the High Court, in exercise of its jurisdiction under article 226 of the Constitution of India, can direct the Central Bureau of Investigation (CBI), established under the Delhi Special Police Establishment Act, 1946, to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government”? But the contention of state was not accepted and the court held that:⁶⁴

Any direction issued by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the constitution and maintain the rule of law cannot violate the federal structure. Being protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the constitution in particular, zealously and vigilantly.

In *M.C. Mehta v. Union of India*,⁶⁵ the Supreme Court while hearing a petition with respect to hardship which the people living in Delhi undergo having regard to the high pollution in the city, T.S Thakur, CJI., A.K. Sikri and R. Banumathi, JJ. directed various measures to be undertaken by the government and local bodies concerned. The Supreme Court asked the Central Pollution

militates against the concept of strong federalism.” Also see, Priyanka Chakraborty, An Analysis on The Case of *Kuldip Nayar v. Union of India* AIR 2006 SC 3127, available at: <http://www.legalservicesindia.com/article/2216/Kuldip-Nayar-V.-Union-of-India-AIR-2006-SC-3127.html> (last visited on Nov.13, 2019).

⁶³ AIR 2010 SC 1476.

⁶⁴ *Ibid.*

⁶⁵ (2015) SCC Online SC 1327.

Control Board to work in cooperation with other authorities to set up sufficient number of control rooms in the capital to monitor the air and take action. The court has been repeatedly asking the Centre and Kejriwal government to keep aside their differences and devise a “common minimum programme” at least for taking steps to deal with the pollution menace. This decision clearly indicates that both the government at centre and state level must work for saving the life of the people by taking proper steps for controlling pollution. It can only be possible when both governments will work in co-operation and collaboration with each other along with municipal corporation. The problems of increasing pollution are common and should be solved through a common minimum programme.

In *State Bank of India v. Santosh Gupta*,⁶⁶ the court said that:

The Constitution of India is a mosaic drawn from the experience of nations worldwide. The federal structure of this constitution is largely reflected in Part XI which is largely drawn from the Government of India Act, 1935. The State of Jammu & Kashmir is a part of this federal structure. Due to historical reasons, it is a State which is accorded special treatment within the framework of the constitution of India. The findings of the court in this judgment now has been diluted with respect to the special status of Jammu and Kashmir by the Presidential order 2019.

In *UCO Bank v. Dipak Debbarma*,⁶⁷ the court has made several observations on the federal character of our constitution and the need to maintain the federal balance which has been envisaged in our constitution to prevent any usurpation of power either by the centre or the states. We reproduce the same with profit:⁶⁸

The federal structure under the constitutional scheme can also work to nullify an incidental encroachment made by the Parliamentary legislation on a subject of a State legislation where the dominant legislation is the State legislation. An attempt to keep the aforesaid constitutional balance intact and give a limited operation to the doctrine of federal supremacy can be discerned in the

⁶⁶ Civil Appeal Nos. 12240-12246_OF 2016.

⁶⁷ (2017) 2 SCC 585.

⁶⁸ *Supra* note 15 at para. 132.

concurring judgment of Ruma Pal, J. in *ITC Ltd. v. Agricultural Produce Market Committee*, wherein after quoting the observations of this Court in the case of *S.R. Bommai v. Union of India* (para. 276), the learned Judge has gone to observe as follows (para. 94 of the report): 276. The fact that under the scheme of our constitution, greater power is conferred upon the Centre *vis-a-vis* the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, states are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States.

This judgment reflects that even there is doctrine of federal supremacy but it does not mean that state have no autonomy. The state is supreme within their allotted sphere and centre has no authority to transgress the limits. If centre will do so, the court has to interpret the entries by giving widest possible interpretation to each entry.

Since the AAP (Aam Admi Party) came to power in Delhi, the confrontation with the centre started. Kejriwal alleged that LG is not allowing elected government to work and interfering in day to day affairs, which is a violation of federal structure. The tension between L-G and the elected government reached to the court. The High Court of Delhi held that:⁶⁹

The L-G being the administrative head of the National Capital Territory Delhi exercised complete control of all matters regarding (NCT) of Delhi.

The appellant was before the Supreme Court, challenging the decision passed by the High Court of Delhi on August 4, 2016.

⁶⁹ The High Court of Delhi said that “it is mandatory under the constitutional scheme to communicate the decision of the Council of Ministers to the Lt Governor even in relation to the matters in respect of which power to make laws has been conferred on the Legislative Assembly of NCTD and an order thereon can be issued only where the Lt Governor does not take a different view”, available at <https://www.tribuneindia.com/news/nation/here-s-a-brief-chronology-of-the-tug-of-war-between-aap-govt-l-g/615084.html> (last visited on July 14, 2019).

