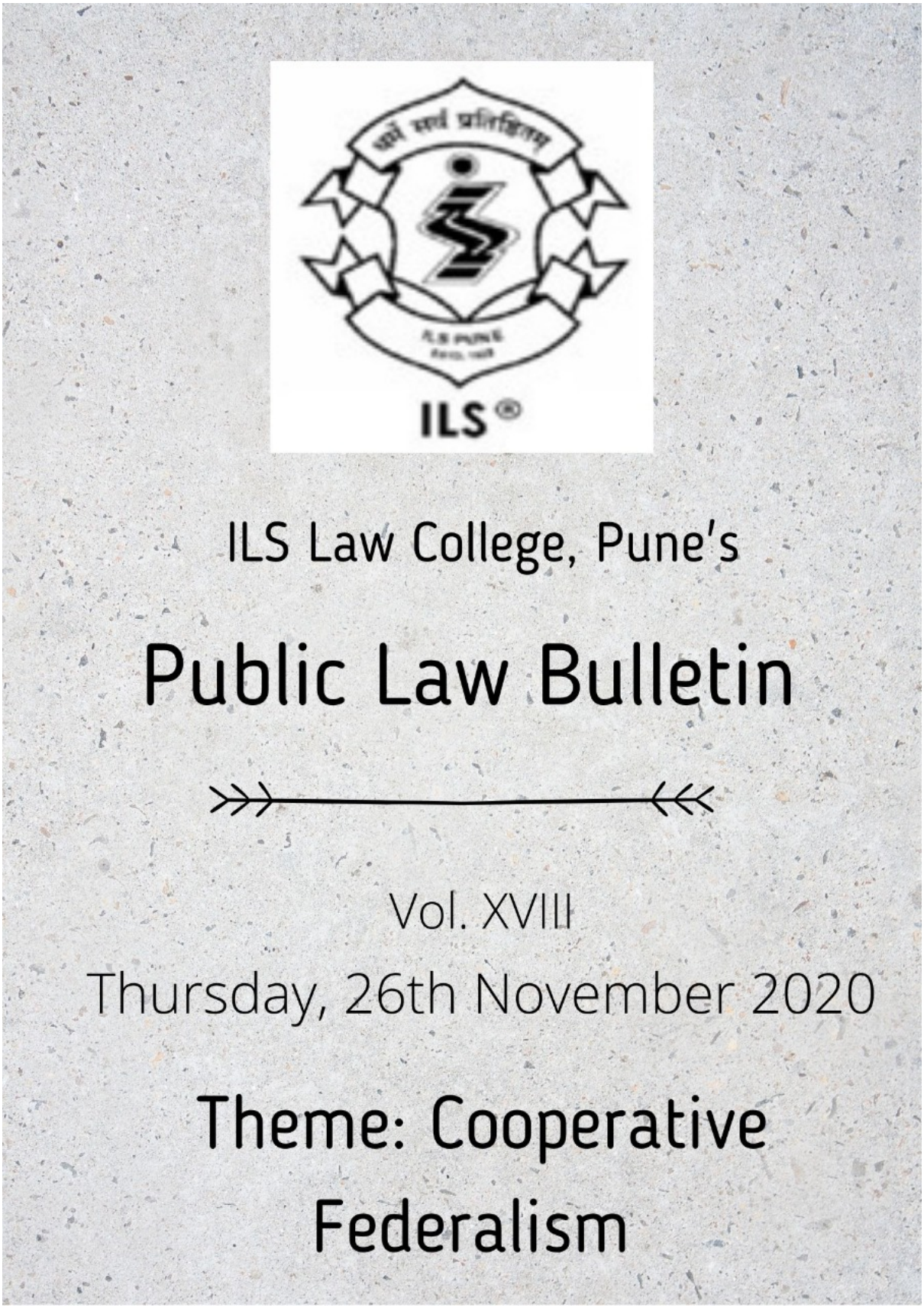
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Theme: Cooperative Federalism

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A. MESSAGE FROM THE EDITOR

Thursday, 26th November 2020

Remembering the Constitutional Legacy of Dr Ambedkar: Some Critical Reflections

Let me congratulate all the readers, students and the faculty for having recently celebrated the Constitution Day. Had we been able to present this issue of Public Law Bulletin on the Constitution Day itself, it would have been most opportune. However, due to some unavoidable reasons, we could not do so.

In this issue, we have grappled with several interesting themes –

1. The Constitutionality of the Farm Bills
2. The Asymmetrical Federalism of Nagaland under the Indian Constitution
3. Gerrymandering during elections and how it violates the spirit of one vote one value: A study of US and India
4. Legal Theory- Constitutional Trust during Distrustful Times- using the normative framework of J Misra in State of NCT of Delhi v UOI
5. The GST Compensation Confusion
6. The Intergovernmental Councils as a means to encourage Cooperative Federalism
7. The tussle of education as a concurrent subject

I want to begin my brief article by reminding all of us, myself included, three warnings voiced by Dr B.R. Ambedkar in his memorable speech delivered by him in the Constituent Assembly on 25th November 1949. The speech is also important as he very eloquently articulated the conception of social democracy, delved into the idea of how India has to shape itself from state to nation, and stressfully lamented on contradictions within our society. He observed:

Social democracy

What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy.

Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.

We must begin by acknowledging the fact that there is a complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which we have a society in which some have immense wealth as against many who live in abject poverty.

On the 26th of January 1950, we are going to enter into a life of contradictions. In politics, we will have equality and in social and economic life we will have inequality. In politics, we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up.

The speech is also important for the exposition of the conception of fraternity. He observed:

The second thing we are wanting in is recognition of the principle of fraternity. What does fraternity mean? Fraternity means a sense of common brotherhood of all Indians – of Indians being one people. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve.

When I dissect these excerpts from his memorable speech, I realize what kind of visionary Dr Ambedkar was. Not only he never tried to own the Constitution, but he repeatedly emphasized that on 26th January 1950 when the Constitution was adopted, it was still a work in progress. He enshrined several ad hoc provisions in the Constitution to guard against unpredictability, uncertainty and chaos. If at all Dr Ambedkar cherished anything, it was the principles and values underlying the Constitution, principles and values which he so spectacularly articulated in the preamble of the Constitution. He was also very touchy about the introduction of certain new institutions like an independent election commission or the institution of reservations of seats in favour of SCs and STs in parliament and state legislative assemblies. However, his singular most contribution is the incorporation of the notion of human dignity in the preamble of the Constitution.

Dr Ambedkar was never obsessed about either a particular text of the Constitution or its provisions. He was only bothered about nurturing and conserving values of equality, liberty, dignity and fraternity forming the bedrock of the Constitution. In short, Dr Ambedkar was concerned about espousing and advocating a robust Constitutionalism. He was interested in the nourishment of an equal India with each citizen enjoying equally the right to equality before the law and equal protection of the law. We have already quoted him above wherein he emphasized on why India will take a long time to transform into a nation from a state noting the prevailing socio-economic inequalities in the country.

When I look at the response of constitutional institutions to the values and principles so much celebrated and emphasized by Dr Ambedkar, I am nothing but disappointed and at times even appalled. Look at the values of rule of law and democracy. Politicians across all the political parties openly incite people to violate the law, i.e. recently many politicians in Maharashtra instigated the public not to pay the electricity bill, go for bandhs and destroy public property. We often hear political parties threatening the

government with action if their viewpoints are not heard by it. These kinds of actions are exactly the ones against which Dr Ambedkar very earnestly guarded all of us.

Look at the parliament, has parliament pondered seriously about its duties conceived in the Constitution? Look at the recently enacted farming bills. The way protests are being held on the outskirts of the borders of Delhi against these bills by the farmers, reminds us of the British days of civil disobedience and *satyagraha* as if we are fighting against a colonial government. It is extremely disappointing to see certain politicians holding parliament to hostage on the strength of the mob of a few thousand people. I do not have any qualms if a particular law is not acceptable to opposition or certain groups within India. I have also no problems for such groups or opposition parties holding agitations and protests in a civilized manner to indicate their strong dissent to such laws. However, to force the government to roll back in legislation on the strength of agitations or bandh by the mob is not a legitimate or constitutionally countenanced strategy. The constitutional validity of the law can be challenged in the court or even censure motion may be moved against the government against particular legislation, and if still, the opposition is not successful, it can persuade the people of this country to change the government during the next elections. However, to object to legislation on the so-called ground that it was passed in an undemocratic manner is the masquerading of private vengeance into public or political emotions, tactics solely outside the spirit of the constitutionalism of civilized nations.

Take the example of article 108 obligating it to codify its privileges and immunities. On the turn of 3rd millennium with the Constitution becoming 70 years old, the parliament of India is still happy and satisfied with its privileges and immunities being frozen as they stood on 26th January 1950. In other words, the Indian parliament is happy to enjoy or claim those privileges and immunities which were to be enjoyed by the British parliament on 26th January 1950. But why this lethargy and apathy? Does it not sound colonial to still value the British parliament? Is there not a fundamental difference between the British parliament and the Indian parliament? Is not the British parliament supreme whereas is not the Indian parliament subordinate and responsive to Indian Constitution? These are some of the poignant questions which keep begging the answers.

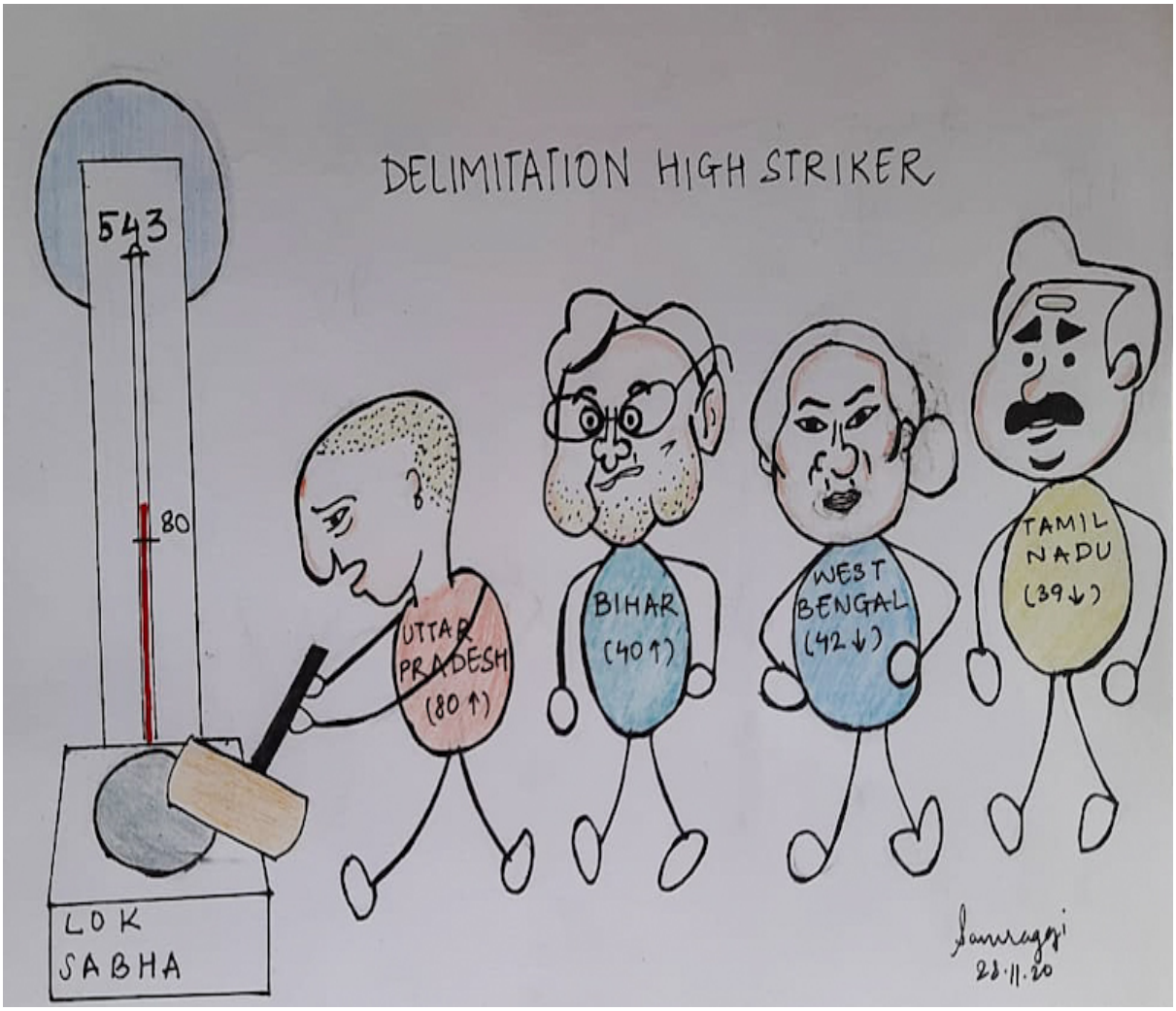
Similarly look at Article 100 wherein quorum for the parliamentary session is merely 1/10th of its members. Is it not ridiculous to know that even serious legislation like Companies Act can be enacted into law by merely 55 members of Lok Sabha and 25 members of Rajya Sabha? Curiously, the quorum for having a session of GST Council is the presence of ½ of its members, i.e. 15 members out of 30. I ask myself whether the GST Council is more important than the Indian Parliament? Does the former take more important decisions than later? However, Parliament merely looks the other way round instead of trying to answer the above questions. Last but not the least, look at the obligation on parliament to hold its sessions every six months. Again, the colonial and chaotic response of the parliament to this obligation is worth reflecting. Has parliament conducted itself in sessions? Or has it merely allowed its members to engage in mudslinging by throwing paperweights on one another or by breaking the furniture or the speakers – all government property? Whether merely assembling like an undisciplined lot, fulfils the obligations to hold the session? Or does parliament require conducting its meaningful parleys and interactions touching with the various aspects of the lives of the citizenry? In this brief article, I have tried to identify yawning gaps in the Constitution which have been endured by the lethargy and dysfunctional performance of the parliament. When Dr Ambedkar wrote the Constitution, the aforementioned provisions were merely to respond to the transitions. I do not think any serious observer and even a student of Indian Constitutional Law would ever argue that he was interested in reading of these provisions semantically.

To sum up, therefore, instead of just emphasizing on ownership of Constitution to Dr Ambedkar, let us pause for the moment and introspect about his dreams which very clearly reflected in his three warnings. Let us pay heed to these three warnings and be wary of populism or short cuts to secure brawny political points. May Almighty give all of us wisdom to behave constitutionally.

