Beyond Federalism*

Federalism is the mode of political association and organisation that unites separate polities within a more comprehensive political system in such a way as to allow each to maintain its own fundamental political integrity.[1] The term 'federal' itself is derived from the Latin word *foedus*, meaning a covenant. By definition, therefore, a federal relationship implies equal partnership between individuals, groups or governments, or a cooperative relationship attained through negotiations amongst equal parties as a basis for power-sharing. K.C. Wheare defines a 'federal government' as an association of States which has been formed for certain common purposes, but in which the member States retain a large measure of independence.' A federal government exists when the powers of the

* The 29th Dr. C.D. Deshmukh Memorial Lecture delivered at the India International Centre on 14 January 2012.

By **B.N. Srikrishna**

government are divided substantially according to the principle that there is a single independent authority in respect of some matters, and there are independent regional authorities for other matters, each set of authorities being co-ordinate and subordinate to the others within their respective spheres.

Federalism is by now widely accepted as one of the forms of political organisations that is strongly interlinked with democracy. It can exist in the manner of sharing territory, political power and financial resources, and a detailed methodology is worked out in respect of all three facets.

The United States of America is a paradigm of federalism in action. The U.S. Constitution of 1787 was carefully crafted so as to maintain the integrity of each of the States forming the Union. According to *The Federalist*, an invaluable book that provides an explication of the political theory and extolls the advantages of the adoption of the Constitution of 1787, there are three basic choices for building a federal system – by 'force', 'accident', and 'reflection and choice'.

A federal democracy implies that the polity is so designed as to ensure that there are appropriate checks and balances so that all institutions are checked and balanced by other institutions, which exercise their constitutional power and are autonomous by themselves. This is a situation in which 'ambition must be made to counteract ambition'.[2]

In order to ensure the existence of a properly working federalist system it is essential that there is a written constitution governing it. The constitution would be the document embodying the fundamental rules which are agreed to, a priori, before bringing the federal system into existence.

Although the Constitution of the United States is generally believed to be the first federal system, federalism has hoarier history. The ancient Israelist tribes that existed sometime in the 13th century had a system that could loosely be called a federal system. It is debatable as to whether this system was a 'federation' or a 'confederation' as understood by modern-day definitions. The early leagues of Greek City States were more by way of confederations where ultimate authority and sovereignty rested with the constituent units while the leagues governed to pursue the common purposes for which they were formed. In both the Israelist and Greek federation systems the aim was unification of communal democracies in the larger

interest in the realm of defence. Both disappeared as a result of conquest by Alexander, and later, by Rome. The Roman Republic, although formally called federal, had an arrangement that was quite asymmetric. Rome became the federal power and the weaker cities conquered by it were attached to it as loose federal partners, ensuring local autonomy to a certain extent, but not given full political rights as Roman citizens. Subsequently, when Rome consolidated its powers, federalism remained on paper while the Roman Empire became a centralised one.

The self-governing cities, which developed in Northern Italy and Germany with leagues of cities, were also established as loose confederations. They survived only as long as it was in the interest of the rulers to allow them to. The provinces of the Netherlands had substantial local autonomy under the Roman Empire and turned into an independent confederation sometime in the late 16th century after revolting against the Spanish King. The loose federation of the United Provinces of the Netherlands came to an end when Napoleon conquered them. After his fall, the Dutch adopted a constitution which preserved the provinces as part of a unitary decentralised monarchy and which continues to exist even today. After the Second World War the Netherlands and their erstwhile colonies in the Carribean reconstituted themselves as the Kingdom of the Netherlands which, although formally federal, is characterised by asymmetrical relations between its several constituents.

In the 18th century, federal theory was rediscovered as a result of political thinkers like Montesquieu and Rousseau. Their writings contributed in large measure to the political thinking that went into designing the federal structure of the United States of America. In the 19th century, Alexis de Tocqueville explained the strengths and weaknesses of the American experience on the basis of political theories. Germanic political theorists also examined the problems of federalism in the Germanic countries and produced their expositions of the difference between *Bundesstaat* and *Staatenbund*. The French tradition, spearheaded by Pierre-Joseph Proudhon, advocated a more Utopian type of federal theory that would ensure the absence of fundamental political conflicts that had emerged in society during that century.