The Constitution Bench of the Supreme Court in *Govt. (NCT of Delhi) v. Union of India*,⁷⁰ held that “the Lieutenant-General of the Delhi had to act as per the aid and advise of the Council of Ministers of Delhi Government except in matters of land, police and public order.” The court further held that, “the LG cannot interfere in each and every decision of the Delhi Government, there is no need for the Delhi Government to seek the permission of Lt. Governor in all matters. Although decisions of the Government have to be communicated to the LG.” The court also said that “Delhi was not a 'State', and occupied a special status under the constitution.”⁷¹ The Five-Judge Constitution Bench comprising of CJ Dipak Misra, A.K Sikri J., A.M Khanwilkar J., DY Chandrachud J. and Ashok Bhushan J., pronounced separate concurring judgments and held:⁷²

Our constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give full-fledged effect to both these concepts.

The bench further observed:⁷³

“The constitutional vision beckons both the Central and the State Governments alike with the aim to have a holistic edifice. Thus, the Union and the State Governments must embrace a collaborative federal architecture⁷⁴ by displaying

⁷⁰ (2018) 8 SCC 501. The court observed: “constitutional statesmanship between the two levels of governance, the Centre and the Union Territory, ought to ensure that practical issues are resolved with a sense of political maturity and administrative experience.”

⁷¹ *Ibid.* While holding so, the court has observed that in a democracy, real power must vest in the elected representatives and Lt. Governor cannot interfere in every decision of the Delhi Government. The court further said that:

The fundamental feature of federalism is that the legislature in each state is supreme within that state. Therefore, in order to preserve the federal spirit of the Indian constitution it is imperative to not interfere with the functioning of state governments by the governors or the Lt Governors who are only the titular head of the states.

⁷² *Id.*, para 284.7.

⁷³ *Id.*, para 284.8

⁷⁴ *Id.*, para. 115. Cameron and Simeon described “collaborative federalism,” as: “[T]he processes by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behaviour through the exercise of its spending power, but by some or all of the governments and the territories acting collectively.” D. Cameron, R. Simeon, “Intergovernmental relations in Canada: The emergence of collaborative federalism” 32 (2) *Publius* 49-72 (2002). Further in *NCT Delhi Case* (para. 116) the Court said that “the Union and the State Governments should always work in harmony avoiding constitutional discord. In such a collaboration, the national vision as set out in the Preamble to our constitution gets realized. The methods and approach for the governments of the Union and the States may sometimes be different but the ultimate goal and objective always remain the same and the governments at different levels should not lose sight of the ultimate

harmonious coexistence and interdependence so as to avoid any possible constitutional discord. Acceptance of pragmatic federalism⁷⁵ and achieving federal balance has become a necessity requiring disciplined wisdom on the part of the Union and the State Governments by demonstrating a pragmatic orientation.”

This judgment is really very significant for centre and state relationship and it focused that co-operation and collaboration between two government is required, if we want to achieve constitutional enshrined in the preamble of the Constitution. The people should not suffer due to conflict between the two *i.e.* the Central government and the state governments.

III Critical analysis of Indian federalism

There is criticism that “the Indian constitution does not satisfy certain essential tests of federalism, namely, the right of the units to make their own constitution and provision of double citizenship⁷⁶ as American constitution has. Even the essential characteristics of federalism like duality of governments, distribution of powers between the Union and the state governments, supremacy of the constitution, existence of a written constitution and most importantly, authority of the courts as final interpreters of the Constitution are all present in our constitutional scheme.” But at the same time, the constitution has certain features which can very well be perceived as deviations from the federal character,⁷⁷ due to this deviation many constitutional experts doubted on the federal nature of the constitution. They described it as more unitary and less federal

objective. This constitutional objective as enshrined in the constitution should be the guiding star to them to move on the path of harmonious coexistence and interdependence. They are the basic tenets of collaborative federalism to sustain the strength of constitutional functionalism in a Welfare State.” *Id.*, at para. 119 the said that: “the idea behind the concept of collaborative federalism is negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development. The Union Government and the State Governments should endeavour to address the common problems with the intention to arrive at a solution by showing statesmanship, combined action and sincere cooperation. In collaborative federalism, the Union and the State Governments should express their readiness to achieve the common objective and work together for achieving it. In a functional constitution, the authorities should exhibit sincere concern to avoid any conflict.”

⁷⁵ *Id.*, para. 127 The court held that: “The concept of pragmatic federalism is self-explanatory. It is a form of federalism which incorporates the traits and attributes of sensibility and realism. Pragmatic federalism, for achieving the constitutional goals, leans on the principle of permissible practicability.” *Id.*, para. 128: “It is useful to state that pragmatic federalism has the inbuilt ability to constantly evolve with the changing needs and situations. It is this dynamic nature of pragmatic federalism which makes it apt for a body polity like ours to adopt. The foremost object of the said concept is to come up with innovative solutions to problems that emerge in a federal setup of any kind.”

⁷⁶ *Supra* note 41 at 8.

