

Understanding federalism in India through the J&K reorganisation Act, 2019

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Introduction

The term ‘federalism’ talks about the dissemination of powers which is assigned by the constitution to the government at different levels for the betterment of the society. One is allocated at the local or the state level and other at the national level.⁴ Both these levels of government function at considerable independence as well as are co-dependent on each other. This is the most salient feature of a federal government.

Why Federalism?

Federalism features at least two levels of government: a central level and a secondary level that comprises territorial entities that divide the country, such as regions, states, and provinces. It not only allows these disparate groups to share power over common interests, but it also allows them to enjoy some autonomy from central state institutions. A constitution protects federations not only in terms of how power is distributed in central state institutions, but also in terms of the powers and obligations of the central state and provinces, states, or regions. However, federalism is not a cure-all. There are several issues that federalism alone cannot address, such as how to protect minorities or the fact that federalism can be costly because institutions must be built not just at the federal level, but also at the regional, state, and provincial levels. When it comes to pandemics or natural catastrophes, different levels of government sometimes have trouble coordinating policies or policy responses.⁵

In India, Federalism means the affiliation between both the centre and the state governments. This structure is recognised by Part XI of the Constitution of India which talks discusses the division

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⁴ George Anderson, *Federalism: An Introduction*, (Newyork: Oxford, 2008).

⁵ *Why Federalism*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, (Aug. 28, 2020), <https://www.idea.int/news-media/media/why-federalism>.

of legislative, administrative, and executive responsibilities between the central government and the Indian states. The legislative powers are divided into three categories: Union List, State List, and Concurrent List, which represent the powers granted on the Union government, State governments, and powers shared among them, respectively.

The 'compact' between the former 13 British colonies that formed themselves first into an union and later into a federal polity under the 1791 constitution of the United States of America (USA) was the most important aspect of federalism in the USA. Units in a confederation have the right to secede, but they do not in a federation, even though they are allowed a lot of autonomy to function within their designated areas. Kashmir was a princely state before 1947. Even after India's and Pakistan's independence, the princely state of Kashmir decided to be independent but after the invasion of tribesmen of Pakistan in Kashmir, the ruler Hari Singh needed India's help. India decided to help only if Kashmir would be a part of India.⁶ In the 1962 case of *West Bengal v. Union of India*, the Hon'ble Supreme Court also gave utmost importance to "agreement or compact between states" as a vital characteristic of the federal structure.⁷ Later, this judgement was overruled by the Kesavnanda Bharti case⁸ where 'federalism' was accepted as the basic structure of the Constitution which was also repeated in the 1994 case of *S.R. Bommai vs Union Of India*.^{9,10}

During the Constituent Assembly debates, the first prime minister, Jawaharlal Nehru cautioned that "*it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere.*"¹¹ Dr B R Ambedkar assured the Constituent Assembly: "*The Constitution is a Federal Constitution...The Union is not a league of states...nor is the states the agencies of the Union, deriving powers from it. Both the Union and the states are created by the Constitution, both derive their respective authority from*

⁶ Faizan Mustafa, *Article 370, Federalism and the Basic Structure of the Constitution*, THE INDIA FORUM, (July. 05, 2019), <https://www.theindiaforum.in/article/article-370-federalism-and-basic-structure-constitution>.

⁷ *The State Of West Bengal v. Union Of India*, 1963 AIR 1241, 1964 SCR (1) 371.

⁸ (1973) 4 SCC 225.

⁹ Arvind P. Datar, *The case that saved Indian democracy*, THE HINDU, (April. 24, 2013), <https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article12209702.ece>.

¹⁰ *S.R. Bommai vs Union Of India*, 1994 AIR 1918, 1994 SCC (3) 1.

¹¹ Constituent Assembly Debates, Volume V, 20 August 1947.

the Constitution.”¹² To govern such a diverse polity, a structure of “asymmetrical federalism” was adopted.¹³

Creation of Linguistic States & Language Agitation

During this era, there was a demand from the regional areas to divide the state on the basis of language which marked the regional assertion over national politics, which reinforced the federal spirit right from the moment of Indian independence. This was also the era when the Congress had a huge influence. Although the Union government had first decided to not divide the state on the basis of language, but due to a huge pressure from the regional areas and to avoid conflict in the early era post-independence, the centre decided to recognize the demand of the people and divide the states on the basis of language.¹⁴

At first, the centre had decided to declare ‘Hindi’ as the national language as the Congress was dominated by Hindi speaking members. This caused unrest among the South Indian areas which continues even today. The movement to use Hindi as a national language also resulted in anti-Hindi riots in Tamil Nadu in year 1965. Therefore, the centre decided to adopt bilingualism and declared that English, along with Hindi, would continue to be used for all official purposes of state communication in the country.¹⁵

India’s distinct Quasi-Federal scheme

The adoption of federalism in India as a quasi-federal or “centralised” federal structure is a strikingly unique model, characterised as a “paradox” more often than not owing to its central/unitary bias. While the USA is a classic example of a ‘federation of states’ wherein provincial units “come together” to form a federation, India follows a distinct model of federalism quite antithetical to that, more popularly understood as the “holding together” federation – wherein

¹² Constituent Assembly Debates, Vol. VIII, 33.