After the Second World War, new federations were founded and restored in Eastern Europe, such as Germany, Austria and

Czechoslovakia. Africa also had its share of federations in Nigeria, Comoros, Ghana, Kenya, Uganda and Tanzania. Asia produced federations in India, Malaysia, Pakistan, United Arab Emirates and United Arab Republic. Depending on the strength of the political culture and the contemporary political climate, some survived and some died a natural death. In a truly federal system the constituent polities, in theory, must have substantial influence over the constitutional amendment process; the assumption being that the power exercised by the constituent polities is such that any serious change in the political order can only come about with the decision of the dispersed constituents. This is what would truly reflect the federal division of powers; this is what is important for popular government as well as for protecting federalism.[3]

Since federalism constitutes a complex governmental mechanism for governance of a country, it must have an inbuilt balance between the forces working for concentration of power at the Centre and for those urging dispersal of such powers amongst the constituents. A truly federal constitution must envisage a clear-cut demarcation of governmental functions and the powers between the Centre and the regions as sanctioned under a written constitution. This gives rise to two issues: (a) that encroachment by one level of government into the exclusive domain of the other would amount to a violation of the constitution, and (b) any violation of the constitution would be justiciable and adjudicated by an independent judiciary within the area assigned to it by the constitution.

India is one of those countries in which the Constitution consciously adopts a federal structure and which continues to work till today. But the question often debated is whether the Indian Constitution is *truly* federal in nature. According to Wheare, the Indian Constitution is in practice only quasi-federal and does not conform to the test of being truly federal in nature. Sir Ivor Jennings, however, takes the view that India is a federation with a strong centralising policy. After a fairly extensive analysis of the judgements of the Supreme Court of India, D.D. Basu is of the view that the Indian Constitution is neither purely federal nor purely unitary, but is a combination of both. According to him, it is a Union or a composition of a novel type.

On 26 January 1950, the Federal Union of India was established. The Indian situation is unique in terms of geographical areas,

population and the number of languages spoken across the country. The distribution of power between the Centre and the States under the Indian Constitution owes much to historical and political factors: to the way in which the British ruled the country and the manner in which they unified the country under their direct control by integrating the various principalities in the Indian Union. Although it was easy to integrate the areas directly ruled by the British, the treaties of accession signed by different independent rulers led to the integration of different principalities with the country. When the Constitution was adopted, Dr. B.R. Ambedkar, Chairman of the Drafting Committee, and Pandit Jawaharlal Nehru, both colossuses in the political field, were in favour of adopting a unitary system. Sardar Patel, another strong leader, however, was an advocate of the federal system and played a crucial role in the crafting of it. The debates in the Constituent Assembly give an insight into the thinking on whether the Constitution should have a State or Central bias.

Responding to the criticism of the tilt towards the Centre, Mr. T.T. Krishnamachari, during debates in the Constituent Assembly on the Draft Constitution, said:

> .... Are we framing a unitary Constitution? Is this Constitution centralizing power in Delhi? Is there any way provided by means of which the position of people in various areas could be safeguarded, their voices heard in regard to matters of their local administration? I think it is a very big charge to make that this Constitution is not a federal Constitution, and that it is a unitary one. We should not forget that this question that the Indian Constitution should be a federal one has been settled by our Leader who is no more with us, in the Round Table Conference in London eighteen years back.
>
> I would ask my honourable friend to apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by

: B.N. Srikrishna

> the superior unit. The important words are 'must not be completely circumscribed', which envisages some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our Constitution is a federal Constitution. I urge that our Constitution is one in which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere.

Dr. B.R. Ambedkar explained the position in these words:

> There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralisation and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the center and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the center and the States not by any law to be made by the center but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the center for their legislative or executive authority. The center and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the center too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the center and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the center and the Units by the Constitution. This is the principle embodied in our Constitution.

When the new Constitution was adopted in 1951, there were large federal States like Assam, Jammu and Kashmir, Bihar and Uttar Pradesh, which had been formed on geopolitical considerations, while Orissa was formed on ethno-cultural considerations. In 1956, as a result of the States' Reorganisation Act, eight new federal

States were formed along ethnic/linguistic lines: these were Andhra Pradesh, Karnataka, Kerala, Madhya Pradesh, Punjab, Rajasthan, Tamil Nadu and Tripura. During the period 1960 to 1966, five more federal States, namely, Gujarat, Maharashtra, West Bengal, Nagaland and Haryana were established. Between 1970 and 1972, the States of Meghalaya, Manipur and Himachal Pradesh came into existence. Sikkim, with its ethnic Nepalese majority of Lechas and Limbus, merged with India in 1975 to become the 22nd Indian State. In 1987, the States of Arunachal Pradesh, Goa and Mizoram were formed. Uttarakhand, Jharkhand and Chattisgarh were the 26th, 27th and 28th States, respectively.