⁷⁷ *Supra* note 15 at para. 123.

because the Central government is more powerful than the State governments. Distribution of power between Centre and state is done by three lists in schedule VII, but all-important subjects either are placed in Union List or Concurrent List and this distribution make the Centre stronger.⁷⁸

Indian constitution has certain striking unitary features too. “The Parliament can alter or change the areas, boundaries or names of the States.”⁷⁹ “During emergency, the Union Parliament is empowered to make laws in relation to matters under the State List,”⁸⁰ “the Parliament shall have the power to make laws with respect to any matter included in the State List, if the Council of States declares by a resolution of 2/3 of its members present and voting that it is necessary in national interest,”⁸¹ “in case of inconsistency between the Union and the State laws, the Union Law shall prevail.”⁸² “If the legislature of two or more states pass a resolution that it shall be lawful for the Parliament to make law on the subject in State list.”⁸³ “Parliament shall also have power for the purpose of implementation of any International agreement, treaty and convention.”⁸⁴ “If there is any repugnancy between law made by the Parliament and the law made by the legislature of State on the subject of Concurrent list, the law made by Parliament will occupy the field.”⁸⁵ Additionally, “the Governor of a State is empowered to reserve the Bill passed by the State Legislature for consideration of the President and the President is not bound to give his assent to such a bill.”⁸⁶ That apart, “the executive power of Union shall extend to give directions to the States and empower Union officers to execute matters in the State List.”⁸⁷ Further, “if the government of a state is not carried on in accordance with the provisions of the constitution, the President has power to impose President’s rule in such State, either on the report of the Governor or otherwise.”⁸⁸

⁷⁸ Alice Jacob, “Centre-State Governmental Relations in Indian Federal System” 10 (4) *Journal of Indian Law Institute* (1968).

⁷⁹ The Constitution of India, art. 3.

⁸⁰ *Id.*, arts. 250, 352, 356.

⁸¹ *Id.*, art. 249.

⁸² *Id.*, art. 251.

⁸³ *Id.*, art. 252.

⁸⁴ *Id.*, art. 253.

⁸⁵ *Id.*, art. 254.

⁸⁶ *Id.*, art. 200.

⁸⁷ *Id.*, art. 256.

⁸⁸ *Id.*, art. 356.

Fiscal federalism⁸⁹ refers to the responsibilities between centre and state related taxation and expenditure. Both centre and state government can levy and collect taxes. But in our constitution more powers are vested with the centre for imposing tax and centre has to determine the share of state in tax revenue. The states do not have much financial resources as centre have. In financial matters states always look for assistance to the centre. But I think after the GST, the situation has been changed and the state governments may tax the consumption of goods and services (SGST) and agricultural incomes.

In our country, we have two Houses in Parliament *i.e.* the Lok Sabha and the Rajya Sabha⁹⁰ or Council of States (elected by members of state legislative assemblies). The Fourth Schedule to the constitution provides for allocation of seats to the States and Union Territories in Rajya Sabha. The allocation of seats is made on the basis of the population of each state. But the election for Rajya Sabha is merely a formality because the party can nominate any person and if party have sufficient number of members in legislative assembly, the person will be elected. There is also no requirement of domicile in the state concerned getting elected.⁹¹ Basically, parties used to oblige to who are loyal to the party.

One of the criticisms is that the state has no role in amending process of the constitution other than ratification by one half of the states in case of some amendments. The power to amend lies with the centre. But I think it is not proper to oppose the federal character on this ground because we have one constitution for the whole country and it is considered as flexible and rigid accordingly.

Our Constitution is considered as federal in spite of many unitary features because almost all features of Federal Constitution exists in our constitution. In order to be called “federal”, it is not necessary that a Constitution should adopt the federal principle completely. It is enough if the federal principle predominant principle in the Constitution.⁹² So the mere presence of unitary

⁸⁹ The fiscal federalism mainly comprises allocation of rights and duties related to taxation and expenditure responsibilities and system of transfers between the different jurisdictions/levels of government such as Centre, State and local governments. See, Vijay Kelkar, “Towards India’s New Fiscal Federalism” *NIPFP Working Paper Series No. 252* (2019), available at: <https://www.nipfp.org.in> (last visited on Nov. 6, 2019).

⁹⁰ The Rajya Sabha is a representative of the states in the Union legislature (hence the name, Council of States). For this reason, the Rajya Sabha is granted powers that protect the rights of states against the Union.

⁹¹ *Supra* note 60.

⁹² *Supra* note 25 at 286.

features in a constitution, which may make a constitution quasi federal in law, does not prevent the constitution from being predominantly federal in practice.⁹³

IV Challenges to Indian federalism

Federalism is often seen as a concept subject to changing economic, social, and political conditions, and the need for adaptability is stressed in this context more often than in other areas of constitutional law.⁹⁴ The dimension of federalism in India constantly have been changing from time to time. Actually, federal principle could not be executed in India till 1967⁹⁵ due to dominance of one political party at centre and states and centre emerged as guardian of states, there was rarely any problem between centre and states, if any problem arose it could easily be solved within the party itself.⁹⁶ The states were not in position to defy from any direction of Union because all ruled by one party and they were bound to follow the ideology of party which is not necessary if the other party ruling in states.