Dr Sanjay Jain
Editor-In Chief
Associate Professor, Additional Charge
Principal, ILS Law College

B. CARTOON: DELIMITATION HIGH STRIKER

- SAMRAGGI DEBROY, III BA LL.B



C. VITAL CONSTITUTIONAL QUESTIONS: AGRICULTURAL MARKETS: THE FEDERALISM CONUNDRUM

-SOHAM BHALERAO, V BA.LLB

The roots of Federalism

Since the inception of the Constitution itself, 'Federalism' as a principle has had a tumultuous journey with various judicial pronouncements either undermining it in the Indian context or giving it enough teeth to be recognized as one of the basic features of the Constitution. The Apex Court in the case of State of WB v. Union of India[1], rejected the idea that the India is an 'absolute federal state', while the same court held it to be a part of the 'basic structure doctrine' in the case of Keshavananda Bharathi[2] as well as S.R Bommai[3]. With a country as diverse as India, the needs of the people, culture, language, traditions change within a few kilometers. In such a scenario, principally it is vital to note how big a role 'Federalism' has to play in the effective working of the Country, as an overly-centralized approach runs the risk of turning a blinds eye to the changing requirements of smaller regions i.e. States. Simply put, the whole concept of Federalism is imbibed in the understanding that in certain matters the State Governments are in a better position to take a call vis-à-vis policy decisions and the same shall be respected. The same principle also applies for the Central Government in specific matters. This is enumerated in the Constitution via Article 246 which provides for the demarcation of powers with respect to making laws and provides for three lists namely the Union List, State List and the Concurrent List. As the name suggests, entries provided in the Union List grant exclusive power to the Union Government making laws. The same goes for the State

[1] 1963 AIR 1241, State Of West Bengal vs Union Of India

[2] 1973 AIR SC 1461, Kesavananda Bharati v. State of Kerala

[3] 1994 AIR 1918, S.R. Bommai vs Union Of India

List. The Concurrent List provides for both the Union as well as the State to make laws with the Union Law presiding over the State law in case of a conflict.

Farm Bills; the Whats and the Hows

The recently passed agricultural laws are mired in controversy not only because of the contents of the laws but also because of the manner in which they were passed. Notwithstanding the fact that they were bulldozed through the Parliament in an arguably questionable manner, many questions have been raised with respect to it striking the federal nature of our Constitution. These questions can however be resolved after a careful analysis of the relevant provisions of the Constitution. Prima Facie, the subject finds a mention in all three lists. Entry 14 of the State list provides for agricultural education and research, pests, plant diseases. Moreover, Entry 28 of the same provides for (markets and fairs). In the Union List, Entry 42 deals with Inter-State trade and commerce. In the Concurrent List, Entry 33(b) provides for Trade and commerce, production, supply and distribution of foodstuffs, including edible oilseeds and oils. Entry 34 of the same list provides for price control.

As far as status quo is concerned, every State has its own Agriculture laws with their own variations. There lies no debate that when the State Government legislates on a particular entry from the State List, it is valid law. However, Article 254 of the Constitution states that in case of a conflict of law made by the Union and the State under the Concurrent List, the law passed by the Parliament shall prevail. This forms the root of the debate in the current case as Union Government relying on Entry 33(b) of the Concurrent List is elastically stretching the term "foodstuff" to include agriculture and hence gain validity. Moreover Entry 28 of the State List provides exclusive power to the State to legislate on markets. However, it can be argued that it is subject to Entry 33 as a valid law passed by the Parliament from the Concurrent List always prevails over a State law. Moreover Entry 34 of the Concurrent List (Price Control) furthers strengthens the Government's argument. It is to be noted that the Essential Commodities Act,1955 was also passed using Entry

33 of the Concurrent List which was duly noted by the Sarkaria Commission on Centre-State Relations. These entries are no strangers to controversy with the government of Tamil Nadu recognising that these entries had a damaging impact on state autonomy in the sphere of agriculture. In a memorandum to the Sarkaria commission they that demanded they these entries are transferred from the concurrent list to the state list. The Left Front in West Bengal at that point of time went a step further and demanded that not only the existing entries in the concurrent list but also those in the Union list that constrict the states' jurisdiction in agriculture should be deleted. They claimed that "Agriculture, including animal husbandry, forestry and fisheries, should be exclusively a States subject…The recent trend, with the Centre progressively encroaching in the sphere of agriculture, must be reversed".[4] It is almost ironical that the same Essential Commodities Act has been amended again using the same entries from the same lists.

A further argument can also be made that the Union Government could have invoked Article 301 read with Entry 42 of the Union List to pass the laws in question. Article 301 states that trade and commerce throughout the nation shall be free while Entry 42 provides for "inter-state trade and commerce". While the wordings "inter-state trade and commerce" are certainly not wide enough to include regulating agriculture through the Union List rather than the Concurrent List, but while read with Article 301 it makes for a compelling case. It has to be noted that in the case of Atiabari Tea, the Apex Court interpreted Article 301 to include not just inter-state, but also intra-state trade in goods[5]. If the same interpretation is carried forward to Entry 42 of the Union List, the Government may very well be able to justify it as valid law even through the Union List. The last weapon that the Union Government could have used was of Article 249, which allows the said Government to legislate even on Items on the State List with the consent of 2/3rd States. While this approach

[4] https://thewire.in/agriculture/agriculture-marketing-reforms-federalism

[5] https://indianexpress.com/article/india/apmc-reform-law-centre-says-states-powers-not-being-encroached-6416432/

certainly looks appealing from a democratic perspective, it would have been a herculean task for the said Government to go past the practical difficulties of securing the vote of 2/3rd States and negotiating with warring partners in their State alliances. Notwithstanding the fact that the ruling Party itself is also in power in 2/3rd States, this approach on paper sounds viable, but not necessarily a better alternative to the one used.

The Statutory Interpretational perspective

Historically, whenever there has been a dispute with respect to which entry does a particular law fall under; the judiciary has not shied away from applying the doctrine of "pith and substance". It essentially means that the Judiciary shall look at the substance of the subject matter at hand. After understanding the true nature of the subject matter, it shall evaluate into which list it fits. The incidental encroachment of the subject matter in a different list does not render it invalid. Eg. If the true nature of "A" clearly falls into the Union List, even though "A's" extensions and ancillaries fall into the State List, it would be the Union List that "A" would fall under as the substance of "A" lies in the Union List and not the State List. In the current case, the application of the doctrine would be extremely tricky as the substance of the subject matter i.e. "Agricultural reforms" can fall under all three lists. Moreover, the application of the Doctrine of "Colourable Legislation" which states that "What cannot be done directly cannot be done indirectly as well" is also used in determining the validity of conflicting laws. However as stated above, the line to demarcate under whom does the authority to lie to pass the laws in question is too thin to come to an objective conclusion.

The Status quo: -

It has to be noted that prior to the passing of these laws, every State had its own view on the working of Agricultural markets. While States like Kerala had completely removed the Mandi system, States like Punjab were heavily dependent on it. This gave rise to varied arguments and claims upon which is the most pro-

farmer modus operandi. This issue was heavily politicized with it being included even in Manifestos. Upon the passing of these laws, amidst a huge uproar, multiple bills were passed in various States to dilute the laws passed by the Parliament. Arguments were raised in aplomb that the States should have been consulted before these laws were passed as agriculture forms the core of the economy of multiple states. Notably, Article 254 elaborates on a situation where there is a clash between a central law and a state law. In such a scenario, for the state law to prevail, presidential assent to the law passed by the legislative assembly is a vital requirement, failing which the central law shall prevail. In the present case, even if Governors of the respective States assent to the bills, without the presidential assent, the laws are rendered useless. It is interesting to note that in 2017, the Central government released the model Agricultural Produce and Livestock Marketing (Promotion and Facilitation) Act, 2017 to provide states with a template to enact new legislation and bring comprehensive market reforms in the agriculture sector. In furtherance of that the 15th Finance Commission report provided that states which implement the model laws will be eligible for financial incentives[6]. While some states chose to implement it, some didn't. A similar approach was taken for the implementation of the Shops and Establishment Act, where a model Act was released by the Union Government; the States were expected to frame their own Acts in furtherance of it. This approach however has not worked in the present case with many states passing bills which completely nullify the central bills . Whether this a win for "Federalism" or "Dissent for the sake of dissent" is something that only time would tell.

[6] https://www.prsindia.org/theprsblog/changes-agricultural-marketing-laws-across-states

D. INTERSECTION OF PUBLIC LAW: POLITICAL TRADITIONS: GERRYMANDERING FROM AMERICA TO INDIA

-SAMRAGGI DEBROY III BA LL.B

The United States of America recently fought one of the fiercest and unpredictable electoral battles that resulted in the blue's victory over red, ousting Republican President Donald Trump by Democrat President - elect Joe Biden.[1] The results of the 2020 elections took several days to be confirmed and were allegedly infested with rigging, vote theft and other electoral malpractices (unfounded claims of President Trump).[2] The defeat did not go well with the President, who then filed a flurry of lawsuits[3] challenging the outcome of the elections. While those claims are disputable, the undisputed truth of the American electoral process is the unpunctuated tradition of gerrymandering, an intangible token from the past and a certain quandary of the future. The process of electoral redistricting in America[4] is a decennial procedure exercised to establish equity amongst its states to uphold the fundamental principle of any federal democracy - 'one man, one vote.' However, this process gives both the parties ample opportunities to manipulate the boundaries in a way that supports them. The shape of the electoral districts in turn shape the

[1] Anonymous, "Joe Biden elected the 46th President of the United States", *The Hindu*, Nov. 8, 2020, *available at*: https://www.thehindu.com/news/international/us-presidential-election-2020-voting-and-results-live-updates/article33012711.ece (last visited on November 25, 2020).

[2] *Id*.

[3] Anonymous, "Most secure elections in American History", *Scroll*, Nov. 13, 2020, *available at*: https://scroll.in/latest/978486/most-secure-election-in-american-history-us-officials-dismiss-donald-trumps-fraud-claims (last visited on November 25, 2020).

[4] Carson, L. Jamie & Michael H. Crespin. "The Effect of State Redistricting Methods on Electoral Competition in the United States House of Representatives Races." 4(4) *State Politics & Policy Quarterly*, 455 (2004).

electoral result and often thwarts majority will. This forms the crux of gerrymandering. As Thomas Hofeller says,

"*Usually the voters get to pick the politicians, in redistricting the politicians get to pick the voters.*"[5]

Moving 7,000 miles eastwards, there lies another federal democracy - India, a country which is popularly not cited as an example of electoral fairness. Political *pundits* all over the world have made comparisons between both the countries and concluded how the younger federation needs to imbibe American values to pursue fairness in its electoral process. But the delimitation process in India (despite the exercise's current stagnation) remains as one of the crowning gems in the country's electoral portrait; a set up that the United States may want to adopt. This essay seeks to draw parallels between American redistricting and Indian delimiting (vis - a - vis gerrymandering) and make a case for the latter. In Part I, the author studies the existing literature on the political and legislative history of gerrymandering in America. Subsequently, in Part II, the author analyses the impact that gerrymandering has on federal principles. In Section C, the author compares the Indian process of delimiting to its American counterpart, and states the findings of the comparison.

I. Of Elbridge Gerry and Salamanders

The earliest instance of electoral abuse in the form of district boundary manipulation was witnessed in 1812. Governor Elbridge Gerry of Massachusetts enacted a law in

[5] Miles Park, "Redistricting guru's hard drives could mean legal, political woes for GOP", *NPR*, Jun. 6, 2019, *available at*: https://www.npr.org/2019/06/06/730260511/redistricting-gurus-hard-drives-could-mean-legal-political-woes-for-gop (last visited on November 25, 2020).

the same year that defined state senatorial districts.[6] The peculiar alignment of this district supported the Federalist Party by giving disproportionate representation to the Republican-Democrats. The silhouette of the district was such that it resembled a 'salamander'. Elkanah Tisdale,[7] an American cartoonist of those days, drew the district in the form of a salamander and published in the "Boston Gazette". Lo and behold, America got its fabulous animal - *Gerrymander*.

Gerrymandering, thus, came to be defined as the practice of drawing the boundaries of electoral districts in a way that gives one political party an unfair advantage over its rivals or that dilutes the voting power of members of ethic or linguistic minority groups.[8] The former type is called political or partisan gerrymandering, while the latter is termed as racial gerrymandering. Gerrymandering perturbs the two essential buttresses of a federal democracy - equality of size of constituencies and equality of the value of vote of citizens. It is interesting to note that the decennial process of 'redistricting' (American counterpart of delimiting, as termed in India) provides the fodder to gerrymandering. Given the humongous landscape of America, almost as diverse as India, the process of redistricting takes place against the backdrop of a varied nation consisting of small and large populations, politically uniform and politically disparate areas.[9] There are Republican and Democrat strongholds that are difficult to swing in the favour of the other party. Here enters the brilliance of gerrymandering that manages to create distortions to the electoral results.

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[6] Jennifer Davis, "Elbridge Gerry and the Monstrous Gerrymander", *Library of Congress*, Feb. 10, 2017, *available at*: https://blogs.loc.gov/law/2017/02/elbridge-gerry-and-the-monstrous-gerrymander/ (last visited on November 25, 2020).

[7] *Id*.

[8] Brain Duignan, "Gerrymandering", *Encyclopaedia Britannica*, Oct. 11, 2019, *available at*: https://www.britannica.com/topic/gerrymandering (last visited on November 25, 2020).

[9] Brian O'Neill, "The Case for Federal Anti-Gerrymandering Legislation", 38 *University of Michigan Journal of Law Reform* 683 (2005).

Gerrymandering usually employs that standard technique of 'pack and crack'.[10] Packing signifies combining large portions of two incumbent districts into one, thereby 'packing' the maximum number of voters voting for the same party in the same district.[11] This decreases their influence in other places. The next step is to crack a large block of partisan voters into as many districts as would suffice to dilute their influence by scattering the population.[12] An illustration may prove helpful. If a Republican wants to win, he would structure the districts in such a way (given the state is governed by a Republican government), that citizens voting for democrats would be packed in one district, and other districts be cracked in a way that makes the Republicans receive more votes. Thus, even if the Democrats have a higher vote share in a state, they will win lesser seats and ultimately lose the state to their rivals. One of the states that suffer from extreme gerrymandering is North Carolina.[13] In the 2018 state elections, the Republicans received 50% votes as opposed to Democrat's 48% votes.[14] However, the red party went on to win as many as 10 seats out of a possible 13 congressional seats[15] to register their victory. Manipulation of state district boundaries was of such level, that the State Court prohibited the usage of this state map for the 2020 presidential elections.[16]

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[10] *Supra* Duignan.

