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## **INDIAN FEDERALISM IN THE ERA OF COVID-19: BALANCING BETWEEN THE ISSUES AND CHALLENGES**

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### **ABSTRACT**

The World is struggling from Covid-19 and every country is trying its best to deal with it. India is also trying to defeat Covid-19 with the Centre-State collaboration. However, during this struggle some fissures in Centre-State cooperation revealed. During this time, the States acted as first responders and Centre had to supply them with adequate funds and autonomy to deal with the crisis. This called for Centre to view the States as equals and to provide them with decision making independence to strengthen their capabilities. Covid-19 poses a litmus test for federalism in India, which is already debatable among the constitutional law experts. Though India responded fairly to Covid-19 but somehow some actions showed that how there is still lack of spirit of Federalism or Cooperative Federalism. The glaring example of the same is the implementation of country wide lockdown without the consultation of states, the migrant workers interstate crisis in which states tried to blame each other, etc. The researchers, through the present paper, ascertain the need to work upon how the cooperation between Centre and States and between States themselves be made more efficient in turbulent times.

**Keywords:** Indian Federalism, Covid-19, Cooperative Federalism

## Introduction

India's reaction to the COVID-19 pandemic had moved the equilibrium of its government structure. The pandemic has empowered the central government to actualize expansive changes in areas like, agriculture, healthcare etc., which are generally viewed as the domain of the States. This activity by the central government is characteristic of its eagerness to exploit a worldwide crisis and utilize the switches of federal power to execute huge reforms. It likewise demonstrates that, in spite of customary way of thinking, the established structure of India's federalism is less pertinent to the genuine relation between India's central and state governments.

Right to Health is a fundamental right under the Indian Constitution and it is widely accepted that it is the most important component of human development. Any society's empowerment comes from the freedom that people enjoy which includes, freedom from hunger, malnutrition, poverty and lead a healthy life. For enjoying all these rights, access to healthcare is crucial which can eventually improve the health status. Throughout the world, one of the fundamental roles of any government is to provide and regulate health services to its citizens<sup>1</sup>.

Healthcare in India is a state subject which means that states have the primary power and duty to deliver such health-related services<sup>2</sup>. But here, the problem arises with the fact that states are not vested with desired financial powers which could help them to meet their responsibilities and the reason being that the Centre holds maximum control over finances and tax revenues of the country. The current power sharing arrangement between both the levels of government leaves more decision-making power in the hands of Centre. During this current COVID-19 Crisis in India, State governments have struggled to duly perform their duty to maintain public health due to the budgetary constraints and also because of lack of capacity and medical infrastructure. This crisis removed the veil from the fact that how much states are relied on central government for financial support. Due to lack of technical expertise with the states, the shortcomings in public health management were exposed through the past outbreaks, such as Japanese Encephalitis in Uttar Pradesh and Bihar<sup>3</sup> or Monkey Fever in Karnataka

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<sup>1</sup> Govinda Rao and Mita Chowdhury, *Health care financing reforms in India, NIPFP WORKING PAPER*, 100, (2012), [https://nipfp.org.in/media/medialibrary/2013/04/wp\\_2012\\_100.pdf](https://nipfp.org.in/media/medialibrary/2013/04/wp_2012_100.pdf)

<sup>2</sup> INDIA CONST. 7<sup>th</sup> Schedule, Entry 6 (State List), <https://www.mea.gov.in/Images/pdf1/S7.pdf>

<sup>3</sup>Jai Prakash Narain, A. C. Dhariwal, and C. Raina MacIntyre *Acute encephalitis in India: An unfolding tragedy*, INDIAN JOURNAL OF MEDICAL RESEARCH (May 2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5644291/>

because states failed to respond such outbreaks<sup>4</sup>. The healthcare sector in India is underfunded as India spends \$73 on health care per capita, whereas the world average is approximately \$1100 as per 2018 data.<sup>5</sup>

### **Federalism in India**

Federalism, in its fundamental sense implies division of executive and legislative power between central and state government so every administration can work freely in its own realm. In a nation like India the significance of federalism is essential in light of the fact that various individuals from different culture and background live together. Neither it is feasible for a single government to make laws for the entire nation, nor it is alluring in light of a legitimate concern for the individuals with varied societies, culture, language and different background. So, the Central government can make laws for the whole and any part of the territory of India and the specific State governments can make and implement the laws as per the social, economic and political conditions of the people living in different regions.