Indira Gandhi had imposed an internal emergency in the country and after emergency when election was held, first time Congress lost and Janata Party came to power at the centre and in large number of states. For the first time the importance of federalism was realized by ministers of Congress ruled state.⁹⁷ Even the Congress came back to power in 1980. Thereafter, Congress party's dominance come to an end and advent of multiparty system and coalition governments⁹⁸ followed on the heels of the 1989 parliamentary election and this new system cleared the way for federal power sharing by smaller and national parties.⁹⁹ With the change in governance from one party rule to coalition government, the concept of federalism also changed, on one side it (Multi-Party System) helps in strengthening the concept of federalism, on the other side, it also creates conflict between the centre and state because of different parties ruling at two different levels of

⁹³ *Id.* at 287.

⁹⁴ Rudolf Dolzer, "The Role of the Courts in the Preservation of Federalism: Some Remarks on the U.S. and the German Experience", in Mahendra P. Singh (Ed.), *Comparative Constitutional Law* 68 (Eastern Book Company, 1989).

⁹⁵ After the general election in 1967 the main conflict between centre and states emerged because in many states non congress parties formed government e.g. Kerala, Orrisa, West Bengal, Punjab and Madras non congress parties formed government.

⁹⁶ C.S. Pandit, "Changing Pattern of Centre's Relations with States" *Indian Express*, Mar. 30, 1969.

⁹⁷ *Supra* note 25 at 285.

⁹⁸ In coalition government, many political parties come together either through pre poll alliance or post poll alliance.

⁹⁹ Mahendra Prasad Singh, "Federalism, Nationalism and Multicultural Secularism in India" 13 (1) *Indian Journal of Federal Studies* 22 (2012).

government. And in coalition government, different political parties share power and all political parties have their own party line and ideology and some time, it also becomes an obstacle in passing a law or making any policy. The rise of regional parties has had its own effect in constraining politically the exercise of power by the central government. It has been said:¹⁰⁰

Formally, the central government possesses very substantial power, especially powers of intervention and pre-emption, but functions within an ethno-political context that requires those powers to be used to preserve federalism in form and to no little extent in spirit as well.

From 1989 till date the era of coalition government is continuing.¹⁰¹ “In the last 30 years, because of fractured verdicts leading to the formation of coalition governments, plural power centres emerged that impacted the role of the Prime Minister. This also led to the erosion of the pre-eminent position of the Prime Minister.”¹⁰² “Past experience shows that in our federal set-up, a Prime Minister with a national image can be more powerful than an individual who is identified with a region of the country. Jawaharlal Nehru and Indira Gandhi emerged as strong Prime Ministers.”¹⁰³ But now Mr. Narendra Modi came to power with absolute majority in 2014 and it was repeated in the 17th Lok Sabha election and emerged as a strong Prime Minister. In 2014 or 2019, BJP secured clear majority on its own but they are running coalition government, in which many regional parties are having share. These regional parties basically focused on regional issues and some time the central government take decisions on the pressure of regional parties. But in some states, the other parties are in power and both of the governments fails to work in coordination with each other, it may create obstacles in the work of development in a particular state.

State boundaries have been redrawn in India to accommodate diverse cultural identities due to diverse composition of states. We had 15 states and 6 Union territories in 1956 but today, we

¹⁰⁰ Daniel J. Elazar (ed), *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy of Arrangements* 104 (Longman Current Affairs, 1991).

¹⁰¹ There are two major alliances i.e. NDA and UPA and sometime Third front. (Even BJP have majority in parliament but many parties are part of government).

¹⁰² K. Subramanian, “A Prime Ministerial Form of Government” *The Hindu*, Jun. 17, 2014.

¹⁰³ *Ibid.*

have 28 States and 9¹⁰⁴ Union territories. There are many challenges before India federalism in the present-day scenario. In the succeeding discussion, the author will try to highlight some of the challenges which Indian federalism is facing:

Regionalism

‘India that is Bharat Shall be Union of States’, it indicates that all the states are part of Union and no state has the right to secede. Throughout the Constitution, emphasis is laid on the fact that India is a single united nation and it described as union of states. Article 16 the constitution guarantees the equality of opportunity in matters relating to employment and it prohibits the discrimination on the ground of place of birth. While article 19 (1) (d) gives freedom to every citizen to move freely throughout the territory of India and article 19 (1) (f) conferred the freedom to reside and settle in any part of the territory of India. But we witnessed many incidents of attacks on the citizens due to feeling regionalism in different part of the country. The people in southern part of the country feel neglected. The demand for formation of new states has become prominent in different part of the country. As the demand for division of Uttar Pradesh in four parts and Gorkhaland from West Bengal are the examples of growing regionalism.

Language conflict

Language conflict is also one of the challenges to Indian federalism in different states because of regional languages. In India, there is no language is considered as national language.¹⁰⁵ Article 343 of the constitution says that “the official language of the Union shall be Hindi in Devanagari script.” Recent controversy is related to draft of National Education Policy, its recommendation on the three-language formula and mandatory Hindi teaching in schools. As per the policy, three-language formula is a means of “promoting multilingual communicative abilities for a multilingual country” and children would “now be immersed in three languages early on, starting

¹⁰⁴ Jammu and Kashmir Reorganisation Act, 2019, it reconstitutes the state of Jammu and Kashmir into two Union Territories, one to be called Jammu and Kashmir (With Legislative Assembly) and the other Ladakh. This Act will come into force on Oct. 31, 2019.