[11] Sam Hirsch, "The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting, 2(52) *Election Law Journal* 179 (2003).

[12] *Id*.

[13] David Leonhardt, "A Win for Gerrymandering", *The New York Times*, Dec. 3, 2019, *available at*: https://www.nytimes.com/2019/12/03/opinion/north-carolina-gerrymander-map.html (last visited on November 25, 2020).

[14] *Id.*

[15] *Id*.

[16] Michael Wines, "State Court bars using North Carolina map in 2020 elections", *The New York Times*, Oct. 29, 2019, *available at*: https://www.nytimes.com/2019/10/28/us/north-carolina-gerrymander-maps.html (last visited on November 25, 2020).

The U.S. Supreme Court has consistently held that partisan maps are political documents beyond the scope of the constitution.[17] However, it has also asserted on several occasions that gerrymandering violates federal voting rights law and constitutional protections.[18] In a series of judgments since the 1960s, the Supreme Court has laid several principles. Starting with the 1962 *Baker v. Carr* case,[19] the Apex Court ruled that the failure of the legislature of Tennessee to reapportion state legislative districts to consider the changes in the district populations had *undervalued the votes cast in over populous districts*, thereby violating the equal protection clause of the 14th Amendment. In another landmark case of *Gray v. Sanders* (1963),[20] the Supreme Court framed the principle of '*one person, one vote*'. This principle was reiterated in the 1964 case of *Wesberry v. Sanders*,[21] where it was held by the Apex Court that congressional electoral districts must be redrawn in a way that '*one man's vote in a congressional election is worth as much as another's*'. Moreover, in *Reynolds v. Sims*,[22] it was held that the Equal Protection Clause mandates for *proportionate apportionment* in both the houses of a bicameral state legislature on the basis of the state's population. From these judgments it is clear that the Courts, though not directly, have tried to uphold the values crucial for a federation to survive. The consistent problem that the Courts have faced in cases involving gerrymandering is the inability to discern a reasonable solution. The landmark *Davis v. Bandemer* (1986), the Court held that political gerrymandering could be held unconstitutional if the resulting arrangement is in a manner that will 'consistently degrade a voter's or a group of voters' influence in the political process as a whole'. A suggestion was proffered in *Gill v. Whitford* (2018), where the plaintiff argued that the redistricting plan could be made less discriminatory by objective measurement

[17] *Id.*

[18] *Id.*

[19] 369 U.S. 186 (1962).

[20] 372 U.S. 368 (1963).

[21] 376 U.S. 1 (1964).

[22] 377 U.S. 533 (1964).

of 'efficiency' of votes cast for either candidate in state legislative elections since 2012. The principle used for this solution was that gerrymandering leads to 'wastage' of a citizen's votes and can be countered by evaluating the efficiency of votes.

This suggestion did not lead to its implementation and America continues to grapple with gerrymandering.

II. Gerrymandering Repels Federalism

The United States of America is the world's leading example of a successful federation. Nonetheless, how successful is the American Constitution in protecting its much talked about federalism? The Constitution states that the federal legislature shall be chosen by 'the People of the several states'.[23] But, the states have the power to regulate the "Times, Places and Manner" of congressional elections under the Election Clause.[24] The deception is such that those who have been empowered to protect the citizens' rights are the ones who end up abusing them the most. A *Harvard Law Review* note theorizes that state legislatures' current redistricting practices have subverted the Founder's conception of the balance of power between states and federal government and that they had damaged the 'federalist structure' by the exercise of state choice.[25] Hence, it can be derived that this wielding of power by the state legislatures damages the 'constitutional structure of dual sovereignty'.[26]

Another significant academic study on gerrymandering has formulated the trifold impact of the manipulation on the government:

i) decreased quality of federal representation;

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[23] The Constitution of the United States.

[24] The Constitution of the United States, art. 1(4)(1).

[25] "A New Map: Partisan Gerrymandering as a Federalism Injury", 117(4) *Harvard Law Review* 1196 (2004).

[26] Veith v.Jubelirer, 541 U.S. 267, 287 (2004).

ii) bundled state and federal policy decisions for the voter;

iii) diminished accountability.[27]

With respect to the first damage caused by gerrymandering, the case of *Veith v. Jubelirer*[28] is of particular significance. The dissenting opinion by Justice Stevens promulgated the notion that

"*the parallel danger of partisan gerrymandering is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency but to no part of her constituency at all.*"[29]

Therefore, it is safe to assume that partisan gerrymandering liberates the representatives to pursue their interests over their constituents.[30] While normally, incumbency advantages the opposition in an election; in this situation it advantages the incumbent party in an election as that party gets the privilege to extend its monopoly by redrawing the lines to its benefit. As said in the States, census is always an opportunity for gerrymandering,[31] whoever wins the state legislature elections in the census years gets to redraw the districts since it is essentially a decennial process. This seriously undermines democracy and makes federalism responsible for it.

Coming to the bundling of state and federal policy decisions of the voters, whenever the choice of party differs in the state and federal level, the prospects of electing the favoured federal party to power is negligible if another party is elected at the state

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[27] *Supra* Brian O'Neill.

[28] Veith v. Jubelirer, 541 U.S. 267 (2004).

[29] 541 U.S. 267 (2004) (Stevens,J., dissenting).

[30] Daniel R. Ortiz, "Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself", 4 *Journal of Law and Politics*, 653 (1988).

[31] Adam Roberts, "The census is always an opportunity for gerrymandering in America", *The Economist*, Nov. 17, 2020, *available at*: https://www.economist.com/the-world-ahead/2020/11/17/the-census-is-always-an-opportunity-for-gerrymandering-in-america (last visited on November 25, 2020).

level. For instance, if the favoured party of a citizen at the federal level is Republican, then in order to realise their victory, the citizen must vote for them even in the state legislature, even if his/her preferred party at the state level is Democrats. Thus, partisan gerrymandering combines numerous policies-from international relations to the sales tax, from Indian Gaming to environmental regulation-into a single vote.[32] This abuse a citizen's right to political choice by compelling him/her to bundle the choices to choose only one semi - preferred outcome out of a plausible two. Ideally, the Federalist system is designed to separate those choices.[33]

Finally, partisan gerrymandering impedes the voters to fold the representatives accountable. This stems out from the diminished quality of representation. Voters, who are the victims of extreme gerrymandering are bundled up in new districts where they have no chance to voice their disapproval of the representation they received, while the representatives already move to districts where the design is such that the majority supports them. In such circumstances, it is the federal representation that suffers because of the state elections. Accountability, the core tenet of democratic legitimacy, is threatened by gerrymandering,[34] which shifts voter preferences, poorly translating the votes into representation.

III. East or West: A Case for Adopting the Indian System

This brings us to the final segment of this article, where the author shall compare the Indian system to the American one and offer concluding suggestions.

India and the United States are the world's largest federal democracies, but the type of elections they follow are different. While in India, Parliamentary elections are followed where the citizens directly elect the Prime Minister, in the States Presidential elections are followed where their citizens indirectly elect the president. Even if the President elect loses the popular vote, he will still be able to become the

[32] *Supra* Brian O'Neill.

[33] *Id*.

[34] Samuel Issacharoff, "Gerrymandering and Political Cartels", 116 *Harvard Law Review* 593 (2002).

President. This proves that in America, as opposed to India, people's mandate may not always be interpreted in the same manner. Then comes the question of integrity in politics of both the countries. One would be overtly naive if he totally disaccords with the fact that both India and the USA have not been able to eliminate malpractices from their system. However, with respect to the integrity in the process of redistricting or delimiting, India outshines the States.

A. Quality of Representation

The author, for the purpose of this article, chooses to assess the shape of electoral districts or constituencies (in Indian parlance) and the difference between the vote share of a party and its success to determine the quality of representation.

A 2019 *Forbes article* investigated the extent to which Indian constituencies are gerrymandered by evaluating the constituencies' shape. The theory used by the study was that barring coastlines, state borders and national borders, the shape of a constituency should be convex polygon, or in other words, they must be well formed structures resembling a square or a pentagon or a hexagon *et al*. The study blames gerrymandering for India's bizarre shaped constituencies describing the shape of the Padmanabhanagar constituency in Bangalore South as a 'hen doing ballet'. Turns out, as per the distortion index, Assam and West Bengal are India's most electorally compromised states[35] (surprisingly ahead of Bihar and Uttar Pradesh). The study reveals that as per its index Kaliabor of Assam is the most gerrymandered constituency of India, as it occupies only 39% of the convex hull.[36] What the study fails to recognise is that the oddly shaped constituency is a result of skewed geography of the country and not skewed politics. For example, the shape of Kaliabor is such because it has to accommodate an autonomous district seat in the

[35] Karthik Shashidhar, "India's most gerrymandered constituencies", *Forbes India*, Apr. 11, 2019, *available at*: https://www.forbesindia.com/article/special/forbes-india-investigation-indias-most-gerrymandered-constituencies/53011/1 (last visited on November 25, 2020).

[36] *Id*.

middle of the constituency. Most of the other constituencies too face impediments in attaining the perfect 'polygon-ous' shape due to reservation of Scheduled Caste and Scheduled Tribe seats (as they ought to have an SC, ST majority respectively)[37]. The first point of distinction lies in the fact that in India, an independent body - the Delimitation Commission exercises the process of delimiting the constituencies as per the population distribution in each state. The Delimitation Commission is not controlled by any legislative or executive body (like it is in the USA), but instead draws its members from the judiciary and the bureaucracy. Moreover, these shapes do not inherently support any candidate or party as the body that draws these lines is not a political body.[38] Even the *Forbes* article agrees to this point;

"*In a lot of cases, even with significant domain knowledge, it is not easy to tell which candidate or party would benefit from the way the lines on the electoral map are drawn.*"[39]

While assessing the gerrymandered ratio of districts using the distortion index may be of use in the States, it cannot be effectively used in India owing to the above mentioned arguments.

The other aspect of analysing the quality of representation is by evaluating the difference between the vote share of a party and its electoral success. The discrepancy between the two exists in both the countries, albeit owing to different reasons. In India, it is a known fact that it is not the most popular party that wins the elections, but the least unpopular party that does, though there have been situations where the winning party was both the most popular and the least unpopular party. The culprit of the same is the first past the post system. Delimitation of constituencies has not created the discrepancy. But, in America, it is redistricting that

[37] The Delimitation Act, 2002, s.9.

[38] Ananth Krishna, "The Integrity of Politics: Does Gerrymandering exist in India?", *Swarajya*, apr. 18, 2019, *available at*: https://swarajyamag.com/politics/the-integrity-of-politics-does-gerrymandering-exist-in-india (last visited on November 25, 2020).

[39] *Supra* note 41.

is essentially responsible for the difference between the vote share of a party and its electoral success, as the process of redistricting is subject to gerrymandering. It is evident from the fact that in the 2016 elections, President Trump lost the popular vote to the Democrat Presidential candidate Hillary Clinton.[40] The 2016 Presidential election contradicts the popular mandate. Moreover, in India almost 90% of the constituencies witness fiercely competitive elections,[41] whereas in America, elections are highly concentrated in the 'swing states' and the rest of the states witness less competition owing to gerrymandering.[42]

Both the above arguments portray the sorry state of American federalism as opposed to India, in terms of quality of representation.

B. Protection Of Citizen's Fundamental Rights

It is amusing to take note of the fact that the delimiting process in India is a better protector of individual rights than the redistricting process of the USA, given it was the American Constitution from which India borrowed the concept of fundamental rights.

The principle of 'one man, one vote, one value' that forms the essence of any federal democracy is abused by gerrymandering in America, where the dual tactics of 'cracking and packing' insults a citizen's votes by practically wasting it. On the other hand, one would not say that India upholds this principle since the delimitation process has been frozen since 1976. However, apart from the freeze, delimitation in its essence does not abuse a citizen's choice. The right to political equality of a citizen germinates from the Constitution itself.[43] In India the sentinel protecting this equality is the Delimitation Commission, while in the US, the state legislatures are

[40] 2016 Presidential Election Results, *The New York Times*, Aug. 9, 2017, *available at*: https://www.nytimes.com/elections/2016/results/president (last visited on November 25, 2020).

[41] *Supra* note 44.

[42] *Supra* Brian O'Neill.

[43] The Constitution of the United States; the Constitution of India.

the abusers of this right in the garb of its protector. That said, there are exceptions to the rule in India as well, there have been cases of gerrymandering and political influence on the Commission.

Lastly, State Assembly elections in India are completely independent of Parliamentary elections and vice versa. A citizen can choose to elect different parties in the state and union without hampering the victory prospects of either. This is not the case in America, where State elections cast undue influence on the Federal elections (as has been discussed above).

Before concluding, it is imperative for the Americans to take cognizance of how partisan gerrymandering poses a serious harm to its federal system. In the words of James Madison, partisan gerrymandering places '*too great an agency of the State Governments in the General one*.'[44] The United States may want to replicate the Indian process of independent delimiting bereft of any political malpractices, at least in essence. This will reduce the federal dependency on the state elections and help the voter partition his choice between the federal party of choice and the state party of choice. Whatever be the federal remedy that America chooses to imbibe, it must be able to value the electoral competition and not give an upper hand to the incumbent. The paramount objective of any federal reform should be to ensure that voters can make separate choices for state and federal elections and that such a decision follows a balanced districting process. America needs to introspect its decaying federal system immediately, unless the 'Land of the Free and Home of the Brave' cares too little for its free citizens.

[44] See James Madison, "Notes of Debates in the Federal Convention of 1787", *Ohio University Press* 74 (1840).

E. ASYMMETRIC FEDERALISM AND NEGOTIATED SOVEREIGNTY IN NAGALAND

- DEWANGI SHARMA, III BA LL.B

The formation of the Indian state has unique historical, geographical and political underpinnings which gives it a structure that many legal luminaries have noted as being 'quasi-federal' or 'quasi-unitary' - a federation with a strong central or unitary bias.[1] Along with the insecurity of 'holding' diverse states and regions together[2] , the act of negotiating various agreements and bargaining with more than 500 semi-sovereign princely states so that they would accede and merge their territories has influenced the federal relationship between the Centre and the constituent units.