The Constitution classified the States into four categories. Provinces directly ruled by the British were classified as Part A States; princely States that had a relationship with the Government of India under individual treaties were classified as Part B States: these were Hyderabad, Mysore, Jammu and Kashmir, and five newly joined Unions of princely States. Jammu and Kashmir was made subject to special powers accruing from the accession instrument. The remaining princely States acceding to the Union were grouped as Part C States. The territories ruled by the French and Portuguese were later merged with the Indian Union and became Part D States or Union Territories.

Some hold the view that federalism as it is in India has developed along asymmetrical lines, arguing that the major asymmetry began between British India and princely States as terms of accession depended on bargaining strength. Under the instrument of accession, the princely States surrendered whatever sovereignty they possessed to the Indian Union in exchange for concessions, privy purses and certain other privileges. Because the British in India, and their successors the Indian National Congress, were in an extremely strong bargaining position, it rendered the relationship asymmetrical. In the case of Hyderabad, military force was used against the Nizam to integrate the then Hyderabad State into the Indian Union, and police action resulted in integrating the erstwhile Portuguese territory of Goa into the Indian Union.

Post-independence, too, whenever there was assimilation of areas into the Indian Union and a reorganisation of State boundaries as a result of the provisions of Article 3 of the Constitution, it became open to the federal government to define the sub-national territories

: B.N. Srikrishna

and their geographical collocation. This was in direct contrast to the true test of federalism where sovereign units completely cede their sovereignty under an accepted principle in exchange for matters explicitly stated in the constitutional document. Hence, it is argued that the arrangement was asymmetric because the original entities were not allowed to retain their identities. The asymmetric arrangement was therefore recognition of the different states of institutions and administrative standards in the country. Jammu and Kashmir was a special case and acceded to the Union under special terms as recognised in Article 370 of the Constitution. It was provided with its own Constitution and a special assignment of functional responsibilities and exemptions from several Acts of Parliament. The jurisdiction of the Centre has been restricted to foreign affairs, defence and communication, with the residuary power remaining with the State legislature. This is in stark contrast to the situation with regard to other States where the Centre's powers and responsibilities are more extensive and it retains the residuary powers.

Article 371 of the Constitution accords special powers to north-eastern States as a result of the amendments made to the Constitution, typically at the time of conversion of Union Territory into a State or, as in the case of Sikkim, upon accession to India. These safeguards make special provisions to ensure respect for customary laws, religious and social practices, restrictions on the ownership and transfer of lands and restrictions on entry of non-residents into the State. The State legislatures have been given final control over the changes in these matters.[4]

It has often been suggested that the Indian Constitution's federal structure is one of 'Unity in Diversity'. What exactly this means needs critical evaluation. In a truly federal structure, there would be a Union or association of States leading to the setting up of a composite institution under which there is a separate and distinct federal government and State governments. This relationship has not been rigidly defined under the Indian Constitution. It is true that the Indian Constitution and its political set up may not conform to the rigid test of a truly federal State. In fact, the Constitution of India does not even mention the word federal or federalism. The reference in the Constitution throughout is to the Union of India and the States and the distribution of their legislative and executive

powers as indicated in the constitutional arrangement. On the other hand, the inter se relationship obtaining under our Constitution has often been described as 'cooperative federalism', with an elastic set of norms which, according to some, have often been taken advantage of by the powerful Union Government.