¹⁰⁵ Schedule VIII of the constitution includes 22 languages as official language. According to the Census of India of 2001, India has 122 major languages and 1599 other languages, *available at* <https://en.wikipedia.org> (last visited on Jul. 3, 2019). Also see, Art. 343 – 349 of the Constitution of India.

from the Foundational Stage onwards".¹⁰⁶ This sparked outrage across the political spectrum in Tamil Nadu.¹⁰⁷ This is when it is only a draft and objections have been invited earlier till June 30, 2019 further it has been extended upto July 31, 2019. The draft policy should be implemented only after public hearing.¹⁰⁸ The DMK and other political parties have strongly opposed the Hindi move and they united against the imposition of the three-language policy, as suggested in the draft of the National Education Policy that required children in southern states to compulsorily learn Hindi.¹⁰⁹ The clause recommending mandatory teaching of Hindi in all schools was dropped¹¹⁰ from the draft National Education Policy on June 3, 2019, due to protest from Tamil Nadu and some other States.¹¹¹ It indicates that language based differences exists in our country.

The indestructible union and destructible units

To protect the unity and integrity of the nation, the Union is made indestructible. But it is not applicable to states as states can be separated or merged¹¹² but in federal democracies, it is only possible with the consent of the states. But in India, the power of making or remaking States lies with the Parliament. In practice most States has been formed with prior consent of the States. But in case of formation of Telangana, this practice was ignored. The decision to divide Andhra Pradesh raises important questions about federalism and the nation's future. This was the first time in India that a state was sought to be divided without the consent of the State legislature, and without a negotiated settlement among stakeholders and regions, and in the face of public

¹⁰⁶ Centre's Big Change Amid Protests Over Hindi Plan; Not Enough, Says DMK, available at <https://www.ndtv.com/india-news/hindi-row-government-tweaks-draft-education-policy-amid-protests-by-southern-states-alleging-imposit-2047027> (last visited on Dec. 3, 2019).

¹⁰⁷ Tamil Nadu saw anti-Hindi protests from 1937 to 1940 and again in 1965.

¹⁰⁸ Priscilla Jebaraj, "Centre in Damage Control Mode Over Anti-Hindi Protest" *The Hindu*, Jun. 3, 2019.

¹⁰⁹ The controversial sentence appeared in s. 4.5.9, titled 'Flexibility in the choice of languages. It said: "...students who wish to change one of the three languages they are studying may do so in Grade 6, so long as the study of three languages by students in the Hindi-speaking States would continue to include Hindi and English and one of the modern Indian languages from other parts of India, while the study of languages by students in the non-Hindi-speaking States would include the regional language, Hindi and English", available at: <https://www.ndtv.com/india-news/hindi-row-government-tweaks-draft-education-policy-amid-protests-by-southern-states-alleging-imposit-2047027> (last visited on Dec. 3, 2019).

¹¹⁰ It has now been replaced by the following: "students who wish to change one or more of the three languages they are studying may do so in Grade 6 or Grade 7, so long as they are able to still demonstrate proficiency in three languages (one language at the literature level) in their modular Board Examinations some time during secondary school."

¹¹¹ Priscilla Jebaraj, "Mandatory Hindi Goes Out of Draft Education Policy" *The Hindu*, June 04, 2019.

¹¹² Formation of a new state can be by two ways one, by separation of territories from a State, or two, by uniting two or more states or parts thereof.

opposition.¹¹³ Even after 1987, in every case of state formation, the consent of the state legislature was obtained. The broader principle of federalism and the willing consent of constituent units and their people has been deemed to be necessary before a state is formed or a territory merged, unless overwhelming national interest demands action by Parliament. The procedure was observed in creating Jharkhand, Uttaranchal and Chhattisgarh in 2000.¹¹⁴ Earlier it was not necessary but under the constitution, in practice every state has been formed with prior consent, in most cases after a detailed, impartial examination by an independent commission.¹¹⁵ The Supreme Court while dealing with question of interpretation of Article 3¹¹⁶ in two cases¹¹⁷ held that “the views of the State Legislature certainly would be taken into consideration but the same would not mean that the Parliament would be bound thereby.”

Recently, the Union Government issued the Jammu and Kashmir Presidential Order, 2019 on ending Jammu and Kashmir’ special status.¹¹⁸ The debate is going on whether government can issue such an order or not, when the State is under governor’s rule. One hand the government is justifying it on the ground that during Governor rule, the Governor assume any and all functions of the state government, so the action of the government is constitutionally valid. But on the other hand, the question is that if there is president’s rule (Governor’s rule) how does it work? because there is no elected government in Jammu and Kashmir, so the concurrence of legislative assembly is not possible unless new government is formed after election. The matter is now before the Supreme Court.

Role of governor

¹¹³ Jayaprakash Narayan, “A Challenge to Indian Federalism” *The Hindu*, Oct. 28, 2013.