The post-Independence state formation process was marked by considerable resistance and even violence as regions like Hyderabad, Junagadh, Travancore, Jammu and Kashmir and the north-eastern tribal territories attempted to assert their independence and/or autonomy. The response of the Indian state was the merging of these territories either through violence (Hyderabad), persuasive and sustained negotiation (Travancore, Junagadh) or by accommodating and recognizing the demands of independence of regions through special protections (North-east and Jammu and Kashmir).[3]

De Jure asymmetrical federalism has become a common route through which multinational and multicultural states accommodate the demands and needs of sub-national regions by creating institutions that allow such territories within the state to enjoy exclusive legislative and administrative powers especially related to culture-

[1]B N Srikrishna, "Speech on Federalism", Vidhi Legal Policy, available at https://vidhilegalpolicy.in/wp-content/uploads/2019/05/Speech_BNSrikrishna_Federalism.pdf (last visited November 20, 2020)

[2] Fali S Nariman, *State of the Nation*, (Hay House India, 11 June 2013)

[3] Ramchandra Guha, *India After Gandhi,* p.no. 51-69 (Piccardo India, 2017)

making and culture-preservation, which can only be dissolved by mutual consent.[4] The 'federalist sentiment'[5] to join and form the 'Indian Union' was completely absent in territorial regions like Nagaland which forced the Indian state to adopt innovative and accommodative methods to extend India's nation-building project to the hitherto protected 'ethnic/tribal enclaves' which had for long remained insulated to pan-Indian national imaginings[6]

Article 370 was different as it was not put in place to preserve or protect the unique culture, ethnicity, religion or language of the people of Jammu and Kashmir rather it was a result of political expediency and the agreement between the Indian government and the Maharaja of the State. The unilateral and contentious manner in which Article 370 has now been made ineffectual means that the most important example of asymmetric federalism as a characteristic of Indian Constitution no longer exists. This tectonic change in India's federalist character brings the spotlight on the 'peripheral' north-eastern states[7] to understand the significance of asymmetric federalism under the Indian Constitution and its commitment to accommodating the issue of identity and demands of ethnically and culturally distinct regions.

Several observations have been made that the Central government is becoming increasingly more interventionist and dominant[8], with the unilateral abrogation of

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[4] Kham Khan Suan Hausing, "Asymmetric Federalism and the question of democratic justice in Northeast India", 13, India Review p no.. 87–111(2014)

[5] Durga Das Basu, *Introduction to the Constitution of India* p.no. 34 LexisNexis, Ed. 20, 2011)

[6]Khan Khuan Suan,*Identities autonomy and patriotism: asymmetric federalism in North East India* (2009) Jawaharlal Nehru University, available at https://shodhganga.inflibnet.ac.in/bitstream/10603/33090/15/15_chapter%206.pdf

[7]Ronald L. Watts, *Comparing Federal Systems*, 3rd ed. (Kingston: Queens University Press, 2008)

[8]Christoffe Jaffrelot, Sanskruthi Kalyankar, "To What Extent is India a Union of States? From "Quasi-Federalism" to "National Federalism" available at https://www.institutmontaigne.org/ressources/pdfs/blog/indian-federalism-under-modi-theory-practice-policy-brief.pdf (Last visited 20 October, 2020)

Article 370 raising serious concerns over India's federalist commitments. Such concerns have found home in the north-eastern states like Nagaland where demands for greater autonomy and cultural independence remain significant. The state has a complex and complicated history, which has seen brutal violence in its fight for independence and a decades long drawn peace process which has still not found an amicable solution. However, the project of peaceful and democratic integration of Nagaland with the Indian union has not been completely unsuccessful and the Asymmetrical Constitutional arrangement under the omnibus Article 371, and the various negotiated agreements between the Naga political groups and the Central government is a testament of that.

I.Genesis of Asymmetrical federalism in the North-east

The sixth schedule allowed for the formation of the Autonomous District Councils - a system of "internal" self-rule in the tribal hill areas of Assam, Meghalaya, Mizoram and Tripura with civil and judicial administrative powers. This provision was initially envisioned to principally accommodate Nagas and other tribal groups in the hill areas of Assam who had shown concerns about interference in their distinctive culture and lifestyles. Many members of the Constituent Assembly were unhappy with the asymmetrical arrangement and warned of chaos, misrule and "secession-inducing" tendencies of such provisions.[9] Dr. Ambedkar responding to such concerns justified the '*different sort of scheme*' on the basis that *tribal of the north-east have their root in their own civilization* which is starkly different to the rest of the country, they have not assimilated with the dominant Hindu culture of India and have different and *distinct laws* governing inheritance, property, family, etc.[10]Therefore unlike Article 370, the root of asymmetric federalism for north-eastern states lies in accommodation and preservation of the diverse culture of a

[9] Constituent Assembly Debates, Official Report, Vol. 9 (July 30–August 18, 1949) (New Delhi: Lok Sabha
Secretariat, 1949)

[10] Ibid.

territory under a democratic setting and was therefore never sought as a temporary provision to be removed once its political purpose was served.

II. Finding a compromise through Asymmetric Federalism

Article 371 provides the north eastern states with varying degrees of power and autonomy over their customary, religious and social practices, land and other resources. These states also receive special support in financial terms from the central government. Tribes that have been declared as "Scheduled Tribes" do not need to pay Income tax to the central government. Unlike the special position of Jammu and Kashmir, which was a hotbed of contention and was seen as challenging the idea of 'unified India'; the limited extent of autonomy enjoyed by the north-eastern states is widely accepted in the "mainstream" Indian political scene and is appreciated as India's commitment to preserving the diversity of 'ethno-tribal' regions.

The Naga Independentists did not see themselves as part of a monistic and indivisible Indian state and claimed their independent sovereignty and "self-determination". This resulted in a violent, long and brutal armed conflict between Naga political groups and the Indian government. The Nagas were involved in a separate nation-building process while the Indian state saw the region as its own sovereign territory inherited from the British. There was a stark difference in the way in which both the Indian state and Naga people viewed themselves. For the Nagas, especially the Naga Independentists Nagaland or the larger *Nagalim* is a sovereign nation in itself, which was never directly governed by the British and therefore would not automatically become part of the new Indian state.[11]

After horrific brutalities were committed by both sides, eventually in 1963, the state of Nagaland was carved out of the existing larger state of Assam and was given

[11] Supra Kham Khan

autonomy over matters related to customary laws, social and religious practices and control over land and other resources (Article 371) to recognize the exceptionality of the Naga people and satisfy their demand of "self-rule" to some extent. This was the result of **negotiation** in the form of the 16- point agreement between the Indian government under Nehru and members of the Naga People's Convention (NPC). Article 371 A verbatim incorporated the pointers of the agreement related to *negotiated sovereignty* in areas of inter alia, religious and social practices, customary law and procedure, ownership, and transfer of land and its resources.

Article 371 A fulfilled almost all demands raised by the Naga nationalists[12] short of independence and the transfer of certain hill and forest reserved areas to the Naga people. It gives a wide range of autonomy and power to the legislative assembly of the State, more than what is enjoyed by any of the other north-eastern states. Under the article, the legislative assembly of Nagaland has the option to override any law made by the Parliament in relation to the (i) religious or social practices of the Nagas, (ii) Naga customary law and procedure, (iii) administration of civil and criminal justice involving decisions according to Naga customary law, (iv) ownership and transfer of land and its resources. Therefore, the State legislative assembly has almost complete autonomy in matters related to their customary and religious laws and practices. Along with this it also had control over ownership and transfer of land and its resources. This provision was inserted to protect the exploitation of the forests and tribal lands, but the inclusion of the phrase "land *and its resources*" extends the control over the transfer and ownership of even the mineral and petroleum resources with the legislature. It is important to note here that the Naga Legislative Assembly is the only state legislative body to have such powers.

[12]Certain Naga political groups who claimed complete independence saw the negotiated terms of sovereignty as a betrayal to their cause of Self-determination, thus a parallel struggle for independence continued

As a constraint on the power of the legislative assembly, the Governor of the State was given special powers to take charge of the law and order situation in the State after consulting with the Council of Ministers, if there are, *in his opinion*, internal disturbances in the Naga Hills Area (**Article 371A 1(b)**). The existence of this provision is a remnant of the negotiated sovereignty in the 16-point agreement and the violent insurgency and chaos in the state as a response to the creation of Nagaland by the Naga Independentists. The centrally-appointed governor had been given the responsibility to take over the law and order powers in case of internal disturbances which would normally lie with the State government. Sanjib Baruah points out that the central government makes extensive use of retired Indian army Generals as "Governors" to manage the "law and order" problem of the region.[13]Along with this provision the application of Armed Forces Special Provision Act, 1958, Naga Security Regulation, 1962 and other "laws of exception" which bestow broad immunity to the Armed forces to "shoot to kill" in regions declared as "disturbed areas" by the Central government for more than five decades allows the Central government to wield excessive powers via security forces in the region.

III. Tussle for power

The constitutional arrangement in the form of Article 371A is not perfect nor has it snubbed all the issues surrounding sovereignty and self-determination in Nagaland. Several provisions of the Article have become bones of contention as different groups fight for control over power in Nagaland. The differences in imagination and interpretation of clauses under Article 371A reflect the limitations of such negotiation.

(i) Governor of Nagaland and the State Government

[13] Sanjib Baruah, "Confronting Constructionism: Ending India's Naga War," 40 *Journal of Peace Research* 3

On June 16 2020, the Governor of Nagaland (GoN) R N Ravi wrote a long letter to the Chief Minister of Nagaland asserting his powers under Article 371A 1(b) stating that there is a collapse of the law and order situation in the state in light of various robberies and extortion gangs operating openly. The serious action proposed by the Governor met serious backlash from Naga groups and the State government as an attempt to override the powers of the elected State government.[14]

Article 371A 1(b) was taken from point 3(3) of the 16-point agreement which gave the GoN special responsibility in light of the armed insurgency ongoing in the state at the time '*until normalcy returns*'. Even though the clause for conditional operation was not expressly mentioned in Article 371A (1-b), the use of the phrase "*immediately before the formation of that State"* therein does imply the transitional period for which the clause was expected to operate. A few Naga groups claim that the term "internal disturbances" under the provision has lost its meaning since the Naga Independentists declared a ceasefire and entered into a peace process with the Government of India, calling Article 371A (1-b) a dead letter.[15]Furthermore, the problem of corruption, extortion, parallel governments, etc. that the Governor referred to cannot be interpreted in relation to the seriousness of the law and order problem that is referenced in the clause. In light of this it becomes difficult to justify the Governor's actions and his interpretation of the clause. All these concerns raise questions over the validity of the Governor's power after six decades when almost all major Naga groups have "given up arms" and are in the process of brokering a peace deal with the Indian government.

(ii) Government of India and the State Government

In 2012, The Nagaland Legislative Assembly had framed the Nagaland Petroleum and Natural Gas Regulations, 2012 and Nagaland Petroleum and Natural Gas Rules,

[14] Liz Mathew, "As Nagaland Governor takes important law & order decisions, those familiar with state say it was 'bound to happen'", The Indian Express, June 2020

[15] "Article 371 A (1) (b) is a dead letter: Naga Rising", Morung Express, July 2020

2012 to regulate and develop eleven oil blocks it identified across the State. Through these laws the state assembly rendered all Acts of parliament governing petroleum to be inapplicable in the state. It also recognized three categories of land, petroleum and natural gas owners, namely: individuals, village bodies and the State government. The regulations had other provisions which vested the sole authority of regulating and dealing with petroleum and natural gas reserves in Nagaland with the State and the recognized owners, who as per the customary laws can only be Naga people.[16]

The Act was challenged and considered unconstitutional by the central government as well as some Naga Tribes. The Central government challenged the Act citing the Minerals Regulation and Development Act, 1957 and entry 53 and 54 of List I of the Seventh Schedule, which put oil and gas excavation under the purview of the Centre. On the other hand, tribes from Wokha district forming the Lokha Hoho (a local tribal body) claimed that the Acts were against their customary laws and violated their right of ownership of their land.[17]The State government continued to maintain the position that it has the special powers under Article 371A to pass laws for regulating the transfer and ownership of land and its resources.

In 2015, the Guwahati High Court took a Centre-favouring stand, noting that the power to regulate and develop mineral resources and petroleum fell under the Union list and thus "exclusive domain" of the Centre. However it also observed that the issue required further contemplation as Article 371A does give distinct powers to the State Assembly over matters related to "land and its resources" and "customary practices".[18] The State Assembly had relied on the legal advice of luminaries like Fali

[16] Supra Kham Khan

[17] Ipsita Chakravarty, "Bone of the land: The search for oil shapes politics in this corner of Nagaland" available at https://scroll.in/article/869167/bone-of-the-land-the-search-for-oil-shapes-politics-in-this-corner-of-nagaland (Last visited 20 November 2020)

[18]Ibid.

S Nariman and M Hidaytullah[19] to conclude that they do secure the powers to pass laws over regulation of petroleum and other mineral resources and override Parliamentary intervention. However, the strong resistance mounted by the Centre with no clarity given by the Courts the issue remains unsolved and points to the difference in interpretative imagination of different groups w.r.t. Article 371A.

(iii) Naga Civil society and minority groups

The Naga Legislative Assembly passed its own Municipality Act in 2001 where it did not provide 33 percent reservation of seats for women, which is mandated the Constitution (Seventy-fourth amendment) Act, 1993.The Government of Nagaland with the support of Naga Civil society groups took the refuge of Article 371A and its patriarchal invocation of tribal customary laws to deny women reservation[20] for years, even when it was highly demanded by the women groups in Nagaland. The law was amended to provide for reservation as ordered by the Guwahati High Court in 2006. However, the Naga Mothers' Association had to approach the court for its implementation. There was violent uproar in Nagaland against the move which resulted in the State government stalling the polls. The battle for reservations and preservation of customary practices continued for years until the Supreme Court passed an interim order in 2017 in favour of one-third reservations for women in Urban Local Bodies. Again, the decision was met by violent protests spearheaded by the Naga Hogo (a group of 18 Naga Tribes). The main petitioner before the Supreme Court Naga Mothers Association had to withdraw their name from the petition as a

[19]Legal Opinion and Interpretation of Article 371A(1)(a) of the Constitution of India and Related Documents, Kohima: Department of Justice and Law(1986). Also See Supra 4.

[20]Narain B. Sagar, "NLA Committees Reject 33%Women Reservation," Eastern Mirror, Dimapur, September

21, 2012, available at http://www.easternmirrornagaland.com (Last visited 20 November 2020)

response and the Chief Minister resigned.[21] It became very difficult to effectively conduct the local body elections in Nagaland and the state government maintained a neutral stand speaking on both sides of the issue.