Federalism in India is built upon the sub-structure of power-sharing in a parliamentary democracy and it should ideally involve two basic features: devolution of authority and decentralised administration, both of which were often sacrificed at the altar of strong governance at the Centre. It cannot be gainsaid that the concept of unity, rather than individuality, had a marked influence on the drafting of the Constitution. While a truly federal State comprises 'indestructible Union of indestructible States', it is seen that the States have never remained 'indestructible' as is understood because the manner in which the States were formed, reformed and re-altered runs against this tenet. Perhaps the strong influence of Dr. Ambedkar and Jawaharlal Nehru led to supremacy of the Union over the States in matters that concerned national interest. The pervasive influence of the pre-independence Government of India Act, 1935, with its pattern of distribution of legislative powers, also shaped the drafting of the Constitution. Even under the Constitution, the longest is List I, the Union List, which comprises concerns of defence, arms and ammunitions, foreign affairs, foreign trade, atomic energy, treaties, war-and-peace, electronic communication, currency, coinage, Reserve Bank of India, industries, natural resources, Supreme Court, to name a few. The State List comprises, inter alia, public order, police, trade, commerce within the State, agriculture, markets, money-lending, land revenue and various taxes. The Concurrent List includes, among others, issues like preventive detention, transfer of non-agricultural property, contracts, economic and social planning, monopolies, social security, education, labour welfare, factories, press control and electricity. Article 248, read along with item 97 of List I, confers residuary legislative powers on the Union; a reading of Articles 245 to 255 of the Constitution makes it clear that the Union has larger legislative powers. Even in the matter of executive powers, the Constitution gives ample power to the Central government to issue directions to the executives in the State governments and enjoins upon the States not to impede or prejudice the executive power of the Union. It can, therefore, perhaps be justifiably argued that despite

the professed federal form of the Constitution, it is actually unitarism masquerading in federal form.

Some writers have argued that the failure to rigidly define the boundaries of power-sharing between the Union and the States, far from being a flaw, is a virtue of the Indian Constitution. It is suggested that the reason why India has been successful is because the Indian federal system has the important attribute of flexibility in the system. 'Cooperative federalism', with its formal and informal rules for maintenance of the political system as well as for peaceful change management, has worked well in practice. While the U.S. Constitution in its history of 200-plus years of existence has been amended only 27 times, the Indian Constitution can boast 94 amendments in the last 60-odd years. This, it is pointed out, is the strength of the system and not its weakness. The 73rd and 74th Constitutional amendments resulting in the creation of a Panchayat Raj or third tier of government in rural areas and elected urban bodies is held out as an example of such flexibility, which would not have been possible under a rigid pattern of sharing of powers.

Although the political wisdom of cooperative federalism has been much appreciated, the Indian federation has both vertical and horizontal imbalances with regard to fiscal issues. Vertical imbalance is the imbalance faced by the various levels of government in their relative ability to raise revenues vis-a-vis their expenditures. This imbalance is said to be more acute in the case of the Indian federation because the taxation powers of the Union are overwhelming as compared to those of the States. The Union government has the power to tax corporate income, personal income, foreign trade, manufacture and services sectors, as well as on major mineral resources. The States are less capable of raising taxes on income from land, sales on goods and other local taxes such as property tax. Horizontal imbalance refers to the ability of the States to raise revenue for meeting their expenditures. The ratio between the highest and the lowest per capita income is estimated to be 5:1. Ironically, the poorest States are also the largest in terms of population, which compounds the problem of horizontal equalisation. Of course, the constitutional machinery evolved by Article 280 is the formation of an independent constitutional body appointed every five years: the Finance Commission, which reports to the President of India and is charged with the distribution

of financial resources between the Union and the States. The Commission has a duty to evolve the principles on which grants-in-aid of the revenues of the State are made from the consolidated funds of India and the measures needed to augment the consolidated funds of a State to supplement the resources of the entities in the Panchayat Raj.[5]

Several judgements of the Supreme Court have discoursed on the nature of federalism and whether the Indian polity conforms to it. Any discussion on Indian federalism would be incomplete without reference to some of the judgements.

In *State of Rajasthan vs Union of India and Ors* ([1977] 3 SCC 592), the Supreme Court went on to consider the concept of federalism in theory and the extent to which our Constitution conforms to it. The learned Chief Justice said:

> 55. The two conditions Dicey postulated for the existence of federalism were: firstly, 'a body of countries such as the Cantons of Switzerland, the Colonies of America, or the Provinces of Canada, so closely connected by locality, by history, by race, or the like, as be capable of bearing, in the eyes of their inhabitants, an impress of common nationality'; and, secondly, absolutely essential to the founding of a federal system is the 'existence of a very peculiar, state of sentiment among the inhabitants of the countries'. He pointed out that, without the desire to unite there could be no basis for federalism. But, if the desire to unite goes to the extent of forming an integrated whole in all substantial matters of Government, it produces a unitary rather than a federal constitution. Hence, he said, a federal State 'Is a political contrivance intended to reconcile national unity with the maintenance of State rights.' The degree to which the State rights are separately preserved and safeguarded gives the extent to which expression is given to one of the two contradictory urges so that there is a union without a unity in matters of government. In a sense, therefore, the Indian union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated and socially, intellectually and spiritually up-lifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by