¹¹⁴ *Ibid.*

¹¹⁵ Staff Reporter, “Federal Structure is Under Threat: Mamata” *The Hindu*, Dec. 7, 2013.

¹¹⁶ Arghya Sengupta, “Interpreting a federal constitution” *The Hindu*, Feb. 4, 2014.

¹¹⁷ *Babulal Parate v. State of Bombay*, 1960 SCR (1) 605 and *Pradeep Chaudhary v. Union of India*, 2009 (6) SCJ 357. Both of the cases dealing with the creation of Bombay and Uttaranchal respectively, the issue before the Court was whether it was open to Parliament to amend the final Bill after the state legislature had expressed its views on an earlier, unamended version. In both cases, the Supreme Court adopted a literal interpretation of Article 3 and held that “there was no requirement that an amendment to a Bill forming a new State would also have to be referred to the State legislature concerned. Such interpretation is arguably correct — the proviso to Article 3 simply states that the Bill must be sent to the State legislature concerned for expressing its views within a specified period. But there is nothing in the proviso which says that the parliament must accept or act upon the views as expressed by the state legislature.”

¹¹⁸ The Constitution (Application to Jammu and Kashmir) Order, 2019. In exercise of the powers conferred by clause (1) of article 370 of the constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir is pleased to make

The office of Governor has always been the centre of controversy since the enforcement of the Constitution. Every time there is debate about the role of Union government in appointing governor and their role as a representative of the central government. It is also practice that with the change of government at centre governors are changed by the ruling party. In 1977, when Janata party came to power, the governors of many states were changed. Same episode was repeated when Congress returned in power in 1980. Thereafter, also same practice is followed by every government, whosoever in power. Many commissions¹¹⁹ were constituted by various governments from time to time to streamline the appointment and role of Governor, but in actual practice there has been no positive change.

Economic and social planning

Economic and social planning falls in the Concurrent List of Seventh Schedule, but the Union exercise authority over national and regional planning in India through NITI Aayog appointed by the Union. Indian federalism has matured quite a bit, and the states have far greater control of their economic and political management than in the earlier phase.¹²⁰ But it does not mean that state are doing nothing in this direction, states are also emerging as eminent participant in process of economic and social planning e.g. health, education, institutional framework, agriculture development, land reforms and organisational changes etc.

Row over Central Bureau of Investigation (CBI)

The term ‘investigation’, appearing in Entry 8 of List I (Union List) of the Seventh Schedule, which read, “Central Bureau of Intelligence and Investigation”. But the police is a state subject and under code of criminal procedure, the police has power to conduct investigation.¹²¹ But CBI has become one of the prime central government agency to conduct investigation. Always there

¹¹⁹ Administrative Reforms Commission, 1966, Raj Mannar Commission, 1971, Bhagwan Sahai Commission, 1971, Sarkaria Commission, 1983, the National Commission to review the working of the constitution, 2000 and Second Administrative Reform Commission, 2005.

¹²⁰ Re-imagining federalism to fulfil India’s potential, available at: <https://www.livemint.com/Opinion/Qa7oGDflxQXBZiuC7XCzxH/Reimagining-federalism-to-fulfil-Indias-potential.html> (last visited on Dec. 3, 2019).

¹²¹ CBI controversy- legal issues and facts, available at: <https://www.legalhelplineindia.com/cbi-controversy/> (last visited on December 25, 2019)

is one common allegation by opposition (Whosoever) that CBI¹²² worked on dictation/direction (Acted as Puppet) of Central government. CBI has often been accused of being Centre's tool to harass state governments.¹²³ When CBI raids Delhi Chief Minister's Office on December 15, 2015 and sealed it. Chief Minister blames Prime Minister and Lieutenant Governor for it. Opposition alleging it as "serious attack on federal polity".¹²⁴ Chief Minister (N. Chandrababu Naidu) of Andhra Pradesh government through an order issued in November 2018, withdrew the 'general consent,'¹²⁵ virtually curtailing the Central agency's powers to conduct investigations¹²⁶ in the state. The consent is necessary as the jurisdiction of these agencies is confined to Delhi and Union Territories under this Act.¹²⁷ But Andhra Pradesh new Chief Minister Y. S. Jaganmohan Reddy has reversed the previous order and allowed the Central Bureau of Investigation (CBI) to go ahead with investigations and raids in the State without prior permission of the state government. It effectively means the CBI can now enter the state without obtaining permission from the Andhra Pradesh government.¹²⁸ The state-centre crisis related to the chit fund scam investigation by the CBI took a sharp turn on February 03, 2019 around 7 p.m. when CBI officials reached the residence of the Police Commissioner in south Kolkata. They tried to enter the residence to question him. But Officials from the Shakespeare Sarani police station stopped the CBI officials from entering it. The CBI officials who had gone there, were bundled into a police vehicle. The police and CBI officials engaged in a fist fight as the

¹²² India has no "federal crimes", only a federal investigating agency. Its powers are subject to the state giving its consent to investigate a crime within its territory, *available at*: <http://www.millenniumpost.in/opinion/attack-on-federalism-339409> (last visited on Dec. 3, 2019).