The women groups deny such conservative and discriminatory interpretations of Naga customary laws as violative of their fundamental rights. Nagaland continues to have an extremely poor record for women participation in local, state and national level politics and the question for women's reservation and systemic conduct of local polls remains hanging. All these instances also bring into light the *de facto* hold and control enjoyed by the various tribal Naga Hohos and civil groups over the *de jure* authority i.e Naga State Assembly. It also shows that the State and various Naga tribe hohos can stifle women and minority tribes' rights and political representation/mobilisation by invoking a problematic interpretation of Naga customary law and that they can perpetuate social conservatism in the process.[22]

Conclusion

The success of the Indian state in being able to considerably accommodate the demand of autonomy in Nagaland through multiple negotiations, discussions, agreements and constitutional protections make a case for India's ability to address overlapping and multinational imaginations of cultural and regional aspirations. As the State of Nagaland is no more in a state of war or widespread insurgency, democratic politics has consolidated to some extent with regular state and national elections. However, the peace process between Naga civil groups and the Central government is still hanging in limbo.

The long-drawn talks and negotiations between the two groups crossed a big milestone when the Framework Agreement was signed in 2015. The agreement set

[21]Arunabh Saikia, "As Nagaland prepares to review reservation for women in civic bodies, old fault lines surface", available at https://scroll.in/article/855672/as-nagaland-prepares-to-review-reservation-for-women-in-civic-bodies-old-fault-lines-surface (Last visited 20 November, 2020)

[22] Supra Kham Khan

out guidelines on which the final power arrangement would be finalised and was expected to be complete by October 2019.[23]The framework agreement which is not publicly available is said to use terms like 'shared sovereignty' which according to the Naga groups implies an "equal relationship" between India and Nagaland. The most influential Naga group NSCN (IM) leveraging this point has put forth demands of a separate flag and a separate constitution which the NDA government in New Delhi is unwilling to concede.[24]

Evidently, the current asymmetric arrangement between the two units is far from ideal and perfect. The special category status accorded to Nagaland and the other 10 north-eastern states may not assume "centrality" in Indian federal setting but it still remains the foundation for extension of democratic justice and nation building in the least emotionally integrated parts. This foundation of asymmetric federalism would also allow the central government to negotiate a power sharing arrangement with the Naga groups that does not impinge the "integrity and unity" of the larger Indian state but also accommodates the demands of the Naga groups. There are sources that suggest that New Delhi is considering extension of the sixth schedule and formation of Autonomous District Councils in Nagaland and for Naga groups in Manipur.[25] There is also a need to address the concerns over problematic and inconsistent interpretations of Naga customary laws that do not perpetuate discrimination and conservatism.

A transparent, rule-based design which will not only help in "coming-together" of federal units but also "holding together" which enhances the freedom and political

[23]On the eve of a final Naga settlement: It is NSCN (IM) versus other armed groups, available at https://scroll.in/article/938884/on-the-eve-of-a-final-naga-settlement-it-is-nscn-im-versus-other-armed-groups (Last visited 21 November, 2020)

[24] Ibid.

[25]What does the new historic naga peace accord have that the Shillong accord of 1975 did not, available at https://scroll.in/article/746319/what-does-the-new-historic-naga-peace-accord-have-that-the-shillong-accord-of-1975-did-not (Last visited 21 November, 2020)

representation of the state. Article 371A has not been successful in balancing the right to autonomy and cultural preservation on one hand and enjoyment of equal rights, safety and liberties by the citizens on the other hand. The lack of clarity in interpretation of the provisions and an interventionist tendency of a strong centre call for a need to establish a robust power sharing arrangement between the two units.

F. LEGAL THEORY: CONSTITUTIONAL TRUST IN DISTRUSTFUL TIMES

-RASHMI RAGHAVAN, V BA LL.B

The Constitution is a repository of meaning-making. Institutions of power, administrative and enforcing bureaucrats, judges, and people of different groupings all derive different meanings as to their identity and representation from within this pious document. India's Constitution being long and verbose is based on the codified model of Constitutions due to which each actor's role in the working of our nation is specified. Where other comparative Constitutions are shorter and have more norm-based Articles allowing judges to interpret new meaning every time a unique question is posed; India's Constitution is built in a manner that contemplates cultivating a culture of democracy from within its contours. It was posited that if you get the structure of the government right, then government will be unlikely-even unable to behave tyrannically. The framers placed various checks and balances; for instance; making the Constitutional Courts the arbiters of justiciable rights between State and citizens or even States *inter se*, by organizing politics to ensure that a representative democracy based on the Parliamentary model was enacted, that the Executive was subservient to the will of the people expressed by the Cabinet, or of the role of the Executive in Emergencies in a new, volatile India. While framing these codes, the framers debated each clause vociferously, sometimes elaborating on the provisions that may be prone to mischief and at other times leaving it to the wisdom of the people implementing the Constitution. Dr. Ambedkar is oft-quoted saying "*However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good.*"[1]The drafters left some meanings unsaid 'trusting' the functionaries to use their best judgment when it came to resolving such

[1]Available at https://www.brainyquote.com/quotes/b_r_ambedkar_753213

constitutional conundrums.[2] It will be argued that such '*trust*' takes shape in many forms. It is an expectation that the Constitution itself has from its implementers, it is a duty imposed on functionaries during their interactions with other constituent bodies and finally it is a commitment to the morals of the document itself. This '*constitutional trust*' is an anchor that helps navigate the tumultuous clashes and roaring silences during storms that come in the way of a modern democracy.

Trust being commonly understood as loyalty, confidence or the faith in another has no pre-determined meaning in the Constitution. Although each Article and Schedule elaborately details the powers and duties of constituent bodies, they do not specifically require 'commitment of faith'. In that sense, 'constitutional trust' itself is a wide constitutional silence. Who is one supposed to trust? Fellow functionaries, the citizens, oneself, or the document? Is that trust supposed to be raised to an expectation in the benefit of the one who is a rights-bearer or does it give a favorable presumption for the duty-bearer? Such questions when analysed without specific contexts would make constitutional trust as flexible as other doctrines like the basic structure or constitutional morality. It is pertinent to recognize that Constitutional Trust would take different forms even for separate stakeholders in a Writ petition (where the Court is trusted to protect the individual liberties of people, the State is trusted to have exercised reasonable restrictions and the citizen is trusted to have acted in a *bona fide* manner) or different contexts for the same instrumentality (the Union's role in an action of Preventive Detention of a citizen is purely administrative and based on protection of national interests which is substantially different from imposing emergency on a State in order to protect the state's integrity). At both these times, Constitutional Trust can be invoked to argue that the Union breached its explicit or implicit commitments to the citizen or the federal state. Every dispute among states could be characterized as a breach of obligations or '*trust*' needing adjudication on the contours of the Constitution. The permutations of such a trust

[2]See re Art. 143, Constitution of India and Delhi Laws Act (1912), AIR 1951 SC 332 where this phrase was first discussed.

are endless and yet continuously evolving. Therefore, such a fluid idea like Constitutional Trust is best analysed with a singular focus on Federalism as was done in the *State of NCT of Delhi V Union of India*. [3]

In this case, the Government of NCT of Delhi under Chief Minister Arvind Kejriwal challenged Article 239AA of the Constitution over the influence of the lieutenant Governor on the administration of the region of Delhi. The case saw arguments at length on the 'constitutional status' of Delhi, on whether it was a Union Territory, a State or a hybrid form of the two. Furthermore, it also meant interpreting whether the cabinet form of government introduced in Delhi had any ramifications on the Governor's role and whether he was to be 'consulted' or 'concurred' on state policy. Finally, it also contested the ambit of disagreements that such a Governor could have and when she could act in the interests of the state. Spanning 535 pages, the judgment argues at length on the need to have harmonious construction of Article 239AA so that the will of the people imposed via a responsible government can carry out its legislative mandate without constant encumbrances by the Union Executive or its agent as in this case was the Lieutenant Governor.[4] J Misra however, takes a different route in delimiting the contours of federal powers in the context of Delhi. He reasons that the drafters placed '*constitutional objectivity*' and '*constitutional trust*' in the hands of the functionaries so that the comprehensive vision of a modern democracy is realized in its truest form. He elaborates,

"*The element of trust is an imperative between constitutional functionaries so that Governments can work in accordance with constitutional norms. It may be stated with definiteness that when such functionaries exercise their power under the Constitution, the sustenance of the values that usher in the foundation of constitutional governance should*

[3] (2018) 8 SCC 501.

[4]Ibid, J Chandrachud and J Bhushan, pages (232-535)

remain as the principal motto. There has to be implicit institutional trust between such functionaries."[5]

He posits that, the Constitution has imposed a degree of trust on its bearers and they can remain true to this trust and further it only when they follow a degree of objectivity in terms of their work. Without getting into the definitional matrices of such'objectivity' he explains that only such objectivity would guide authorities like a lighthouse to a constitutionally right decision. This objectivity will be achieved when such decisions would have a form of normative acceptability and follow established norms and conventions which are tested through time. Only such decisions will pass the constitutional muster and withstand scrutiny in the Judges words.[6] In practical terms this would translate into following 'a due process of law'. Away from the historical baggage of this phrase, what is effectively meant is that when the procedure laid down in the Constitution is followed, an objective status is attached to it. Such a decision can be said to be free from basal political instincts or 'subjective interests' and complies with established norms of law making. At such a high degree of objectivity, the policy attaches to itself the coveted 'trust' of the Constitution and can be adjudged in the Courts as being fair and reasonable. In situations where the Constitution has to be followed not merely by word but by spirit, this doctrine applies with equal if not more force as the Constitution was not only meant as a legal document but as a socio-political vision for a Federal state where the Centre and State work independently and separately yet mutually. From the landmark judgment of *S.R.Bommai* it was made clear that India's federal status was to be collaborative and not competitive and the power of emergency was not to be used to trump the state's autonomy and regional independence.[7] J Misra uses this inherent weaving of collaboration between state and Centre to argue that such constitutional

[5]Ibid para 77.

[6] Ibid para 64.

[7] (1994) 3 SCC 1

silences are much better resolved through consensus-building than by litigation in Constitutional Courts. He writes,

"Thus, 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."[8]

Therefore, Justice Misra writes of a dictum that lawmakers themselves are bound by. They are bound by the code of procedure that is written in the Constitution and furthermore, by an expectation of mature statesmanship that features collaboration rather than coercion. Meeting such standards of constitutional objectivity thus gains the 'constitutional trust' to a policy and confers on it a faith of legitimacy and genuineness. Such a constitutional trust would ultimately have bearing as being a constitutional moral, i.e. adherence to the tenets of constitutional procedure. However, would such an objectivity, trust and ultimately the moral invite legal ramifications or is it a standard of morality with no consequences? The court has answered this question multiple times in the affirmative. Be it cases of emergency,[9] or the domain of the Seventh Schedule or appointment of members to the Rajya Sabha, the Court has ultimately criticized any attempts to usurp power or attack the federal integrity under the colour of Constitutional means. This draws our attention that legal ramifications are possible and even successful when this trust is broken. What such remedial actions in Courts seek to enforce on the errant entity is a degree of accountability and adherence to the constitutional culture. Such legal

[8]Supra NCT, para 117.

[9]State of Rajasthan and Ors v Union of India, (1978) 1 SCR 1

consequences also mean that this 'constitutional trust' is a way of balancing powers between the federal entities and treat them equally before the eyes of law.

This doctrine has much value to a jurist and a judge to develop a theoretical framework model to argue/ countermand any policy decision. However, for a litigator arguing statutes and positive law such a doctrine will be valuable only if there were practical ways of nurturing it, either by a test or by tangible terms by locating distrust in the actions of a law-making entity. In such a scheme, three questions can be posed:

1. Who makes the law and how easy is it to make?
2. How readily do we find conflicts between the Federal/Union and the State law?
3. Who enforces these laws?[10]

The first question can be answered by an enquiry into political and procedural safeguards that precede law-making. Although it can be presumed that the Union acts as an expression of people's will it cannot be presumed that the political interests also guarantee state sovereignty. As Justice P.B.Sawant remarks, in our polity the nomenclature of federal, quasi-federal or unitary doesn't need much discussion when the practical importance of constitutional provisions carry much more importance. It must always be remembered that States are neither satellites nor agents of the Centre. They have an independent constitutional existence and an important role in the development of the people and the Union.[11] In such practical inquiries, like that of Article 356(1) it is much more relevant to enquire whether such proclamations can be issued arbitrarily and at the earliest instance than whether the Constitution 'allows' the issuance of an emergency. If the Union seeks to demarcate a state the enquiry is not on "whether it can?" but "how easily can it?". Even if

[10]See Ernest Young, Federalism as a Constitutional Principle, 83 U. Cin. L. Rev. 1057 (2015) Available at: https://scholarship.law.uc.edu/uclr/vol83/iss4/1

[11]Supra Bommbai, para 99.

Article 3 imposes a silence on whether stakeholders have to be consulted before creating a new state, it can never be an arbitrary, fanciful and an over-night decision. The ease of executing power must be scrutinized to maintain the delicate federal balance and trust that states have ceded to the Union. Such an enquiry is relatively challenging in contemporary times where most standing committees are non-functional or disbanded, laws come to be passed in the wrongful nomenclature and are passed as ordinances which subsequently come to be ratified. In all such cases, borrowing J Misra's terminology, the 'objectivity' of such laws must be scrutinized and lawyers ought to be suspect at whether this tilts federal balance disproportionately by making law a non-collaborative effort and an imposing initiative.