¹³ K. Venkataramanan, *Explained: India’s asymmetric federalism*, THE HINDU, (Aug. 11, 2019), <https://www.thehindu.com/news/national/the-forms-of-federalism-in-india/article28977671.ece>.

¹⁴ PAUL R. BRASS, *ETHNICITY AND NATIONALISM: THEORY AND COMPARISON*, (NEW DELHI: SAGE PUBLICATION, 1991), 110.

¹⁵ Duncan B. Forrester, *The Madras Anti-Hindi Agitation, 1965: Political Protest and Its Effects on Language Policy in India*, PACIFIC AFFAIRS, UNIVERSITY OF BRITISH COLUMBIA, (1966) vol. 39, no. 1/2, pp. 19–36, <https://doi.org/10.2307/2755179>.

a state with geographical diversity and multicultural character devolves some autonomy to its provinces to embody conflicting regional interests and administrative ease.¹⁶

While India has adopted a two-tier federal model much like the other federal states wherein the ‘Centre’ and the ‘States’ have their distinct set of ‘powers’, its “sui generis” structure ensues delegating more power to the ‘Centre’ over the ‘States’ – thus highlighting the contradiction to the very essence of federalism. Flowing from that, India has been described as the ‘Union’¹⁷ and not the ‘Federation’ of States, to exhibit the structure of the model adopted by India wherein, though the states have been empowered with a catena of other rights, they do not enjoy the autonomy to secede or divorce themselves from the ‘Union’. This particular point can be explained via the rationale adopted by the framers of the Constitution who were cognizant of India’s multi-ethnic diversity, but owing to their apprehensions of further dissent and secessionist propensity in a nation that had already bore the brunt of the bloody partition, they made an earnest attempt to abstain from creating India into an all-encompassing federal polity.

How has the Constitution incorporated India’s centralised federalism?

This imbalance of power leaning towards the Union is evident in the Constitution, wherein the Parliament has been given the authority by virtue of which new states can be admitted as well as formed by the Union¹⁸, and wherein their areas can be altered, and boundaries and names of the States can be changed¹⁹ – a practice starkly at odds with the characteristics of federalism since the States. Moreover, in addition to the demarcation of powers highlighted in the Seventh Schedule of the Constitution between the Centre and the States, the Schedule also features a Concurrent List which highlights the subjects over which both the Centre and the States have the authority to formulate laws, however, an overriding authority has also been conferred on the Centre in case of incongruity. This ‘Doctrine of Repugnancy’ is highlighted under Article 254(1), wherein the Parliament is entitled to exercise its “pre-emptive power” over state legislation if any provision of a law made by the legislature of a state is repugnant to any provision of a law made by Parliament

¹⁶ Alfred Stepan, *Federalism and Democracy: Beyond the US Model*, 10 J. Democr. 19-34, 20-30 (1999).

¹⁷ INDIA CONST. art. 1.

¹⁸ INDIA CONST. art. 2.

¹⁹ INDIA CONST. art. 3.

or to any provision of an existing law with respect to matters enumerated in the Concurrent list.²⁰ Not just that, but the Parliament is also empowered with formulating laws on subjects which find no mention in either of the ‘lists’ in the Seventh Schedule, as a part of the Union’s exclusive ‘Residuary powers’. Furthermore, Articles 256 and 257 place a mandatory duty on the states in regard to exercise of their executive powers, and no precedent for these provisions can be found in American, Australian, Canadian, or Swiss federal systems.²¹ Furthermore, the States' ability to raise their own resources in fiscal concerns is stifled, for which they rely heavily on the Centre for financial aid. There also exists a conspicuous imbalance of power in the favour of the Centre concerning Emergency provisions enshrined in Articles 352 to 360 of the Constitution, wherein the Parliament has unfettered power to turn the federal scheme into a pure unitary one by bypassing the State legislatures. All these provisions and more make it apparent that despite the fact that the States are sovereign in their designated legislative field and that their executive power is contemporaneous with their legislative rights, the powers of the States are not anywhere close to the extensive (overriding) powers vested in the Union putting it in a commanding position in the Indian “quasi-federal” scheme.