¹²³ *Can states ban CBI from investigating?*, *available at*: http://timesofindia.indiatimes.com/article/show/66663465.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on Nov. 30, 2019).

¹²⁴ Delhi Chief Minister vs L-G: A timeline of the tussle since Kejriwal took office, *available at*: <https://indianexpress.com/article/cities/delhi/delhi-chief-minister-vs-lieutenant-governor-arvind-kejriwal-anil-baijal-najeeb-jung-supreme-court-timeline-5245029/> (last visited on Nov. 14, 2019).

¹²⁵ The general consent is routinely given by State governments for periods ranging from six months to a year to the CBI and all agencies under the Delhi Special Police Establishment (DSPE) Act, 1946.

¹²⁶ If a state refuses CBI investigation and a major probe requires conducting raids, the agency will have to approach the courts to take permission for the same. See, <https://timesofindia.indiatimes.com/india/can-states-ban-cbi-from-investigating/article/show/66663465.cms> (last visited on Nov. 14, 2019). In *State of West Bengal v. The Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476, the court held that "any direction issued by the High Court, in exercise of its jurisdiction under article 226 of the constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State cannot be violating the federal structure and shall be valid in law."

¹²⁷ K. Venkateswarlu, "CM revokes Naidu's decision, CBI can resume work" *The Hindu*, June 4, 2019.

¹²⁸ *Ibid.*

latter were pushed into the vehicle.¹²⁹ West Bengal Chief Minister Mamata Banerjee went on an indefinite sit-in-strike in front of the Metro Channel at Esplanade same night. She said her agitation was to “save democracy, the constitution and the country.”¹³⁰ These incidents reflect the conflict between centre and state governments over the CBI and it is interesting that such conflict only arise if two different parties are in power at centre and state.

Legislative conflicts

In our constitution, the legislative power is divided between the centre and the states and both are made supreme in their respective spheres. The division of legislative power is in respect of both territory and subject matter.¹³¹ In Schedule VII there are three lists *i.e.* Union List (Parliament has exclusive power to make law), State List (State Government has exclusive power to make law) and Concurrent List (both government have concurrent power to make, in case of conflict, law made by Parliament will prevail). Basically, maintenance of law and order is a State subject.

The Prevention of Communal Violence (Access to Justice and Reparations) Bill, 2014,¹³² was produced in extended winter session of Parliament, but united Opposition forced the government to defer the Communal Violence Bill in the Rajya Sabha.¹³³ The Bill was opposed by BJP and non-Congress ruled sates on the ground that it is against federal structure.¹³⁴

¹²⁹ Shiv Sahay Singh and Suvojit Bagchi, “Mamata Banerjee goes on stir after CBI tries to quiz Kolkata police chief” *The Hindu*, Feb. 3, 2019.

¹³⁰ *Ibid.*

¹³¹ *M.P. V. Sundararamier and Co. v. State of Andhra Pradesh*, AIR 1958 SC 468, Venkatarama Aiyer, J observed: “In a Federal constitution where legislative powers are distributed between different bodies, the competence of the legislature to enact a particular law must depend upon whether the topic of that legislation has been assigned by the constitution Act to that legislature. If a law is on a field not within the domain of the legislature, it is absolutely null and void.”

¹³² The Bill was to replace the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005.

¹³³ Government forced to defer Communal Violence Bill, *available at*: <https://www.thehindu.com/news/national/government-forced-to-defer-communal-violence-bill/article5656766.ece> (last visited on Dec. 8, 2019).

¹³⁴ In the National Integration Council meeting held in September 2011 the Chief Ministers of various states have raised serious objections over the proposed legislation expressing their concern over the violation of the Federal principle. These Chief Ministers are from various political parties culled from diverse ideological backgrounds. Ms. Jayalalitha had written to all the Chief Ministers in the country and all the Members of Parliament to asking them to oppose this Bill. Ms. Mamata Banerjee, Ku. Mayawati, Sri Nitish Kumar, Sri Naveen Patnaik and many others took strong exception to this Bill Communal Harmony to hijack the powers of the entire law and order machinery. The drafting committee gives vague assurances on the question of violation of the Federal principle. *See*, Ram Madhav, ‘Communal Violence Bill threat To National Integration, Social Harmony and Constitutional Federalism’, *available at*: <https://sites.google.com>. (last visited in Dec. 8, 2019).