The second question is answered best by reading the law in conflict because Constitution's federalism provisions are often ambiguous, and they leave a lot to be inferred from the general structure. The bare notion of fidelity can tell us that those provisions and principles must mean *something,* but it provides little guidance about exactly *what* they mean. This little guidance allows Parliament to enact laws on a broad and overarching theme and if and when challenged, argue the semantics of the same in the Courts. Such a legal challenge on semantics is most likely to occur in the challenge to the three Farm Bills hurriedly passed through in Parliament. These bills overarchingly aim to reform the status of the farmer, overhaul outdated techniques of agricultural transactions and modernize the markets. Such words when are simultaneously placed in the object clause of statutes are ambiguous as to the specific entries they seek to fall under. Apart from the general rules of interpretation of the Seventh Schedule, there must be a clear intention on the part of lawmakers to overturn state law or impose an all encompassing law by focusing on the specific entries of the Concurrent List whence it seeks legitimacy. Allowing the Union to pick and choose its entries when a challenge is mounted is an affront to the trust that States have by virtue of Article 246 of the Constitution. In the case of the farm bills, the laws in substance are on 'agricultural reform' which fall under the

exclusive domain of the State List. If the Parliament chooses the words 'markets' as an overriding context to legislate on agriculture, it should award no presumption of legitimacy before the Courts. The co-operative aspect of our Federalism also provides that in matters of national interest, the Rajya Sabha can cede any entry to the Union to make a law. The farm bills which are heavily contested could have also been passed state-wise, if it relates solely to the reform and upliftment of agriculture and the farmer. These provisions show that the Constitution itself envisions that trust can be placed by the State on the Centre after due negotiation and consultation. Such an exercise was successfully undertaken during the transfer of education into the concurrent list and recently during the introduction of the GST. The ambiguity of a conflicting law is highly determinative of the subjectivity of Parliament and adding such a safeguard to drafting only makes laws more coherent and determinative in the demarcation of federal powers.

Finally, the third question as to enforcement was debated by our Constituent Assembly. Dr. Ambedkar felt that if enforcement was not uniform then each states would have different laws and means of culpability and even in the Concurrent entries, an overarching law would remain ineffective if the Central Executive is toothless. His vision of a social and political democracy required that States compulsorily enforce enacted laws and not pass caveats in the name of federal independence.[12] This translated as Article 256 of our Constitution which imposes an obligation on States to ensure compliance with Central laws. Thus, when states are divided on an overwhelming question of national importance like the status of women or caste-crimes, it was envisioned that a Central law made in this regard will be enforced by States in a committed manner. In such cases, it becomes important to give states an opportunity to participate in the law because breaching this obligation will only harm the Centre's interests of uniform progress and will result in bureaucratic mutiny. The obligation under Article 256 is not simply a mandate but is

[12]See Madhav Khosla, India's Founding Moment :The Constitution of a Most Surprising Democracy, 2020, Harvard University Press

an after-effect of deliberately thought out policy that has been approved by the Council of States. Thus, constitutional trust inheres when enforcement is backed by state participation and not merely by Presidential assent to a conflicting policy.

An effective enquiry of these questions can mount a valiant challenge to such colourable constitutional mandates. The locations of trust in the document and visible actions of distrust and unaccountability in the Parliamentary process would clearly show that the Union/State intended to breach the Federal Structure in order to benefit itself in practical scenarios. Such violations of constitutional trust would inevitably be scorned and ought to be dismantled by the highest Courts. There lies the ultimate trust-- in our Courts.

G. GST AND COOPERATIVE FEDERALISM

-VISHAKHA PATIL, III BA LL.B AND NIHAR CHITRE, V BA LL.B

Introduction

The Constitution conspicuously omits "Federal" to describe India. Rather, Art. 1 (1) defines "India, that is Bharat, shall be a union of States". India's federalism is not an agreement between the states and no states can secede from it, it does not fit into the textbook definition of a "Federal" or "Unitary" government. The division of powers between the Union and States in India is unique. The Seventh Schedule of the Constitution provides for the distribution of legislative powers between the centre and state under various lists.

It was believed that the distribution of the financial resources at the centre and state level was a complicated affair that led to a higher amount of total taxes paid. Based on the recommendations of the 13th Finance Commission, the Parliament passed the Constitution (101st amendment) Act, 2016 (the "GST" Act). The Act was also ratified by more than half of states and received the president's assent. GST Act paved the way for a uniform tax regime in the country i.e. Goods and Service Tax (GST) and replaced Central and State indirect tax levies.

GST: A value added Tax

GST, a value-added tax is a comprehensive multi-stage destination-based tax that is paid by the consumers but is remitted to the government by the businesses selling the goods and services. Under this Centre can collect taxes from CGST (Intrastate sale) and IGST (Inter-State Transaction), while the State government can collect SGST (Intra State sale). The transition from origin-based to destination-based taxes posed a threat of uncertainty for some states. It was the then Finance Minister, Arun Jaitley who had assured the state's compensation for loss of revenue arising on account of implementation of the GST tax for a transition period of 5 years. To give

effect to this, the Goods and Services (Compensation to States) Act 2017 was implemented. Under section 3, the Act provides an annual growth rate of 14% in their GST revenue, therefore, if any state's GST revenue falls below this rate, it will be taken care of by providing compensation grants. To provide these grants the Centre under section 8 can impose GST compensation cess on certain luxury goods like caffeinated beverages, coal, tobacco and certain passenger vehicles. The proceeds of the cess collection will be credited to the "Goods and Services Tax Compensation Fund" and shall be utilised for compensation payments[1]. From the amount that remains unutilised, 50% will be transferred to the Consolidated Fund of India as the share of the Centre and the balance 50% sh l be distributed amongst the States in the ratio of their total revenues from the GST tax in the last year of the transition period.

Compensation Cess

For the year 2019-2020, the compensation requirement of states doubled from Rs. 81,141 crore to Rs. 1.65 lakh crores implying that the GST revenue grew at a slower rate. There was a delay in the payment of the compensation due to lack of funds and more than 64,000 crore of it was met from the financial year 2020-21[2]. The shortfall in the fund was met through surplus cess collection from previous years and partial cess collections of 2020-21 and a percentage of transfer from unsettled GST funds from the Centre to the Compensation fund (collected in 207-18 from interstate and foreign trade that was not settled between the state and centre). The trend continued for the financial year 2020-21 as the growth of GDP is expected to be lower which will lead to lower GST collection and higher compensation requirement. At the same time, a large sum of the collection has already been utilised for paying compensation for the year 2019-20.

[1]Goods and Services Tax (Compensation to States) Act, 2017 (Act 12 of 2020), s. 20

[2] See, Cost of GST Compensation, *available at* https://www.prsindia.org/theprsblog/cost-gst-compensation (last visited 24th November 2020)

The states expect the Centre to fulfil their constitutional obligation as they conceded to doing away their right to levy the taxes in return for compensation. The Centre argued that the unprecedented act of god affecting both the central and state revenues does not mandate for the Centre to compensate for all types of revenue losses. Even though the states are entitled to compensation under Section 7 during the transition period, but as the compensation is to be paid only from the fund, therefore, the centre is under no obligation to provide for the insufficient funds. The liability shifts on the GST Council to decide on the mode of making good the shortfall. Article 292 of the Constitution prescribes that the Union can extend their executive power to borrow only upon the security of the Consolidated Fund of India, and as compensation cess is a tax owed by the states, the Centre cannot borrow on the security of the resource it does not own.

The GST Council came up with a couple of measures involving states borrowing the funds to fulfil the shortage in money. Either they could take advantage of the special window set up for them to borrow the shortfall only on account of GST implementation, which will be fully repaid from the compensation cess fund without being counted as state's debt. Or the states could take into consideration the current pandemic situation and borrow the entire amount of Rs. 2.35 lakh crore and bear the interest burden though the principal will be repaid from the cess proceeds, while the GST shortfall amount will not be counted as State's debt.

Many of the states ruled by the opposition parties have rejected these recommendations and expect the Centre to borrow money on their behalf. As Thomas Isaac, the Finance Minister of Kerala pointed out it is the moral responsibility of the centre as when there was a surplus in the cess fund it was

deposited in the consolidated fund of India for the public account of the government[3].

GST Council

The GST Council has been lauded for its accommodative spirit of federalism as a body comprising the Union Finance Minister, Union Minister of State for Finance and all finance ministers of the states will be governing the actions of both the Centre and the State government. The Council is required to take decisions by a majority of not less than 3/4th of the weighted votes of the members present. But, the vote of the central government has a weightage of 1/3rd of the total votes cast, and the votes of all the state government will be counted together to form 2/3rd of the total votes cast in that meeting. Even if all the states collectively agree on a resolution to change this format, it can't be passed as they cannot achieve a 3/4th majority without the Centre's assent, placing the Centre in the position of Veto. At the same time, the Centre too has to get 18 of the 29 states on its side to pass a proposal, but the scale is weighed down by the support of politically aligned states.

The GST Council creates an illusion of vesting the decision making powers equally with the levels of the federal government. The conversation between the Centre and the state regarding the negotiations of compensation is occurring on the social media platform, without the interference of the Council. Under Article 279 A(11) the GST Council is required to establish a mechanism to adjudicate between the Centre and one or more states. But as seen in the 39th GST Council Meeting, no such dispute resolution mechanism was adopted to accommodate the woes of the states. The Council is managed by the Government of India's revenue department which reports to the Union Minister of Finance, which represents the Centre in the GST

[3] See, Centre's stance on GST compensation to states is untenable, legally and morally, *available at,* https://indianexpress.com/article/opinion/columns/gst-compensation-payments-shortfall-centre-cess-6585749/ (last visited 23rd November 2020)

Council, therefore any recommendation or advice lacks proper objective and credibility[4].

Conclusion

The characteristic feature of the federal structure is legislative autonomy with the financial independence of the governments in their demarcated constitutional responsibilities. Over the years there have been concerted efforts on behalf of the Sarkaria Commission, 10th Finance Commission and Punchhi Commission to grant more fiscal autonomy to state governments, to incur their expenditures per their needs and goals. Taxes were a major contributor to the source of revenue for the state governments; it is only fair for the states to rely on the compensation fund for their sustenance. The urgency of fiscal empowerment has been highlighted during the current pandemic when the states at the forefront faced a financial crunch and unlike the centre did not have broad-based tax handles nor did they have the autonomy to borrow. In times like this, the Centre is scurrying away from their moral and legal obligation, raising doubts regarding the fiscal federalism vis-a-vis cooperative federalism and whether GST was truly an accommodative initiative.

What can be predicted about the situation after the end of the transition period of 5 years as the economy is expected to contract during the current year? Except for a few north-eastern states, most states have seen an increase in the compensation requirements by manifold. The compensation grants form a significant share of the overall revenue receipts. The states and the GST Council have a mammoth task of bridging the gap with other tax and non-tax resources to avoid a potential fall in the size of their state budget.

[4]See, V Bhaskar and Vijay Kelkar, The GST Compensation Cess: Problems and Solution, *Pune International Centre.* Available at https://puneinternationalcentre.org/wp-content/uploads/2020/06/TheGSTCompensationCessProblem.pdf (last accessed on 27th November, 2020)

H. UNDERUTILISATION OF THE INTER-STATE COUNCIL: BLEMISHING COOPERATIVE FEDERALISM

-ASHOK PANDEY, IV BA LL.B

One of the most peculiar features of our Constitution is the unique, asymmetric quasi-federal structure. The adoption of such a structure with a strong Centre was imperative, given the wide socio-economic and geographical disparities of newly independent India. While pre-independent India was also governed by a federal governance mechanism by the British, the Governor General assumed wide powers. The Constitution-makers were cognizant of this fact and hence, they sought to De-Centralize power between the Centre and States and laid down the three lists of subjects, which distributed the legislation making power on two levels. However, a bare perusal of these lists makes it apparent that there is immense scope of conflicts and over-lapping jurisdiction. Moreover, there are many instances in the Constitution where the Central government assumes more power than the States. In order to effectively address these conflicts and uphold the spirit of cooperative federalism as envisioned by the Constitution makers, Article 263 was added in the Constitution.

Article 263 gives power to the President to establish a Council for matters associated with ensuring coordination between the Centre and the States on legislation and policy formulation on conflicting subjects if he thinks that it is required to be established for public interest. He is further empowered to decide upon its composition, duties and procedure. It should be noted that at the commencement of the Constitution, no such Council was established. However, on the recommendation of the Sarkaria Commission on Centre-State relations, the President

exercised his power under this Article and established a "non-permanent" Constitutional body, the Inter-State Council in 1990[1].

The Inter-State Council consists of the Prime Minister (Chairman), Chief Ministers of all states, Chief Ministers of all Union territories which have a legislative assembly and the Administrators of the Union territories which do not have a legislative assembly, six ministers of the Union Cabinet rank, to be appointed by the Prime Minister

Although the Constitutional mandate for setting up such a Council existed since the commencement of the Constitution, there was never a need to establish such a Council to resolve disputes because the entire Country was ruled by one party on both- the Central as well as the State level.

Since its inception, the Inter-State Council has had only eleven meetings with the last meeting held in July 2017[2]. Although the Council has been reconstituted in 2019[3], there are no updates as to when the next meeting would take place. The COVID pandemic has severely impacted every aspect of our lives. While governments are doing everything in their capacity to curb the pandemic, its communicable nature and people's general reluctance to follow the physical distancing guidelines is only adding insult to injury to the efforts.

It is very important that in such testing times, the spirit of cooperative federalism is upheld so that the legal machinery is sound and flexible to the needs of the

[1] Gazette Notification of the Inter State Council Order, 1990, available at <http://interstatecouncil.nic.in/wp-content/uploads/2016/08/gazette_1.pdf> last accessed on 17th November 2020.

[2] Meetings of the Inter-State Council, available at <http://interstatecouncil.nic.in/isc-meetings/> last accessed on 17th November 2020

[3] *Inter-state Council reconstituted with Prime Minister as Chairman, Economic Times*, 14/08/2019, available at <https://economictimes.indiatimes.com/news/politics-and-nation/inter-state-council-reconstituted-with-prime-minister-as-chairman/articleshow/70680747.cms?from=mdr> last accessed on 17th November 2020.

staggering economic downfall and health care practices. However, a plethora of Ordinances on subjects having an overlapping domain, the PM CARES fund and the controversy surrounding it with regard to its conflict with State Relief funds; and in the midst of all this, the absence of any will to conduct State-Council meetings is unfortunate and is seriously straining Centre-State relations.

Background

The genesis of Article 263 goes back to Section 135 of the Government of India Act, 1935 which provided for the establishment of an "Inter-Provincial Council" by the Governor General if they found it necessary for the purpose of:

(a) inquiring into and advising upon disputes which may have arisen between provinces,

(b) investigating and discussing subjects in which some or all of the provinces or the Dominion and one or more of the Provinces, have a common interest, or

(c) making recommendations upon any such subject and, in particular, recommendations for the better coordination of policy and action with respect to that subject

The Clauses of this Section have been emulated verbatim into Article 263 of the Constitution.

The National Development Council (NDC) was established in 1952 as the first body post-independence for the purpose of mobilizing efforts and promoting discussions and deliberations for the planned development of every part of the country under the aegis of Prime Minister Nehru, by the Planning Commission. However, it was formed by an executive order and not under Article 263. The Administrative Reforms Commission (ARC), which submitted its first report in 1969, recommended the utilization of the mandate under Article 263 for the first time to establish an inter-state council for a period of 2 years to begin with, which would undertake discussions and deliberations to ensure smooth governance. However, it also suggested that this Council should not take up issues which are being discussed within the NDC, particularly the issues of socio-economic planning and

development. Its function was to be restricted to the political aspect of governance only.