: B.N. Srikrishna

the Central Government. The question of legitimacy of particular actions of the Central Government taking us in particular directions can often be tested and determined only by the verdicts of the people at appropriate times rather than by decisions of Courts. For this reasons, they become, properly speaking, matters for political debates rather than for legal discussion. If the special needs of our country, to have political coherence, national integration and planned economic development of all parts of the country, so as to build a welfare State where 'justice, social, economic and political' are to prevail and rapid strides are to be taken towards fulfilling the other noble aspirations, set out in the Preamble, strong central directions seems inevitable. It is the country's need. That, at any rate, seems to be the basic assumption behind a number of our Constitutional provisions.

56. Mr. Granville Austin, in 'The Indian Constitution Cornerstone of a Nation' (see p. 186) in the course of an account of our Constitution making, points out that the members of our Constituent assembly believed that India had unique problems which had not 'confronted other federations in history'. Terms such as 'quasi-federal' and 'statutory decentralisation' were not found by the learned author to be illuminating. The concepts and aspirations of our Constitution makers were different from those in American or Australia. Our Constitution could not certainly be said to embody Dr. K.C. Wheare's notion of 'Federalism' where 'The general and regional governments of a country shall be independent each of the other within its sphere.' Mr. Austin thought that our system, if it could be called federal, could be described as 'cooperative Federalism.' This term was used by another author, Mr. A.H. Birch (see: Federalism. Finance and Social Legislation in Canada, Australia and the United States p. 305), to describe a system in which:

'... the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions.'

> 57. In our country national planning involves disbursements of vast amounts of money collected as taxes from citizens residing in all the States and placed at the disposal of the Central Government for the benefits of the States without even the conditional grants' mentioned above. Hence, the manner in which State Governments function and deal with sums placed at their disposal by the Union Government or how they carry on the general administration may also be matters of considerable concern to the Union Government.
>
> 58. Although Dr. Ambedkar thought that our Constitution is federal 'inasmuch as it establishes what may be called a Dual Polity,' he also said, in the Constituent Assembly, that our Constitution makers had avoided the 'tight mould of Federalism in which the American Constitution was forged. Dr. Ambedkar, one of the principal architects of our Constitution, considered our Constitution to be both unitary as well as federal according to the requirements of time and circumstances'.
>
> 59. ... [O]ur Constitution creates a Central Government which is 'amphibian', in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case. ...'

It was pointed out that Articles 350, 355 and 356 derogate from the strict constitutional principle of federalism but that such departure is permitted by the Constitution because of the extraordinary situation arising out of threat to the continued existence of constitutional democratic government. Article 356, Clause (1) authorises a fair degree of intervention on the ground that it is the considered opinion of the President that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. Quoting Dr. Ambedkar, it was pointed out that the Constitution permitted such departure so that it can move from a federal to unitary plane, as the situation warrants (ibid.).

Further, he said, ours is a 'Dual Polity', meaning a Republic 'both unitary as well as federal' according to the needs of the time and circumstances. This 'Dual Polity' of ours is a product of historical accidents. A genuine federation is a combination of political units which adhere rather tenaciously to the exclusion of the Central

authority from strictly demarcated spheres of State action, but where there is a Central or federal 'government'. The extent of federalism depends upon the extent of demarcation in the executive, legislative and judicial spheres. In a truly federal constitution this demarcation is carried out in a comprehensive and detailed manner. The limits are clearly specified.

Our country's history shows that it was really the British who succeeded in giving reality to the objective of establishing a unity of India both politically and administratively. Even they preserved a duality of systems of government. There was a British India under the Governor General presiding over the destinies of the various provinces under Governors as Imperial sub-agents, but all acting on behalf of an Emperor whose government ruled from Westminster and Whitehall. And, there were other parts of the country ruled by Indian Princes owing allegiance to a foreign Emperor to whose authority they paid homage by acknowledging his sovereignty or the paramountcy exercised through his Viceroy. These two parts were sought to be knitted together into a federal polity by the Government of India Act of 1935. Federal principles, including a Federal Court, were embodied in it so as to bring together and coordinate two different types of political systems and sets of authorities. But, after the constitution of the Indian Republic came the gradual disappearance of princely States and a unification of India in a single polity with a duality of agencies of government, only for the purposes of their more effective and efficient operations under a Central direction. The duality or duplication of organs of government on the Central and State levels did not reflect a truly federal demarcation of powers based on any separatist sentiments that could threaten the sovereignty and integrity of the Indian Republic to which members of our Constituent Assembly seemed ardently devoted, particularly after the unfortunate division of the country with disastrous results.