After the terrorist attack on Mumbai on November 26, 2008, the Union government proposed to set up National Counter Terrorism Council (NCTC) on the pattern of USA. Whose main objective was to counter any terrorist activity that might take place in India. But it was opposed by the opposition and the states on the ground of violation of federal structure. Due to opposition from some non-Congress states governments, the issue of the NCTC had been put in the cold storage. Even the Centre was ready to make some changes in the NCTC draft, including controversial issues like its power and jurisdiction is an effort to take all opposing states on board.¹³⁵ The law could not be passed due to the conflict between centre and states, despite the fact that the body like NCTC was needed for closer co-ordination between the Centre and States to deal with terror in a holistic manner.¹³⁶ But the National Investigation Authority¹³⁷ (NIA) was established after Mumbai terror attack because there was need of a central agency to tackle the problem of terrorism. The government introduced the National Investigation Agency (Amendment) Bill, 2019 on July 08, 2019 seeking to further strengthen the National Investigation Agency by giving it powers to probe terror attacks targeting Indian and Indian interests on foreign soil. The legislation will also allow the NIA to probe cybercrimes and cases of human trafficking.¹³⁸ The agency will be empowered to conduct investigation in any part of the world.¹³⁹ India is facing the problem of Terrorism, militancy, organised crimes etc. and to curb this problem there is an urgent need that the country as a whole comes together and the state governments must help the centre so that we can save the nation. There is a need that both the Union and states government must work with the co-ordination with each other.

Actually, federalism in India has totally been changed with the beginning of an era of coalition governments. Political ambitions are prevailing over the administrative and financial aspect of the Union-state relations. If same party is in power at the centre and states there is a rare possibility of any conflict but if opposite parties are there, then the position will be different. All

¹³⁵ Sandeep Joshi, "Opposition Targets Centre for not averting blasts" *The Hindu*, Feb. 23, 2013.

¹³⁶ *Ibid.*

¹³⁷ The Agency came into existence with the enactment of the National Investigation Agency Act 2008 by the Parliament of India on Dec. 31, 2008. The National Investigation Agency is a central agency established by the Indian government to combat terror in India. It acts as the Central Counter Terrorism Law Enforcement Agency. The agency is empowered to deal with terror related crimes across states without special permission from the states, *available at*: https://en.wikipedia.org/wiki/National_Investigation_Agency (last visited on Dec. 9, 2019).

¹³⁸ Govt introduces Bill in Lok Sabha to amend NIA Act, *available at*: http://timesofindia.indiatimes.com/articleshow/70128164.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on Dec. 19, 2019).

¹³⁹ *Ibid.*

states work on their own whims and resort to ludicrous dole-outs like girl marriages, unemployment cheques, distribution of sarees, laptops, cycles *etc* and various handouts with little thrust on development for natural well-being of the people. These gimmicks result in a colossal waste of wealth and drag the states to heavy debts and people to poverty.¹⁴⁰ We as a nation have to adopt a holistic approach for the whole nation to ensure prosperity and well-being for all, through exhaustive planning. A government which believes it represents “the Will of the People” due to its majority in Parliament, has failed to understand that it governs under a federal constitution, where each state is autonomous.¹⁴¹ So there should be common agenda for the development of the nation.

V Conclusion

Based on the foregoing discussion, it can be concluded that Indian constitution has all the features of federal constitution, the centre and states are independent to make laws in their respective field assigned by the constitution. However, the centre has supremacy in certain situations that is also mentioned in the Constitution itself. If either government tries to transgresses the limits an independent judiciary plays an important role as the apex court is considered the protector and guarantor of the Constitution. The concept of federalism in India keeps changing since the commencement of the Constitution. With the change in the political system *i.e.* from dominance of one-party rule to the era of coalition government. Following the rise of regional parties and fragile coalition governments, the federation has to grow more flexible and conciliatory, particularly in its financial aspects. The GST is an example where States equally has power to impose tax so that they can enjoy autonomy, which is a big tax reform in fiscal history of India. Both centre and state governments supposed to work in co-operation and coordination with each other instead of being involved in conflict.

Recently, the Supreme Court emphasised in the *NCT of (Delhi) case* on the concept of collaborative federalism, where both the Centre and the state governments should express their readiness to achieve the common objective and they have to move on the path of harmonious co-existence and interdependence irrespective of their differences. If both governments involve in

¹⁴⁰ K.C. Agarwal, *Crusade India* 369-70 (Knowledge Books Inc, 2007).

¹⁴¹ Attack on federalism, *available at*: <http://www.millenniumpost.in/opinion/attack-on-federalism-339409>, (last visited on Dec. 3, 2019).

any kind of conflict, the ultimate sufferer will be the people. Both the governments operate simultaneously on the same people and in the same territory, so in modern time they must perform functions with understanding and cooperation. But some time due to different political ideology, conflict arises between the Centre and state governments. In the present era, the way of governance should be according to the need of the common people, because it will not be possible that all 28 states are being ruled by same party and it is obvious that other party ruling in the state has its own ideology may be different from the party ruling at centre, in this regard both the governments before taking any decision have to collaborate with each other. No policy and programme can be implemented effectively unless both the governments will work together for achieving the constitutional goal. It is need of the times that in India we have to adhere to the principle of co-operative/collaborated federalism.

The people elected government at three levels and government at each level is accountable to their respective electorates and it is the constitutional obligation of each government to work for the welfare of the people. So, keeping in view the changes *i.e.* globalization, technological advancement and paradigm shift in economic policy, it is necessary that the Union and states government must co-operate and collaborate with each other along with local bodies to address the common needs of the people.