Federalism mandates the sharing of political as well as constituent power. In federal structure there is the requirement of division of power between both level of governments, i.e., Union and State. The power has been divided between them to avoid the conflict and chaos between the two jurisdictions and this division of power is the crucial feature of the Federal structure.

However, the understanding of federalism is a lot more dynamic than what meets the eye. Despite there being a lot of emphasis on the theoretical aspects of different types of federal theories prevalent across the globe, the ultimate objective is the smooth practical functioning of the state concerned. This is what makes a federal form of government a very dynamic one in its outlook.

Unitary system was prevailing till Government of India Act, 1935 came into force during the British era which introduced the federal concept in India. There was no agreement or treaty among union and states which made the Indian federal system by giving certain duties, powers and responsibilities to the states under the Indian constitution. The aim of the framers of the

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<sup>4</sup>Shashank Atreya, *Health a state subject, but Covid proved how dependant India's states are on Centre*, THE PRINT (18 June 2020), <https://theprint.in/opinion/health-a-state-subject-but-covid-proved-how-dependant-indias-states-are-on-centre/442602/>

<sup>5</sup>Shanoor Seervai & Arnav Shah, *India's Failure of Leadership Collapses Health System in COVID-19 Surge* THE COMMONWEALTH FUND (April 20 2019) <https://www.commonwealthfund.org/blog/2021/indias-failure-leadership-collapses-health-system-covid-19-surge>

Indian constitution was to establish a federal system in India by taking into consideration the social diversities and the vast size of the country. “In framing of the Constitution, the Constituent Assembly had many models to draw upon, but it wisely decided to take the Government of India Act, 1935 as the basis on which the new constitution was to be formed.”<sup>6</sup> The framers of the Indian Constitution were quite aware of the fact that external conditions, vastness of the country and its heterogeneous elements can be undesirable for the unitary system and can also prove inefficient<sup>7</sup>. Therefore, they went for the idea of federal constitution.

In the constitution of India, various items of legislation are given in three lists: Union, Concurrent and State List under 7<sup>th</sup> Schedule of the Constitution.<sup>8</sup> These lists enumerated the powers that are vested in the Parliament, State Legislature and to both of them in a concurrent manner. Federalism contains the complex mechanism of government of a country and here, the Central and State governments exist simultaneously and they derive their power from the Constitution.<sup>9</sup> Powers are divided among Centre and State governments under the federal constitution in which Central Government make laws for whole or a part of the country and the state governments may make laws for the whole state, this all is done in such a way that each government is independent in its own sphere. They have their own powers and that power is exercised independently, none is subordinate to other but are co-ordinate to each other.<sup>10</sup> This structure is based on unity as well as diversity, between the effectual central power and the requirements for checks and balances on that power.<sup>11</sup>

As per Prof. Wheare:<sup>12</sup>

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

As quoted in the case of Govt. (NCT of Delhi) v. Union of India:<sup>13</sup>

“A proper respect for state functions, recognition of the fact that the entire country is made up

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<sup>6</sup> 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 286 (Universal Law Publishing 2008).

<sup>7</sup> XI, Constituent Assembly Debates, 657-58.

<sup>8</sup> M.P. SINGH, V.N. SHUKLA's, CONSTITUTION OF INDIA 794 (EBC, 2017).

<sup>9</sup> DURGA DAS BASU, COMPARATIVE FEDERALISM 5-6 (Wadhwa, Nagpur, 2008)

<sup>10</sup> K.C. WHEARE, MODERN CONSTITUTIONS 19 (Oxford University Press, 1975).

<sup>11</sup> ANDREW HEYWOOD, POLITICS 167 (Palgrave Macmillan, New York, 2007).

<sup>12</sup> K.C. WHEARE, FEDERAL GOVERNMENT 33 (Oxford University Press, London, 1963).

<sup>13</sup> (2018) 8 SCC 501 at para 92.

of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”<sup>14</sup>

Article 245 of the Indian Constitution<sup>15</sup> empowers “the parliament to make and enforce law in any part of the country” whereas, the States can make laws for the whole or any part of its state. Article 246 of the Indian Constitution<sup>16</sup> classify the power of the Union and the State by classifying those powers into the three lists, Union list, State list and the Concurrent list which demarcates the power of both level of governments.