Our Constitution exudes a pragmatic approach to federalism while distributing legislative powers between Parliament and State legislatures, with a concurrent field as well, indicating the spheres of governmental powers of State and Central governments overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central government, the executive power of appointing State Governors, Chief Justices and Judges of High Courts, powers of

giving appropriate directions to the State governments, and of even displacing the State legislatures and governments in exceptional circumstances or emergencies of not very clearly defined ambits or characters. No other 'federation' in the world has exactly similar unitary features. It is open to debate whether such a system can legitimately be called 'federal' in *stricto sensu* by application of political theory. The function of 'supervision' is certainly that of the Central government with all that it implies.

Through the Constitution, the overall reins are in the hands of the Centre in both the fields. Parliament has the exclusive authority to legislate on matters enumerated in List I. So has the State legislature the exclusive legislative power with respect to the various entries in List II. Both have concurrent powers in regard to the entries of List III. The residuary power in accordance with Article 248 and Entry 97 of List I lies with the Central Parliament. It has a predominant role to play with respect to matters in the concurrent list, as is clear from Article 254. Article 249 confers power on Parliament to legislate with respect to a matter in the State List in the national interest. When a proclamation of emergency is in operation as provided for in Article 250, Parliament has the power to legislate with respect to any matter in the State List. Some inroads into the State's exclusive legislative field by the Centre is allowed under circumstances mentioned in Articles 252 and 253. As provided for in Article 254, in some situations the State is under an obligation to reserve a Bill for the consideration of the President and receive his assent before being made into a law.

'It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution', declares Article 355. In the eventuality of a failure of the constitutional machinery in States, provision has been made in Article 356 for the Centre to assume legislative and executive powers, though not the powers vested in the High Court of a State. The effect of proclamation of emergency under Article 352 is to enlarge the executive power of the Union and extend it to giving direction to any State as to the manner in which the executive power thereof is to be exercised as provided for in Article 353.

: B.N. Srikrishna

The administrative relations between the Centre and the States are largely governed by the provisions of Chapter II of Part XI of the Constitution. Article 256 provides that 'the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State'. Significantly, it has further been stated therein that 'executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be accessory for that purpose'. The control of the Union over the States in certain cases has been provided for in Article 257.

The following characteristics and features of our Constitution indubitably demonstrate the weak character of our federal structure and the controlling hand of the Centre on States in certain matters:

(a) The Governor of a State is appointed by the President and holds office at his pleasure. Only in some matters does he have discretionary power; in all others the State administration is carried on by him or in his name or with the aid and advice of the Ministers. Every action, even of an individual Minister, is the action of the whole Council and is governed by the theory of joint and collective responsibility. But the Governor, as the head of the State, the Executive and the Legislature, has to report to the Centre about the administration of the State.
(b) Entry 45 in List III of the Seventh Schedule empowers Parliament to legislate on the subject of 'inquiries...for the purpose of any of the matters specified in List II', also besides List III, and List I as mentioned in Entry 94 of that List. The constituent power of amendment of the Constitution lies with Parliament under Article 368 providing for concurrence by half the number of the States in certain matters.
(c) Article 2 empowers Parliament by law to admit into the Union or establish new States on such terms and conditions as it thinks fit.
(d) Parliament is also empowered by Article 3 to make law for the formation of new States and alteration of areas, boundaries of names of existing States.

Such is the nature of our federal structure.

In *State of West Bengal v. Union of India* ([1964] 1 SCR 371), the majority judgement delivered by B. P. Sinha, C.J., while analysing the character and nature of our federal structure, observed (p.397):

> The exercise of powers legislative and executive in the allotted fields is hedged in by numerous restrictions, so that the powers of the States are not coordinate with the Union and are not in many respects independent ... [t]he political sovereignty is distributed between, as we will presently demonstrate, the Union of India and the States with greater weightage in favour of the Union.