Navigating the “asymmetry” in the Indian federal structure

Within federalism, there can be two types of foundational logic that governs the centre-state relations. The first is called symmetric federalism where all regions enjoy equal powers and have an identical relationship to the central government²² with no special consideration given to any specific sub unit. Such an arrangement is characteristic of largely homogenous populations where there is no *need* to take any differences in consideration when defining the identity of sub units. The second is called asymmetric federalism i.e. in a largely uniform centre state relationship, there are exceptions carved for certain special states/sub units owing to some very specific reasons. It is a function of diversity to the extent that the *only* way that there can be a working relationship between the union and the states is if those special differences are recognised. Yash Pal Ghai

²⁰ H. M. Rajashekara, *The Nature of Indian Federalism: A Critique*, 37 Asian Surv. 245-53, 248 (1997).

²¹ *Id* at 248-50.

²² Kashish Mahajan, *The Abrogation of Article 370 and Bifurcation of Jammu and Kashmir - A Bridge Too Far*, 9 INDIAN J. Const. L. 106 (2020).

writes²³ ‘Asymmetry acknowledges the unevenness of diversities and opens up additional possibilities of awarding recognition to specific groups with special needs or capacities’.

This demonstration of the polarity of power in the Constitution is also clubbed with a scheme where in a special status in the form of greater autonomy relative to other states has been conferred upon certain states to safeguard them from the overriding power of the Centre owing to their rather sensitive socio-political demography. For instance, the Constitution's Sixth Schedule encompasses certain provisions for governing tribal areas (Assam, Mizoram, Meghalaya, Tripura). Under this specific scheme, autonomous districts and regions are to be created, wherein an autonomous district with different Scheduled Tribes will be clubbed into separate autonomous regions, in which special Regional and District Councils have the authority to administer laws associated with. These Councils have the authority to enact laws governing land allotment, occupation, and usage, as well as the administration of non-reserve forests and watercourses. Aside from that, they have the power to govern social conventions, and disputes related to marriage, divorce, and property. Though this seemingly highlights a unique ‘federal’ scheme in the Indian Constitution, it is pertinent to highlight that by performing an unprecedented act of withdrawing the autonomy (Article 370) conferred on J&K by means of a Reorganisation Act²⁴ in the year 2019 (which will be dealt with in greater detail in the next section of the paper), the Union has successfully sent a strong message exposing the performativity associated with these “special” provisions, thus highlighting the inconsistency between theory and the practice.

The logic of asymmetric federalism

There are multiple reasons for why a state may arrive at asymmetric federalism, however two are pertinent. First, is the concern of specific communities that their culture and identity are not being adequately recognised in and by the state and that they are not able to equally participate in structures of social and civic life. Second, as a response to the first point, these communities seek constitutional recognition of their ‘special’ circumstances and identity in ways that include them in the union and integrate them into the larger social fabric. Scholars have argued that asymmetries

²³ Yash Pal Ghai, *Constitutional asymmetries: Communal representation, federalism and cultural autonomy*, The Architecture of democracy (1st. ed. 2002).

²⁴ The Jammu and Kashmir Reorganisation Act, 2019.

are of two kinds – first is a rule based asymmetry that is established for the smooth functioning of the union.²⁵ Second, an opaque and discretionary asymmetry purely born out of administrative and political arrangements. Another way to classify this dichotomy is called *de jure* asymmetry and *de facto* asymmetry. De jure asymmetry implies an asymmetry encoded into the text of the constitution for better regulating and defining the terms of the federal structure, and de facto asymmetry implies an asymmetry that is born purely out of specific socio political circumstances. Asymmetrical federalism is thought to be arrived at after a process of ‘rational bargaining’ between the centre and the states, and thus the special considerations present at the moment of bargaining are likely to affect the nature of relationship between the union and states. Scholars have described this asymmetry to be integral to the pluri-ethnic or pluri-national settings present in India in order to cohere as a ‘state nation’ instead of ‘nation state’.²⁶ The differential and layered system of federalism (as outlined above) was both necessary for ‘coming together’ initially and ‘holding together’ after that.²⁷

The court in *Pu Myllai Hlychho v State of Mizoram*²⁸ recognised that asymmetric federalism was ‘part of a single legal order’ and that differential treatment of regions was permitted. The court in various decisions²⁹ has opined that even though the federal principle is dominant in the constitution, ‘*it is not important for us to clarify whether our constitution is federal, quasi federal or unitary in nature*’. However we argue against such an understanding solely because it is *only* a clear understanding of the nature of the relationship of union with the states that can provide clarity with respect to what the union government may do in exercise of its union power, and what are the contours of such power when it comes to federalism. Without a clear understanding, the union government is likely to appropriate the ambiguity to increase its power – as it has been doing since independence.