### **Centralist Tendency in Indian Federalism:**

Federalism generally signifies that the Union and State governments are independent of each other in their respective spheres. Indian federalism has centralist tendency that is why sometimes it is described as ‘Quasi Federal’ or ‘federation without federalism’ or ‘Union of unequal states’. Some features that reflect the Centralist Tendency are:

- The Centre has more important subject matters under its jurisdiction than the states.
- The division of power is tilted towards the Centre more, which is not a form of true federation.
- The overriding authority over the concurrent list lies with the Centre and also the residuary powers.
- Parliament has the power to change the area, boundaries or the name of any state by unilateral action (as stated in Article 3 of the Indian Constitution<sup>17</sup>). That is why Indian

<sup>14</sup> Younger v. Harris, (1971) 401 U.S. 37, 91S. Ct. 746, 27 L. Ed. 2d 669

<sup>15</sup> Extent of laws made by Parliament and by the Legislatures of States

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation

<sup>16</sup> Subject matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List)

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List

<sup>17</sup> Formation of new States and alteration of areas, boundaries or names of existing States: Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

Federation is described as ‘Indestructible Union of Destructive States’. The Constitution of India empowers the parliament to make changes, alter the territory or name of a state even without the state’s consent. A new state can be formed just with the law passed by simple majority (majority of 50% of members present and voting). The existence of a state therefore depends upon the will of the Parliament.

- Most part of the Constitution can be amended by the parliament through a unilateral action and also the power to initiate any amendment in the Constitution lies only with the Centre, Not State.
- During emergency, all the powers of the State governments go to Centre, which makes Central Government more powerful. This changes the federal structure into a unitary one without making any formal amendment.
- Control of Centre over the important offices like, Comptroller and Auditor General, Election Commission of India etc. signifies the centralizing tilt.

### **Issues that Arose during COVID-19 Pandemic:**

The Constitution of India was never envisioned to deal or tackle with pandemic like Covid-19. Our emergency provisions as given under Part XVIII of the Constitution do not dispense the appropriate framework which could be suitable for COVID-19 like situation. Even though there has been no formal declaration of emergency (under which power centralization in the hands of Central government is permissible), there does exist a *de-facto* state of emergency in this case.

This essentially means that despite there not being any specific article in the Indian constitution dedicated to ‘health emergency’, the constitution is not a toothless tiger when it comes to dealing with such contingencies. The very fact that the union was in a situation to take over the administrative control on matters related to the states signifies the fact that there is a broad mechanism established in the constitution to deal with such scenarios.

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(d) alter the boundaries of any State;

(e) alter the name of any State; Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired  
 Explanation I In this article, in clauses (a) to (e), State includes a Union territory, but in the proviso, State does not include a Union territory  
 Explanation II The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory

For responding and guarding against the pandemic, the Central government took over the charge of entire governance and administrative structure, at both Central as well regional levels. There is a need to analyze that how the relationship between Centre and State been working put during this time of pandemic and state of *de-facto* emergency.

The response of government during starting stages of COVID-19 highlighted the unitary shift of the Indian Federal structure. In the first wave, the 'lockdown' was implemented by the Central government to prevent the Covid-19 from spreading at a community level. The Ministry of Home Affairs invoked the *Disaster Management Act, 2005* to issue and implement the lockdown guidelines and which were mandatory for the states to implement. This law gives power to the Central government to give command to State and Local Authorities if required. Even though State governments have their independent powers to deal with situations like these under the Epidemic Disease Act, 1897 but they still had to adhere to the Central government's order<sup>18</sup>.

While analyzing this situation, the definition of Federalism as given by Ronal L Watts spurs in mind. He defined Federalism as "a political system characterized by two subsystems, one of the Central government and the other of the state government, in which the component governments are cordial in the sense that neither is politically subordinate to the other, but which interact with each other at many points, both cooperatively and competitively."<sup>19</sup>

Here in this situation, this is applicable fully as there is the presence of both cooperation and competition between the Centre and State governments. Let's start with the situation where the non-cooperation between the Centre and the States was apparent and put forth the hollowness of Indian Federalism. Many scholars and Political leaders always claimed that Indian Centre-State relation is based on the model of cooperative federalism. This COVID-19 pandemic situation was an apt test for proving the true cooperative nature of federalism, but this was not properly utilized. The argument to support this statement is that when the Central government implemented lockdown to stop the community spread of COVID-19 and to fight the virus but in this process, not only public but that State governments also were not informed about the lockdown decision. Here, a top-down approach has been followed. Many States criticized this sudden implementation of lockdown nationwide that happened without even consulting the