The Sarkaria Commission report on Centre State Relations (1988) accepted the recommendation of the ARC with regard to maintaining the autonomy of NDC but stressed upon the permanent nature of the "Inter-governmental Council" (this name was suggested because it gave a clearer picture of the true character of the Council so as to differentiate it from the other sectoral bodies that were established for specific issues between the Centre and the States)[4] and also suggested that the NDC be renamed to National Economic and Social Council. It further mandated that the Council should meet at least twice a year and various Standing Committees should be formed for the discussion of specific issues which should meet four times a year[5]. The report further suggested that General Body of the Council need not deliberate upon issues at the first instance and that they should be dealt with by the Standing Committee. And unless the Standing Committee opines that the intervention of the General Body is required, it shall not discuss those issues[6].

NDC and NITI Aayog

It is pertinent to note at this juncture that both the NDC as well as the NITI Aayog (National Institution for Transforming India) have the same composition so far as the General Council is concerned. They comprise the Chief Ministers of States, Chief Ministers of Delhi and Puducherry and the Administrators of the remaining union territories and the Prime Minister as the Chairman along with other members of the Union Cabinet.

Both NDC and the NITI Aayog are established by executive orders and have no Constitutional or Statutory mandate. The NDC was established for the purpose of securing cooperation and mobilizing resources for the national plan, to ensure

[4] Commission on Centre-State relations Report (Sarkaria Commission Report), Pg. 238

[5] Commission on Centre-State relations Report (Sarkaria Commission Report), Pg. 239

[6] Ibid Sarkaria Report

balanced growth and to increase the standard of living and the per capita income of the people. The NITI Aayog on the other hand replaced the erstwhile Planning Commission in order to establish a 'bottom-top' approach towards economic development, as against the 'top-bottom' approach of the Planning Commission, which was considered redundant and infructuous in the era of globalization. The NITI Aayog can be given credit for a number of initiatives such as the Atal Innovation Mission, AMRUT, and Digital India etc. In fact, the NITI Aayog has also been working to create a portal to connect 200 million workers looking for blue and grey collar jobs with job providers in order to alleviate the gripping unemployment caused due to reverse migration during the lockdown[7].

Way ahead

While the purposes of NITI Aayog and NDC is to promote cooperative federalism, the fact that they are established by Executive Orders leaves their existence on the mercy of the Central Government, which by itself blemishes the cooperative federalism they seek to promote. On the other hand, the NDC is effectively an infructuous body and its last meeting was held in 2012, with no future meeting schedule in sight.

The Inter-State Council, on the other hand has a Constitutional mandate and hence, tremendous potential to foster the spirit of cooperative federalism. However, its current state needs some monumental changes, the source of which could be the Sarkaria Commission report. Firstly, it should become a permanent constitutional body which should mandatorily have at least one meeting a year. Further, in order to cater to situations of urgency, the States should have the decision making power to call for an urgent meeting by a resolution passed and endorsed by the Chief

[7] *NITI Aayog developing portal to connect 200 million workers to job seekers*, Economic Times, 23rd July, 2020, available at <https://economictimes.indiatimes.com/news/economy/policy/niti-aayog-developing-portal-to-connect-200-million-workers-with-job-providers/articleshow/77127254.cms> last accessed on 17th November 2020

Ministers of at least 1/2 of the member states. It should also be empowered with a more vibrant bureaucracy, for which the author suggests the subsuming of the NITI Aayog into the Inter-State Council along with the transfer of all the budgetary allocations as well. This would really give impetus to having a more inclusive outlook towards the initiatives of the NITI Aayog with the added incentive of having a General Council where representation and opportunity to express their concerns is given to all states and union territories.

The National Development Council should be respectfully abolished and the Inter-State Council should have the liberty of discussing the social and economic aspects of development as well. Furthermore, any budget set aside for it (if any) should also be transferred to the Inter-State Council.

The Inter-State Council is presently charged with duties as set out in clauses (b) and (c) of Article 263 only. Clause (a) provides for the body established under Article 263 to have the power of inquiring into and advice upon disputes arising between the States. With judicial pendency being one of the main reasons for delayed administration of justice and with alternate dispute resolution showing potential, it is time that the Inter-State Council also be vested with the power under clause (a) so that disputes such as sharing of river waters, territorial disputes and other disputes relating to departmental conflicts could be attempted to be settled at the Council level before knocking the doors of the Court.

The Inter-State Councils should also work in close cooperation with the Zonal Councils established under the States Reorganisation Act and should pay close attention to its recommendations and decisions. For this purpose, it is also suggested that a Committee of Secretaries consisting of representatives from the Standing Committee of each Zonal Council be established before every Inter-State Council meeting and the report of this Committee should be taken up for discussion on priority by the General Body of the Inter State Council.

The creation of the appropriate framework and policies for promoting cooperative federalism in the country does not require any constitutional amendments. The founding parents of our Constitution have laid enough groundwork for that. It is the will to implement which eventually matters. As Dr. B.R. Ambedkar has rightly said,

"However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good."

I. TUG OF WAR ON EDUCATION

-ADITHI RAO, V BA LL.B

Introduction

Federalism is a method of dividing powers between 'general' and 'regional' governments in a way that two of them can co-ordinate and work independently to certain extent. However this word finds no place in the Indian Constitution, its features can be located in the Seventh Schedule. One such subject under this Schedule is the subject of Education which is of vital national importance. For any developing country to rise to the level of a developed country is by providing education to the illiterate masses of the country. No Government can be laid on a secure basis unless the people are educated. As a result, it becomes crucial for the country to demarcate the powers and functions in order to ensure a smooth functioning and progress of the System of Education.

Through this article the author will be tracing the history of the shifts of Education from one list to another, and then briefly talking about the conflict between the Union and the Concurrent list focusing on aspects like Higher Education, Admissions, medium of Instruction etc.

Tracing the shift

Education in the 1700s was mostly a provincial subject. The Charter Act of 1833 however introduced a unitary system of Government. [1] The provincial states were mere puppets of the Central Government. In 1800s the process of decentralization emerged, the provincial governments were made responsible for all expenditure on certain services-inclusive of education. Until India got Independence the day-to-day administration was vested in Provincial Governments, but the Government of India

[1]Role of Government in Education by J.P Naik available at https://dspace.gipe.ac.in/xmlui/bitstream/handle/10973/33742/GIPE-088488.pdf?sequence=2

discharged five distinct functions, viz., the functions of policy making, clearing house of information, research and publications, coordination and financial assistance. [2]The British adopted the University of London federal university' system in which the university is an affiliating body for local colleges, and reports to its local government. The universities' role was to support the goals of its constituent colleges by designing curricula, holding examinations and awarding degrees. [3] This system still finds its place in the 20th Century. Gradually after Independence the focus has now shifted to national development by the newly formed National Institution for Transforming India (NITI Aayog).

Until the 42nd Amendment Act came into effect, education remained on the State List i.e. List II Entry 11. However in 1976, 42nd Amendment Act was effected during the Emergency by the then Prime Minister Indira Gandhi who transferred the state subject of Education to the Concurrent List. This was done because of the thought that it was not being adequately dealt with by the States. [4] Education being a subject of national importance the parliament hoped that it could secure uniformity and have a standard level throughout the country. This resulted in joint responsibility of education whereby they became equal partners. However it is interesting to note that the union even before the 42nd Amendment had asymmetric powers under Article 45, 46, 350A, 351, Entry 64, 65, 66 of List I under Schedule Seven to intervene in matters of education.

Division of Scope of Centre and State

[2]Role of Government in Education by J.P Naik at https://dspace.gipe.ac.in/xmlui/bitstream/handle/10973/33742/GIPE-088488.pdf?sequence=2

[3]Union-State Relations in India's Higher Edcation byJandhyala B.G Tilak

[4]Concurrent Power of Legislation under List III of the Indian Constitution by Shri P.M. Bakshiat https://legalaffairs.gov.in/sites/default/files/Concurrent%20Power%20of%20Legislation%20under%20List%20III%20of%20the%20Indian%20Constitution.pdf

The 7th Schedule of the Constitution divides broadly the subject into Union subjects and state subjects and those which are on the concurrent list. Education is a divided area between the Centre and the States i.e List I, entries 63, 64, 65, 66, and List III, entry 25. Entry 63 of List I gives certain Universities like Banaras Hindu University, Aligarh Muslim University and Delhi University; the university established in pursuance of Article 371-E any other institution declared by Parliament by law to be an institution of national importance. Therefore, it is Parliament which is invested with the power to legislate concerning these Universities. Entry 64 deals with Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance. Entry 65 of List I only places under the exclusive jurisdiction of the Union the "agencies or institutions" created by the Union for the purpose of regulating professional, vocational or technical education. Interestingly one cannot miss entry 25 of List No. III which reads as follows : Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour. However this confusion of overlapping has been cleared by the court. The entry under List I refers to the "agencies and institutions" for training whereas the ones in the concurrent list relate to education. [5]The state list deals with Industrial Training Institutions imparting technical and vocational education institutions which come under the definition of "education" as defined in S. 2 (16) of the Education Act[6] therefore; requiring permission for establishment of all such educational institutions from the concerned State Government.

However, it has been observed that the Union has an upper hand. To illustrate Primary and secondary education is a state subject. The centre has no direct responsibility for it, but it has indirect responsibility for it, rather significant,

[5]Indira Gandhi A.I.T. Institute v. National Council For Vocational Trades, AIR 1989 AP 1

[6]Cl. (16) defines the expression, "education" as meaning general education, technical education, physical education, etc.

responsibility for elementary education which is laid down under Article 45 of the Constitution of India which reads as:

The state shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years. As a result the Central government has under it the Ministry of Education which deals with primary and basic education. Two important organisations are the Central Advisory Board and of education and the All India Council for Elementary Education Act and their primary function is to advice the states w.r.t primary education. [7] It has over the years recommended for better paid, qualified teachers, teaching aids, smooth functioning between the state and the local bodies, pattern of education etc. in order to discharge the function of the state under the Directive Principle of State Policy.

Therefore though the aim was to have a joint responsibility, the union is at a dominating position and the state is not left with enough resources of its own to develop Education which is one of the costliest welfare facilities.

Conflict between the Union and State –

In case of conflict between the two it is necessary that it be dealt with caution and in a harmonious way.

Entry 66 of the Union list deals with two aspects of higher [8]education. In the first place, it covers co-ordination of standards in such institutions; secondly, it covers also the determination of standards in institutions for higher education. Thus the moment a law begins to concern itself with improving or maintaining excellence in

[7]http://14.139.60.114:8080/jspui/bitstream/123456789/16328/1/009_Education_The%20Centre-State%20Relationship%20(371-414).pdf

[8]29 JILI (1987) 425

Higher Education and States by PM Bakshi

institutions of higher learning, the Union list takes over and the concurrent list must take leave.

The pinnacle of Indian education is at the under graduate level and a majority of adults attend state universities or those affiliated to the state.

In the field of Higher Education the University Grants Commission under the University Grants Commission Act, 1956, (the U.G.C. Act) which is enacted under the provisions of entry 66 of List I of the Seventh Schedule to the Constitution has concerned itself not merely with Externa of University Education, like those dealing with buildings, libraries, laboratories, books, equipment etc. but also interna – student indiscipline , medium of instruction, qualification of teachers, co-ordination of standards and so on. [9] The centre provides grants to the universities both capital and operational costs. The UGC also provides assistance to the state universities by way of "grant in aid". When a particular university has been declared to be a deemed university, it comes under the preview of the Union.

It is important to determine the demarcation of the responsibility between the two. But it is not such a straight jacket formula. There are various aspects like that of standard of admission in institutions as well as coordination. It was held by the court that the term "coordination" in Entry 66 of the Union Lost does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concentrated action according to a certain design, scheme or plan of development. It not only acts as a mischief corrector but also maintains a uniform standard throughout. [10]

This demarcation was cleared in a case [11]where the validity of a state act (Andhra Pradesh Commissionerate of Higher Education Act, 1986) was challenged .The main

[9]INDIA'S EMERGING CO-OPERATIVE FEDERALISM S. P. Aiyer*The Indian Journal of Political Science* Vol. 21, No. 4

[10]State of T.N. &Anr. Vs. Adhiyaman Educations & Research Institute & Ors., (1995) 4 SCC 104.

[11]Osmania University Teachers Association v. State of Andhra Pradesh(1987) 3 S.C.J. 294

objective of the state act was to deal with several matters pertaining to higher education within the state and evolve a perspective plan for its development. It provided for the creation of a commissionerate of higher education. This was problematic due to its glaring similarity to the UGC act, only some of the words and sentences used in the commissionerate act were different nevertheless, they conveyed the same meaning. It went to the extent of conferring it with powers such as deciding the location of new colleges, fixing the course of study, coordinate the academic activities, financial activities etc. The court reversed the judgement of the HC which held upheld the Act. SC was of the opinion that UGC Act falls under Entry 66 of List I and it was unthinkable as to how the State could pass a parallel enactment under Entry 25 of List III, unless it encroaches Entry 66 of List I. Such an encroachment is patent and obvious. The Commissionerate Act was beyond the legislative competence of the State Legislature and was declared void and inoperative.