²⁵ Richa Saxena, *Constitutional asymmetry in Indian Federalism*, 56 Economic and Political Weekly 53-60 (2021).

²⁶ Loïuse Tillin, *Asymmetric Federalism*, Oxford handbook of Indian Constitution (1st ed. 2016).

²⁷ Rao, M. Govinda and Singh, Nirvikar, *Asymmetric Federalism in India* (April 2004). UC Santa Cruz International Economics Working Paper No. 04-08, Available at

SSRN: <https://ssrn.com/abstract=537782> or <http://dx.doi.org/10.2139/ssrn.537782>

²⁸ (2005) 2 SCC 92.

²⁹ C. H. Alexandrowicz, *Is India a Federation?* 3 The International and Comparative Law Quarterly 393-403 (1954).

Territoriality and the dilution of federal logic in J&K

On (insert date), president of India passed two orders - 'C.O 272' and 'C.O 273' while the state of Jammu and Kashmir was under president's rule. CO 272 did three things – first, it superseded all earlier presidential orders that extended various parts of the constitution of India to the state, second, extended all provisions of the constitution of India, and third, amended the phrase 'constituent assembly' with the phrase 'legislative assembly' in proviso to clause 3 of article 370. Original text of article stated that such orders under article 370(1) (d) could *only* be passed after concurrence with the state government of J&K. But since the state was under president's rule – the concurrence taken was of the governor (who was appointed by the president) thereby bypassing the whole procedure. CO 273 declared the article (article 370) to be inoperative barring an amendment clause that stated that all provisions of constitution as amended from time to time and without any modification or exception were to be applicable to the state of Jammu and Kashmir. That was achieved because the constituent assembly requirement (in 370(3)) was bypassed and the parliament expressed its views on behalf of legislative assembly.

Thus there are at least three questions associated with this volte face and betrayal of substantive and procedural due process:

1. Can the President legally amend article 367 to replace the constituent assembly of the state with legislative assembly as mentioned in article 370(3)?
2. Is the concurrence of governor in place of the state government (C.O 272) and of parliament instead of legislative assembly (C.O 273), legally permissible?
3. Is the parliament vested with authority under article 3 to bifurcate a state into two Union Territories?

This process destroyed the fundamental understanding of asymmetric federalism that existed ever since the state of J&K signed the instrument of accession to join the union of India. The executive, unilaterally, without consulting the 'constituent assembly' of the state permanently changed the relationship of the state with the union while the state was in a temporary state of president's rule.³⁰ The dilution of a state into a Union territory during president's rule leads us into a legal impossibility since the article only provides for a subsequent evaluation of the 'temporary changes'

³⁰ Article 357(2) states that 'any law made on behalf of the Legislature of the State during the pendency of Proclamation shall, after the Proclamation has ceased to operate, continue in force until "altered or amended or repealed" by a competent State Legislature'.

made during presidential rule by the *state* legislature. If the state is diluted into a UT, there remains no state legislature to evaluate the changes, and thus such temporary changes becomes permanent; which is against the due process requirement put in place in the article.

But it would be incorrect to view the J&K reorganisation bill, 2019 as a one off event. The dilution of asymmetric federalism between J&K and the union government has been a continuous process that started almost instantly after the accession of the princely state to India. The starting of this erosion was ‘The Constitution (Application to Jammu and Kashmir) Order, 1950’ which extended the application of several provisions of the Constitution to the State of Jammu and Kashmir. It was passed by the president in concurrence with both the government and the constituent assembly of the state. The order has since then been superseded by ‘order of 1954’ which has since then been amended several times over to apply almost entirety of the constitution to the state, trying to achieve a symmetric federal structure. Moreover the amendments were enacted in order to circumvent the requirement of ratification of the constituent assembly that has since then been dissolved. In fact, 260 out of 395 Articles of the Constitution, 94 out of 97 entries in the Union List and 26 out of the 47 entries in the Concurrent List have been extended to the State.