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<sup>18</sup> Pranav Verma, *Reaffirming Cooperative Federalism*, THE HINDU (13 May,2020.), <https://www.thehindu.com/opinion/op-ed/reaffirm-cooperative-federalism/article31567966.ece>

<sup>19</sup> Ronald Watts, *Federalism, Federal Political Systems, and Federations*, Annu. Rev. Polit. Sci (1998) <https://www.annualreviews.org/doi/pdf/10.1146/annurev.polisci.1.1.117>

States, due to which states were unprepared for the situation and chaos that happened during lockdown like Migrant workers movement, long queues on Ration shops etc.

*Issues that accentuated during the time of Pandemic:*

- *Financial Crunch faced by States:* The revenue sources of the states collapsed due to lockdown. The majority of the revenue of states comes from stamp duty from property transactions, liquor sale and the sales tax on petroleum-based products etc. These all revenues got halted due to lockdown. However, in the meantime, their expenditures like social sector schemes, interest payments and salaries to the government staff remained unchanged. Apart from that, due to this pandemic, states are now required to spend more on health infrastructure development and on COVID-19 measure which includes quarantining, testing and treatment of virus affected people.

Moreover, one more thing where Centre had an upper hand is that PM CARES Relief Fund has been put under scope of Corporate Social Responsibility contributions whereas contributions made to the Chief Minister Relief Fund did not qualify as CSR expenditure. This caused diversion of potential State revenue to the PM CARES Fund and increasing financial dependency of States on Centre during pandemic. Even MPLADS was suspended and all that funds were diverted to Consolidated Fund of India which discouraged and halted local solutions by the MPs in their area. In such cases, States became dependent Central Governments financially.

- *Migrant Worker Crisis:* The inundation of migrant workers into their own states like Bihar, Uttar Pradesh, Jharkhand etc. from the States where they were working as labourers, worsened the matter because their home states were already facing medical and financial deficits. Both Centre and States government failed to cooperate and unable to come up with a coherent plan to avert the migrant workers crisis.

Though, in theory it was expected that host States will take care of these workers. But reality was somehow different. Migrant workers looked to their home States for help like West Bengal launched a Cash Transfer Scheme to send money between 1000 to 1 lakh to any Bengali migrant and Uttar Pradesh took the responsibility to get back students those who were studying in Rajasthan by arranging 250 buses for them. There was a lack of cooperation between the States in handling this issue due to which migrant workers had to suffer.



There was a lack of cooperative federalism among States also which created more chaos and confusion. All the States suddenly became hyper-conscious about their borders. They sealed their borders to slow down the movement from other states, reserved hospital beds for their own residents, and demanded that they should have freedom to implement their own quarantine, lockdown policies. This all were the sign of presence of weak cooperative federalism among the States themselves. Weak federalism is not only an issue between the Centre and the State, but it is also present among the States themselves which came forward during the time of pandemic<sup>20</sup>.

Another hidden feature of Indian Federal system came forward during the time of coronavirus emergency where States were seen as primary nodes of governance as they look after their residents more sincerely this time and primary task of saving lives were performed more by the States than the Union Government.

### **Healthcare and federalism in India- Impact of COVID-19 on the Healthcare**

As we saw the trend globally, we had certain idea that this pandemic will put stress on our already limited healthcare facility. The healthcare needs created by coronavirus pandemic went beyond our capacity. The first and second wave of Covid pandemic exposed the faulty condition of health infrastructure in India. Though no country can be full fully prepared for such pandemic situations but lack of preparations even after the 1<sup>st</sup> wave made the 2<sup>nd</sup> wave worst, which caused a lot of setback all over the world. In India, it cause a situation worst due because of several factors like overpopulation, nation being in developmental stage, poor healthcare infrastructure, lack of preparedness etc. Healthcare needs created by this pandemic were beyond India's capacity. The numbers of government hospitals are 40883 with total beds capacity of 818396, which amounts to approx 0.57 beds per 1000 population. The situation in rural areas is worse where in comparison to urban areas where the numbers of beds are only 36% of the total beds available in government hospitals in India<sup>21</sup>.