The political development of British India took the form of dismantling a unitary Constitution and introducing a federal scheme through Devolution Rules and the Government of India Act, 1935. Our Constitution accepted a federal scheme, though limited in extent, keeping in mind regional interests, resources, language and other diversities in the vast subcontinent. These facts have been taken into account by the Constitution-makers and a limited federalism was imbued in the Constitution by Article 1 itself providing that India shall be a Union of States.

As already discussed, there is a strong bias in favour of the Union in the distribution of powers between the Union and the States. There are provisions in the Constitution conferring wider powers on the Union in case of financial emergency as well. The executive authority of the Union becomes enlarged, enabling the Union to give directions to the State requiring financial discipline. The Union Parliament can assume legislative powers over any subject included in the State List by a Resolution under Article 249 if such legislation is necessary in the national interest. Whenever State governance cannot be carried out in accordance with the provisions of the Constitution, the President is empowered to take over and the Union can assume the executive and legislative powers of the State under Article 356. Though there is a division of powers between the Union and the States, there is provision for control by the Union government both over the administration and legislation of the State. These are provided for under Article 201 which empowers the President to disallow any State legislation which is reserved for his consent. A duty is cast upon the States by the Constitution under Articles 256 and 257 to execute the Union laws. The executive

power of every State shall be so exercised as not to interfere with the executive power of the Union and that in these matters the States shall be under the directions of the Union. These powers are specifically mentioned in the Constitution and without doubt the Union Government can exercise them ([2006] 7 SCC 1).

Kuldip Nayar and Ors. v. Union of India and Ors (ibid.), held:

> 71. But then, India is not a federal State in the traditional sense of the term. There can be no doubt as to the fact, and this is of utmost significance for purposes at hand, that in the context of India, the principle of Federalism is not territory related. This is evident from the fact that India is not a true federation formed by agreement between various States and territorially it is open to the Central Government under Article 3 of the Constitution, not only to change the boundaries, but even to extinguish a State – State of West Bengal v. Union of India (1964) 1 SCR 371. Further, when it comes to exercising powers, they are weighed heavily in favour of the center, so much so that various descriptions have been used to describe India such as a pseudo-federation or quasi-federation in an amphibian form, etc.

In *S.R. Bommai and Ors. v. Union of India and Ors* ([1994] 3 SCC 1) the court observed:

> The fact that under the scheme of our Constitution, greater power is conferred upon the center vis-a-vis the States does not mean that States are mere appendages of the center. Within the sphere allotted to them, States are supreme. The center cannot tamper with their powers. ... Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities ... enough to note that our Constitution has certainly a bias towards center vis-a-vis the States...'

In *State of Karnataka v. Union of India and Anr,* Justice Untwalia (speaking for Justice Singhal, Justice Jaswant Singh and for himself), observed that:

> Strictly speaking, our Constitution is not of a federal character where separate, independent and sovereign State could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of that reason that sometimes it has been characterised as quasi-federal in nature.

In *S. R. Bommai and Ors. v. Union of India and Ors* ([1994] 3 SCC 1) a Constitution Bench comprising nine Judges of this Court considered the nature of federalism under the Constitution of India. Justice A.M. Ahmadi, in Paragraph 23 of his Judgement, observed as under:

> ... the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VII Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution.

Said Prof. K.C. Wheare in his work 'Federal Government':

> What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament.

In the United States, unlike in India, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal', because it is a mixture of federal and unitary elements, leaning more towards the latter. But then, what is there in a name; what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing

on the controversy in regard to the scope and ambit of Presidential power under Article 356 and related provisions.

In *ITC Ltd. v. Agricultural Produce Market Committee and Ors,* this Court ruled that:

> The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles.

In *State of West Bengal v. Kesoram Industries Ltd. and Ors,* decided by a Constitution bench comprising five Judges, the majority judgment in Paragraph 50 observed:

> Our Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong center. ... True, the federal principle is dominant in our Constitution and that principle is one of its basic features, but, it is also equally true that federalism under Indian Constitution leans in favour of a strong center, a feature that militates against the concept of strong federalism.
>
> The Commission on Inter-State Relations (Sarkaria Commission), in its Report has specifically said that the Constitution, as it has emerged from the Constituent Assembly in 1949, has important federal features, but it cannot be federal in the classical sense. It was not the result of an agreement to join the federation, as in the United States.