Political scientists Saxena and Swenden argue³¹ that there are three types of arrangements that define the role of a constitutional/supreme court in the context of federalism. First, ‘political supremacy assumption’ which assumes that when the political context favours centralization, the court will adopt a centralizing interpretation. Second, ‘judicial safeguard assumption’ assumes that the courts are more likely to defend the federal manifestations of the political system and interpret in a state favourable way. Third, ‘judicial doctrine assumption’ assumes that the court largely adjudicates upon issues of federalism not according to the political context or in a de facto state favourable way, but by looking at previous case laws, *stare decisis* and interpretation. With respect to adjudicating on the relationship between J&K and the union, the court has tilted more on side of the political supremacy assumption, with the court interpreting article 370 liberally to widen the union’s powers vis-à-vis the state, thereby deconstructing the state’s special status. Courts have a

³¹ Wilfried Swenden & Richa Saxena, *Policing federation: the supreme court and judicial federalism in India*, *Territory, Politics and governance*, available at <https://doi.org/10.1080/21622671.2021.1887756>

special place with respect to preserving federalism in so far as they are the final adjudicators of the question of federalism. Therefore even if the question of federalism is a political imagination, the manifestation and reality of the concept is achieved through what the court interprets it to be.

*Prem Nath Koul*³² took a balancing approach to article 370, while maintaining that not all provisions in the article were meant to be permanent, however it was up to the J&K constituent assembly to adjudicate on the matter. *Puranlal Lakhanpal*³³ really expanded the scope of executive power by opining that president's power under 370(1) were to be interpreted in the widest possible sense and the word 'modify' must be read expansively. *Sampat Prakash* also highlighted that the presidential orders passed under article 370(1) could not be challenged on constitutionality post *Lakhanpal*. It was in *Ashok Kumar*³⁴ however, that the court used the word 'permanent' for the first time to define article 370.

The other argument against the abrogation of article 370 is that it is part of the basic structure of the constitution. The court previously as well has stayed away from identifying social and historical arrangement as part of the BSD, and has identified 'moral and political principles at the normative core of the constitution' such as federalism and secularism as part of the basic structure. The question is whether asymmetric federalism is part of the BSD or only the broader notion of federalism. (dash) makes the argument that since it can be argued that since the article is the umbilical cord with which the state is joined with the state, legitimate argument of the article as part of the BSD may be made. Other scholars make the argument³⁵ that it is only federalism and not asymmetric federalism that forms part of the BSD. However we argue that not recognising asymmetric federalism as part of the BSD is an incorrect interpretation of the concept and the decision in *S R Bommai v UOI*. When the court in *Bommai* recognised federalism to be part of the BSD, what it really recognised as basic to the constitutional machinery is the procedural and substantive safeguards placed in the constitution against the centre's ability to dilute the state's power and jurisdiction, and not only the idea of symmetric federalism. And since abrogation of

³² 1959 Supp (2) SCR 270.

³³ 1962 1 SCR 688.

³⁴ 2015 SCC Online J&K 210.

³⁵ Balu G. Nair, *Abrogation of Article 370: can the president act without the recommendation of the constituent assembly?* Indian Law Review, DOI: 10.1080/24730580.2019.1700592 (2019).

article 370 is removing this very constraint, it should ideally be interpreted be as violating the BSD. *Mangal Singh v Union of India*³⁶ interpreted inter as well as intra-State asymmetries as long as ‘they are in conformity with democratic norms and a separation of powers doctrine’. Such an interpretation it thus also likely to qualify the test laid down in *M. Nagaraj v UOI*³⁷ known as the ‘essence of rights’ test which says that only that forms as part of BSD which can be considered to be an ‘overarching principle’ of the constitution.

Conclusion

India, as a quasi-federal structure has been an accepted reality for quite some time now. However there has been a larger thematic dilution of federalism as a concept in the Indian state, with the unilateral and possibly unconstitutional dilution of Jammu and Kashmir’s status from a state to a Union Territory is under judicial scrutiny through a bunch of writ petitions filed before both the J&K High court and the Supreme court.³⁸

India, as a *sui generis* case of federalism is interesting in terms of how the union strikes a delicate balance between the federal units and the centre. Even though calling it a balance in the first place is a questionable generalisation, as is evident by the centralising tendencies, structures and constitutional mechanisms that exists as either de jure asymmetries or executive acts such as the J&K reorganisation act, 2019.

The courts need to play a proactive role in interpreting and preserving federalism in India through preventing executive misuse of centralising provisions and constitutional backdoors of political emasculation. The upcoming challenge to the reorganisation act will possibly act as a litmus test for both earlier mentioned Saxena and Swenden’s hypothesis with respect to judicial attitudes in adjudicating federalism and also will set the record straight with respect to the understanding of federalism in India through the lends of asymmetric federalism.

³⁶ AIR 1967 SC 944.

³⁷ (2006) 8 SCC 212.

³⁸ Mohd. Akbar Lone & Anr. V. UOI and Ors.