With all the setbacks, India took a lesson and is trying to improve its healthcare infrastructure. A new centrally sponsored scheme 'PM AtmaNirbaharSwastha Bharat Yojana' is planned to

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<sup>20</sup> Shoaib Daniyal, *How the Covid-19 crisis is strengthening the concept of a state domicile in India*, SCROLL.IN (19 June, 2020) <<https://scroll.in/article/964558/how-the-covid-19-crisis-is-strengthening-the-concept-of-a-state-domicile-in-india>>

<sup>21</sup> National Health Profile 2020, 15<sup>th</sup> Issue, Central Bureau of Health Intelligence, Ministry of Health and Family Welfare, GOI

be launched with a budget of 64180 crores over 6 years of time period. This will focus on the development of capacities of primary, secondary, and tertiary care Health Systems in nation and also to create new institutions for early detection and cure of any new disease so that India can handle such kind of pandemic situation in future. Government proposed an outlay of INR 2, 23,846 crores for health and well-being, this mark an increase in 137% from last year's allocation. Also the Ministry of Health and Family welfare has been allocated INR 71, 269 crores, which is 10% more than last year.<sup>22</sup>

### **Presence of Federalism in cooperation among Centre and State Government:**

Even though in beginning of the pandemic, there were some arbitrary decisions taken by the Central government, but eventually the Central government chose to work in cooperation and carefully with the States. In recent months the country has also witnessed a remarkable and interesting coordination effort by the Centre and States collectively in addressing pandemic challenge. Later on, things changed in a positive way as Prime Minister began holding meetings and consultation with the Chief Ministers of various States. In a later stage, these meetings held more frequently before issuing any kind of orders dealing with a pandemic like an extension of lockdown, the availability of medicines and hospital beds, etc. and by the time of Unlock 1 and 2, States got more say in decision making and they decided that which area would be declared as a containment zone. Rival political parties started having meetings more frequently to discuss and check the spread of Covid-19 in the country<sup>23</sup>.

The world has come a long way in terms of the categories of federalism prevalent at different points of time. From the earlier high of dual federalism in the US context, to the cooperative federalism, to the competitive federalism, the concept and working of federalism is as dynamic as it gets. As cooperative federalism is one which is very much hailed in India, at least by words if not actions, let us have a look at it in the Indian context.

Long term measures to secure Cooperative Federalism-

- Inter-State Council should be made as a Permanent Body which could help in resolving the issues between Centre and States and between States themselves. This could be step

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<sup>22</sup> Union Budget 2021-2022 <https://www.india.gov.in/spotlight/union-budget-2021-2022>

<sup>23</sup> Niranjana Sahoo, 'COVID-19 and cooperative federalism in India: So far, so good', OBSERVER RESEARCH FOUNDATION (2020, April 30) <<https://www.orfonline.org/expert-speak/covid19-cooperative-federalism-india-so-far-good-65429/>>

towards making this effort formal.

- Management of emergencies and disasters, either manmade or natural should come under III List (Concurrent List) of the 7<sup>th</sup> Schedule.
- There should be establishment of An Inter State Trade and Commerce Commission which could help in establishing the idea of ‘One India one Market’.
- During such Nation-wide emergencies, Centre should always consult with States which could help in trust building and can help States in being ready for the action before its implementation.
- In order to have a better sense of clarity, the subject for dealing with such health emergencies may well be placed in the concurrent list of the Seventh Schedule. This shall actually reduce the bane of blame game which unfortunately happens on a frequent basis when it comes to dealing with such situations.

## **Conclusion**

COVID-19 Pandemic requires all level of governments to act together in a context of uncertainty and under fiscal, economic and social pressure. All level of governments should work on all fronts simultaneously and in sync. For adaptability and flexibility governments need to reconsider their governance system of multi-level and remove their regional priorities.

Indian Federalism has always been about the cooperation where, if Centre makes a law, then it is up to the State Government to implement it within its jurisdiction. The police, an agency that is responsible for maintaining law and order comes under the jurisdiction of State government (except for Delhi). This pandemic could have been handled well if the bottom-up approach had been followed and the States were involved in the decision to implement the lockdown. This could have also given the sense of empowerment to the State government. Even though it is the nature of democracy that political parties try to compete with each other in different matters, but in crucial times like these, both the Centre and State government should rise above the party politics and should cooperate with each other when there is huge rise in coronavirus infection cases across the country. Hopefully, this pandemic will teach a lesson to both Centre and State level governments to fight united at such times and rise above the party and regional politics.