The pragmatic approach to federalism in India was described as: 'an ounce of practice is worth more than a pound of theory',[6] but was dismissed as having an 'an anti intellectual tone'.[7] The claim that Indian federalism is a paradigm of its 'Unity in Diversity' was dismissed as being 'more like an attempt to promote unity in the Indian diversity than to document it' on the ground that communal, regional and caste tensions continue to haunt Indian politics.[8] Issues like unequal size of the States, disparities in economic and social development between and within regions, and management of natural

resources amid growing inter-dependence continue to hamper the vision of 'Unity in Diversity'. The candid admission of the Prime Minister at the International Conference on Federalism that there has been distortion of the national vision and collective purpose by narrow political considerations based on regional or sectional loyalties and ideologies, must be an eye-opener to all of us who pride ourselves on the country's pragmatic approach to federalism. It has been pointed out that examples of chauvinism, domestic insurgencies, social tensions, and federal disputes undermine the claims of the success of India's federal democracy in adopting an inclusive polity. It has been suggested that India's political system remains vulnerable and caution must be exercised against complacency in dealing with the diverse aspirations of the people.[9]

The Indian success story has no dearth of its critics. The Republic of India is 'an ungainly, unlikely, inelegant concatenation of differences' that, decades after its foundation, still exists as a political entity, says one critic.[10]

Interestingly, even the critics of the Indian system have a grudging admiration for it when they say: '*In short, the country poses an incomparable fact pattern, which has been addressed largely by unconventional means and with widely unexpected success.*'[11] Arguably, India's experience is so significant that the nature of diversity, democracy and federalism themselves should be rethought.[12]

Over the last 61 years the country's federalism has been subjected to great stresses and strains. The pressures of political, social, economic and cultural forces have buffeted the federal structure severely, bringing about a paradigm shift in the concept of Indian federalism. There have been growing demands that the federal structure needs far-reaching changes to make it truly federal. Abolition of Article 356, appointment of State Governors with the consent of the States, ensuring security of tenure for State Governors, revamping the role of the Finance Commission, restructuring its powers of allocation of finance, and creation of smaller States are some of the demands made from time to time.

The growth of mass and local politicisation has thrown up a challenge to the very concept of federalism in India. The competition for scarce resources has spawned acrimonious disputes amongst States and between States and the Centre. The Constitutional machinery is finding it increasingly difficult to satisfactorily resolve such disputes within a reasonable time frame. Increasing militancy

and insurgency in Kashmir and the north-east and elsewhere, have rendered it difficult for the government at the Centre to maintain control except by use of armed forces. The strident demands for protection of local languages and culture, and the demands for the creation of more States, even by dissecting those formed on the basis of common language and culture, are creating problems that defy easy solution. The very concept and political theory of federalism is poised to be tested by fire in the current turbulent times.

Federalism can only work when there is a strong sense of unity underlying the diverse constituents. Even when the constituents of the federation continue to protect their interests, there must be a will to subordinate one's short-term interest to the long-term interest of the country. An irrepressible sense of national integrity must dominate if federalism is to work. Unless we can say with Allama Iqbal, '*Hindi hain hum, vatan hai Hindosthan hamara*', and voluntarily subordinate all local dissensions, disputes and differences to the country's interests, we shall have proved right the critics of our experiment in federalism. We need to look and think beyond federalism towards the larger interests of the country. That, more than the machinery provided in the Constitution, will enable us to revive and abidingly re-establish the true spirit of federalism.

•

ENDNOTES:

1. Daniel J. Elazar, *Federalism: Theory and Application*, 1995, p. 1.
2. *The Federalist*, p. 51, quoted in ibid.
3. Ibid.
4. M. Govinda Rao and Nirvikar Singh, *Asymmetric Federalism in India*.
5. Vijay Kelkar, 'The Recent Evolution of Indian Federalism', Address to the IRDC, Ottawa, March 2010.
6. Fali S. Nariman, 'Federalism in India – Emerging Trends and the Way Forward', *2010*.
7. Malcolm MacLaren, 'Thank You India': Lessons from the 14th International Conference on Federalism, New Delhi, 5-7 November 2007.
8. Ibid., p. 117.
9. Ibid., pp. 119–20.
10. Sunil Khilnani, *The Idea of India*, 2004.
11. Ibid., p. 121.
12. Ibid., p. 125.