Admissions

The spread of primary education is quite widespread especially with the duties imposed upon the state to give free education for university level education upto graduation. The idea behind this is for individual betterment and secure better employment throughout the country. At the level of higher post-graduate university education, however, apart from the individual interest of the candidate, or the national interest in promoting equality, a more important national interest comes into play. At the post graduate education and teaching especially in professional courses. To determine the powers the courts have always looked into the width of Entry 66 List I. A mere reading of this Entry shows that the legislation which can be covered by this entry has to deal basically with Co-ordination and determination of standards in institutions for higher education. There exists the topic of admission of eligible candidates/students for taking education in such institutions has anything to do with co-ordination and determination of standards in these institutions. The "one country, one test" National Eligibility-cum Entrance Test (NEET) was

introduced. However this was highly opposed by the private colleges in various states across the country. It was the contention of the petitioners that this process of nationalisation was violated their fundamental rights as unaided minorities had their own procedure of admission and process of selection. However this argument did not stand as the respondents pointed out that these universities can successfully choose the students of their community who have received minimum marks from the merit list of NEET. Though under List III Entry 25, both union and the state have the power to legislate on matter of medical education subject to provisions of List I Entry 66. Now this as stated about deals with determination of standards in Higher Education. Consequently it has the powers to make laws on the same subject and has an overriding effect. For a student who enrols for such speciality courses, an ability to assimilate and acquire special knowledge is required. Not everyone has this ability. Of course intelligence and abilities do not know any frontiers of caste or class or race or sex. They can be found anywhere, but not in everyone. Selection of the right calibre of students is essential in public interest at the level of specialised post-graduate education[12]. Therefore the validity of the NEET was it cannot be said that the Union does not have the powers with regard to admission when the standard of higher education is based on the students who are admitted into the Colleges. [13]

Medium of Instruction:

The question of whether a State Legislature could impose an exclusive medium of instruction looked into in was The Gujarat University, Ahmedabad vs. Krishna Ranganath Mudholkar & Ors[14] in the case of Gujarati for the students who had to study and take examination conducted by the Gujarat University. It was held that If a legislation imposing a regional language or Hindi as the exclusive medium of instruction is likely to result in lowering of standards, it must necessarily fall within

[12]Preeti Srivastava (Dr.)&Anr vs State Of Madhya Pradesh

[13] 2016 SCC OnLine SC 366

[14]1963 Suppl.(1) SCR 112

Item 66 of List I and be excluded to that extent from Item 11 of List II as it then stood in the constitution. Medium of instruction was held to have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. However the state has the power to legislate w.r.t to primary or secondary education. As a result the states have the right to impart regional language to such an extent that the students know the basics and stay grounded to the roots, but when such a policy extends to aspects of higher education there needs to a standard and hence states cannot set medium of instructions for professional courses which fall into the subject of the Union list.

Conclusion

It can be conclusively said that the state without trespassing on the autonomy or the States, the Centre had a useful role to play in evolving suitable educational policies for the country. Co-operative federalism though has given the Union the larger and the important chunk of subjects, the states are given the relevant powers to legislate on certain key aspects. The States were not given complete autonomy to legislate because of the fear of complete localization which might have proved fatal to the development of a progressing nation like India. In 2020 the Union Cabinet approved the New Education Policy 2020 making several drastic changes which might result in over centralisation of the Education system. It proposes changes like changing of the existing bodies like the UGC, AICTE, NCTE, etc with a singular body called the Higher Education Commission of India (HECI), the three language formula in schools, in which two out of the three were to be vernacular, among many other issues. This over ambitious policy might prove fatal to the state autonomy as they play a vital role in these issues like framing policies, rolling out actual policy etc. This also by ways excludes the underprivileged minority and ensures domination by the upper class. This policy will need extraordinary coordination at every level between the two which does not seem quite viable.

J. APPURTENANT SCHOLARSHIP

-BHARGAV BHAMIDIPATI, IV BA LL.B

1. Federalism in the Indian Constitution[1]

-AK. Ghosal

The piece deals with the fundamental questions of the federal structure in India. It makes a comprehensive examination of the nature of federalism, and of the relevant features of the Indian Constitution, especially the division of powers between the Union and States.

2. Federal System in India and the Constitutional Provisions[2]

-Roshni Duhan

This wonderful piece acts as a primer to understanding the deeply rooted federal principles in the Indian Constitution. The article also provides a historical approach to the Indian federalism from the perspective of the drafters and the national leadership.

3. Dynamic De/Centralization in India, 1950-2010[3]

-Ajay Kumar Singh

The article measures the dynamic de/centralization in India since 1950. It tracks India's early centralized model to the more recent decentralization across its legislative, administrative and fiscal dimensions.

[1]Available at, https://www.jstor.org/stable/41853768?seq=1

[2]Available at, https://innovareacademics.in/journals/index.php/ijss/article/download/15080/9047

[3] Available at, https://academic.oup.com/publius/article/49/1/112/5058956

4. The Indian Supreme Court and Federalism[4]

Rekha Saxena & Wilfried Swenden

The comprehensive article situates the Indian Supreme Court within the architecture of Indian federalism. It reflects on the extent to which the composition of the Court as well as its jurisprudence has enabled it to operate as the guardian of Indian federalism.

5. From Executive to Legislative Federalism? The Transformation of the Political System in Canada and India[5]

Douglas V. Verney

This masterpiece from the late 1980s compares the federal systems of Canada and India from the perspective of its constitutional crises in the 70s. The Article tracks the evolution of the systems in these nations from executive federalism to legislative federalism.

6. Asymmetrical Federalism in India: Promoting Secession or Accommodating Diversity[6] (From the book – *Revisiting Unity and Diversity in Federal Countries)*

-Rekha Saxena

Indian federalism is known for its asymmetrical nature in as much as it grants special status to some of its federative units in the constitution. The article excerpt makes a blunt analysis on whether this asymmetry has enabled the unification of diverse socio-cultural groups or has it allowed for "excessive federalism" which has unleashed destabilising forces.

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[4]Available at, https://popups.uliege.be/1374-3864/index.php?id=1699

[5]Available at, https://www.jstor.org/stable/1407405?seq=1

[6]Available at, https://brill.com/view/book/edcoll/9789004367180/BP000019.xml

K. PUBLIC LAW ON OTHER BLOGS

-BHARGAV BHAMIDIPATI, IV BA LL.B

https://indconlawphil.wordpress.com/tag/federalism/

https://www.scconline.com/blog/post/2020/06/19/indias-fair-weather-federalism/

https://blog-iacl-aidc.org/2019-posts/2019/11/28/constitutional-redesign-of-the-federal-balance-india-and-article-370

https://thelawblog.in/2018/01/16/co-operative-federalism-an-indian-perspective/

https://www.orfonline.org/research/the-paradox-of-centralised-federalism/

https://thewire.in/government/rajya-sabha-the-safety-valve-of-indian-federalism

https://indconlawphil.wordpress.com/tag/gst/

https://www.thestatesman.com/northeast/sixth-schedule-layers-of-autonomy-1502752499.html

https://www.orfonline.org/expert-speak/recurring-controversy-governor-role-state-politics-67433/

https://indconlawphil.wordpress.com/category/governors/

L. PUBLIC LAW IN THE NEWS

BHARGAV BHAMIDIPATI, IV BA LL.B

SUPREME COURT IN THE NEWS

1. BK Ravichandra v. Union of India[1]

In a case where the Union of India was sitting over certain lands for 33 years without any authority, the SC bench consisting of Indira Banerjee and S. Ravindra Bhat directed the Union to hand back possession of the suit lands to the appellants within three months. The Court approached the matter through the appellants' right to property by holding that acquisitioning and requisitioning of property needs to be finite and cannot result in the deprivation of the title all together. Lastly, the court held that the phrasing of Article 300-A is determinative and its resemblance with Articles 21 and 265 cannot be overlooked, which in effect are a guarantee of the supremacy of the rule of law.

2. Kirpa Ram v. Surendra Deo Gaur[2]

The 3-judge bench of the SC held that the High Court is not obliged to frame substantial questions of law, in case, it finds no error in the findings recorded by the first Appellate Court. The court opined that the formulation of substantial question of law or reformulation of the same in the terms of the proviso arises only if there are some questions of law and not in absence of any substantial questions.

3. Fertico Marketing and Investment Pvt. Ltd. v. CBI[3]

The Supreme Court in this case has held that not obtaining prior consent of the State Government under section 6 of the Delhi Special Police Establishment Act, 1946 (DPSE Act) would not vitiate the investigation unless the illegality in the

[1]CIVIL APPEAL NO. 1460/2010

[2]2020 SCC OnLine SC 935

[3] 2020 SCC OnLine SC 938

investigation can be shown to have brought miscarriage of justice or caused prejudice to the accused.

4. Rattan Singh v. Nirmal Gill[4]

The division bench of the SC while dealing with the invocation of Section 17 of the Limitation Act, identified two ingredients, i.e., existence of a fraud and the discovery of such fraud. While doing so, the SC held that the burden of duly pleading and proving these ingredients was a burden of proof on the party alleging such forgery.

5. M. Ravindran v. Intelligence Officer, Director of Revenue Intelligence[5]

The Supreme Court interpreting section 167(2) of the CrPC, said that the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in the Article 21. The 3-judge bench held that the history of the enactment of section 167(2) and the safeguard of 'default bail' contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with law.

6. Rusoday Securities Ltd. v. National Stock Exchange of India Ltd.[6]

In an elaborate decision of the SC, the 2-judge bench consisting Khanwilkar J. and Maheshwari J. has discussed the mode of dealing with withheld securities by a defaulting member of the NSE. The Court held that even if mere existence of lien may not entitle the lienee to sell off the property for satisfaction of debt, when the lien is a creation of bylaws, the scope, extent and operation of such lien would also be governed by same scheme.

[4]2020 SCC OnLine SC 936,

[5]2020 SCC OnLine SC 867

[6]CIVIL APPEAL NO. 2690 OF 2009

HIGH COURT IN THE NEWS

1. KC Kondaiah v. State of Karnataka[7]

A division bench of the Karnataka HC, while partly allowing petition, discussed the powers and obligations of the State Election Commission and the limited intervention of the State Government in the exercise of such powers. Infact, the SEC while conducting elections of panchayats or Municipalities enjoys the same status which is enjoyed by the Election Commission of India for conducting elections for Parliament and State Legislature. Lastly, dismissing the State's claims, the court held that the stand of the government to not hold elections soon could not be accepted as there is not discretionary power with it

2. Salamat Ansari v. State of U.P.[8]

The division bench of the Allahabad High Court consisting Naqvi J. and Agarwal J. observed that Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and person liberty. It further held that interference in a personal relationship, would constitute a serious encroachment into the right to freedom of choice of the two individuals.

3. Parveen v. State (NCT of Delhi)[9]

The division bench of the Delhi High Court addressed a petition wherein it was held that a girl who has attained the age of majority is free to reside with whosoever she wishes to. The habeas corpus petition by parents sought to bring their daughter back after she married the Respondent 3. The court after considering the facts, denied the petition.

[7]WP No. 7987 of 2020

[8]Crl. Misc. WP No. 11367 of 2020

[9]WP (Crl) No. 1729 of 2020

4. Gaurav Sharma v. Ishwari Nand[10]

The Himachal Pradesh HC setting aside a conviction against petitioner, discussed the effect of compromise between the parties in cases attracting Section 138 of Negotiable Instruments Acts 1881 and cases of compounding offences under the same. The Court held that the legislative intent of the NI Act was not to send people to suffer in incarceration but to execute recovery of cheque amount by showing teeth of penalty loss.

5. Pranathmaka Ayurvedics v. Cocosath Health Products[11]

The Kerala High Court while allowing the statutory remedy of appeal, discussed the parallel application of provisions and the Court's power of supervision under Article 227 of the Constitution. Firstly, the court held that the heading of the provision cannot be referred for the purposes of construing the provisions when the words and language used in the provision are clear and unambiguous. Thus, if a appeal before a civil court is not opted by a party, it would deter the HC from exercising its power under Article 227. Because there was a statutory right to appeal, the court granted it and did not approach the appeal through Article 227. But while doing so made substantial observations on the right to appeal.

[10]2020 SCC OnLine HP 2464

[11] OP(C) No. 1467 of 2020

L. CASES ACROSS THE POND

-BHARGAV BHAMIDIPATI, IV BA LL.B

DATE	NAME OF THE CASE AND COURT	JUDGEMENT
16/11/2020	*Centre for Environmental Justice (Guarantee) Ltd. v. Anura Satharasinghe*[12] (Court of Appeal, Sri Lanka)	The Petitioner was a non-profit organization with objectives of environmental justice and good governance in the interests of the general public. In the instant PIL, it sought to impugn several acts of the Respondents in the forest complex adjoining Wilpattu National Park. The Division Bench of the Court of Appeals, partly allowed the appeal. While doing so the court interpreted the *polluter pays* principle and held that there was need to settled down all IDPs who were displaced due to the war in Sri Lanka as far as possible. However, this was subject to the respect for rule of law which is the foundation of the Constitution.

[12]Case No. C.A. (Writ) 291 of 2015

5/10/2020	*Kim Davis v. David Ermold*[13](The Supreme Court of the United States)	While denying the issuance of the writ of certiorari as prayed by Kim Davis, a former county clerk in the Commonwealth of Kentucky in relation to the lawsuits accusing her of violating the constitutional rights of same sex couples, the Court went on to highlight the problematic implications of the SCOTUS' decision in *Obergefell* v. *Hodges*wherein the Court read a right to same-sex marriage into the Fourteenth Amendment, even though "that right is found nowhere in the text". In their observations, the Court found that due to *Obergefell*, **those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoulof** *Obergefell*. In other words, *Obergefell* **was read to suggest that being a public official with traditional Christian values was legally tantamount to unpleasant discrimination toward**

[13] Petition for Writ of Certiorari No. 19-926

		homosexuals"
30/10/2020	*Ecila Henderson v. Dorset Healthcare University NHS Foundation Trust*[14](Supreme Court of United Kingdom)	In the instant appeal where the issue was whether the claimant can recover damages for the "consequences" (including the subsequent loss of liberty) of having committed the criminal offence during a serious psychotic episode, which she would not have committed but for the defendant's negligence; the 7 Judge Bench unanimously dismissed the appeal holding that the appellant's claim for damages against Dorset Healthcare is barred by the appellant's criminal act of manslaughter, and are therefore irrecoverable by reason of the doctrine of ***ex turpi causa non oritur actio*** (from a dishonorable cause an action does not arise) i.e. illegality.
9/11/2020	*Kayman Sankar Investments Ltd. v. Blairmont Rice Investments Inc*[15](Caribbean Court of Justice)	Between the parties arose a dispute concerning irregular payments by the Respondent. This formed the subject matter of a plethora of litigation between them. The Court

[14][2020] UKSC 43

[15]CCJ Appeal No 27 of 2012

		of Appeal decided in favour of the Applicants In the meantime, on 21 February 2019, the Applicants applied special leave to appeal against the decision of the Court of Appeal to grant leave to appeal to this Court. The main contention in the instant matter is whether an application seeking to challenge the maintainability of substantiveappeal is itself maintainable or not? The Court held that the Applicants ought not to be allowed to use the special leave application as a pre-emptive strike. The correct forum at which the Applicants must argue is in fact the substantive appeal. The Court further held that the special leave applications in the context of the CCJ Rules are fresh applications by their very nature and cannot be used by a party to appeal against the decision of the lower court to refuse or grant leave to appeal to the CCJ

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