



Encroachment by states in the center's domain- is the Indian federation heading towards a confederation?

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Abstract

The dynamics of federalism in India have been undergoing a discernible shift, marked by an increasing assertion of state autonomy vis-à-vis the central government. This paper delves into the phenomenon of states encroaching upon domains traditionally reserved for the Centre and investigates whether this trend signals a trajectory towards confederation within the Indian Federation.

Through a multidimensional analysis encompassing constitutional provisions, legislative actions, and political developments, this study examines the extent to which states are expanding their influence and challenging central authority. Notably, the paper scrutinizes key areas such as fiscal autonomy, administrative jurisdiction, and socio-cultural policies where states are asserting their prerogatives.

Drawing parallels with confederal systems, where constituent units retain significant autonomy while being loosely bound by a central authority, the study explores whether India is moving towards a similar model. It evaluates the implications of this trend on governance efficiency, intergovernmental relations, and the overall integrity of the federal structure.

Furthermore, the paper contextualizes its findings within the broader landscape of Indian politics, considering factors such as regionalism, identity politics, and the evolving nature of democracy. It critically analyzes the implications of centre-state power dynamics on policy implementation, democratic representation, and national cohesion.

The research highlights the significance of a sophisticated comprehension and flexible governance strategies to manage the changing dynamics between states and the Centre. It proposes a revaluation of the federal structure to better meet the needs and aspirations of states, all while maintaining the unity and integrity of the nation.

In conclusion, this paper provides valuable insights into the evolving nature of federalism in India and raises pertinent questions about the potential trajectory of the Indian Federation towards a confederal structure amidst the growing assertiveness of states in encroaching upon the Centre's domain.

Keywords: Federalism, constitution, Centre-State, Nation, Confederation.

Introduction

In pluralistic societies, wherein there are great diversities, the federal arrangement continues to be the most preferred and administratively apposite form of government. It is generally seen that the smaller units (called by different names like Landers, Cantons, States and Provinces)¹ constituting a nation are very diverse and different from each other, but if they were to survive on their own they would not be able to sustain themselves due to financial handicaps coupled with the lack of adequate armed forces. "Even as a bad singer cannot sing alone, but only in chorus with others, like wise one who cannot walk would require support for himself. So keeping together is important."² Federal form of government thus comes to the rescue of these small units, by reconciling the differences between these constituents, and forming a larger and a more sustainable government, while maintaining the distinct identity of the constituent units.

1.1 Brief overview of Federalism and objectives underlying it: - Federalism is a form of government in which there is a distribution of powers between the Centre and the States. The other indispensable features of federalism are written constitution and constitutional supremacy coupled with certain amount of rigidity. It also calls for an independent judiciary, which has the potential to adjudicate impartially any conflict that may arise in between the

Centre and the State.³ Cooperation, coordination and subsidiarity are also considered to be of primary importance. Federalism undoubtedly constitutes a 'complex governmental mechanism' for the governance of a country. It binds into 'one political union, several autonomous, distinct, separate and disparate political entities or administrative units.' A federal system essentially aims to strike a compromise between those who want devolution of powers to the constituent units and those who favour concentration of powers in the centre. It thus 'seeks to reconcile unity with multiplicity, localism with nationalism and centralization with decentralization.'⁴

1.2 Indian Experiment: - The Indian experiment with federalism has indeed been a unique one, and it shows the sagacity and ingenuity of our Constitution makers, who designed this type of a contrivance for the administration of our country, keeping in mind the historic realities and the needs of the future. An oft repeated word to describe Indian federalism is that it is '*sui generis*'.⁵ The Indian mould of federalism isn't a true copy of the American model, which is considered to be the classic and original form of federal government to be crafted.⁶ It is in fact an altered version, modified to suit the special needs of the Indian nation. India has accommodated multiple diversities through forms of autonomy and decentralization to ensure harmonious functioning between States and Centre. India's federal experiment has undergone, over the past six decades, many trials and tribulations and in essence 'it remains a work in progress'. In the first three decades of the Indian experiment with federalism, a trend towards centralization was discernible. Though the constitution unambiguously provided for a federal setup, the politics prevalent at that point of time (primarily due to pre- dominance of a single party) gave impetus to centralizing forces. However, in recent times there has been a marked shift in this trend. Once again the dynamics between Centre and States are undergoing a drastic metamorphosis.

1.3 Coalition politics and its impact on Indian federal set-up:- With the emergence of the coalition politics, federalism in India stands modified today. The evolution of State-based parties' power and influence today shapes the direction of Center-State relations through the mechanism of coalition governments at the Centre. "More importantly, some parties have engineered, through the political process, an enhanced participation in national policy-making that they could not achieve through formal institutions of co-operative federalism. In effect, federal coalitions have given them participatory opportunities that were earlier denied to the States in institutions such as the Planning Commission, the National Development Council or the Inter-State Council."⁷

1.4 Globalization and its impact on the federal set-up:- Another factor contributing to this paradigmatic shift has been the rapid pace of globalization, which has greatly altered the contours of federalism in India. The powers of the States which were declining progressively in the last century are again on the ascendancy. States are increasingly transgressing their conventional domain and encroaching upon the powers, hitherto reserved for the Centre, in a subtle manner. The recent spurt in Centre- States disputes bear testimony to this phenomenon. Be it the controversy surrounding Teesta River Treaty, Tipaimukh Dam, National Counter Terrorism Centre, Goods and Services Tax or the Pension Fund Regulatory Development Authority, the influence of States in policy making at the Union level, is becoming increasingly evident. Thus, a new trend is discernible these days in the field of study of federalism wherein the influence of States is considerable. Conventionally, a federal State was entitled to speak with a single voice in international affairs. Every nation had a single, unified national and nationwide foreign policy. Of late, however, the constituent units of the federation have also a role to play in formulating a country's foreign policy, thereby reflecting domestic diversity of opinion. The same transgression of domain is found in the field of economic and commercial matters also.

This paradigmatic shift in federalism is very significant and may have grave consequences for the federal balance. Such a shift shall have repercussions on the concept of sovereignty too. In this assignment, the endeavor has been to study the ramifications of such growing powers and influence of the constituent units on the federal balance.

The conceptual contours of federalism and its various offshoots

Many attempts have been made to describe federalism's theoretical essence precisely. There is no universally accepted definition of "federalism" despite extensive study and debate. The name "federalism" comes from the Greek word "foedus," which means covenant. Federalism is a concept that may be applied to any system that has two or more components that are not completely independent but work together to build the system as a whole.

Kenneth C. Wheare, an authority in the field of federalism says⁸:

“A federal government exists when the powers of the government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and there are independent regional authorities for other matters, each set of authorities being coordinate with and not subordinate to the others within its own prescribed sphere.”

“A federation is taken to be a species of political organization that is marked by the combination of shared rule and self-rule⁹. Federalism combines the principles of unity and diversity (*“concordantia discors”*). The component units must have independent authorities and be eligible to participate at the federal level. Some legal experts define federalism as a system in which the same group of persons are subject to the authority and power of several levels of government. State governments are more regionally focused and in closer proximity to the people, but the federal government frequently has a different constituency and, therefore, distinct goals. Multiple levels of governments are better equipped to address the diverse needs. John Stuart Mill¹⁰ listed three necessary conditions for a federation: i) sufficient mutual sympathy “of race, language, religion, and, above all, of political institutions, as conducing most to a feeling of identity of political interest”; ii) There should be a rough equality of strength among member units to prevent internal domination by one or two, and no member unit should be so powerful as to not require union for defence or unduly tempt to secession.¹¹

Federalism provides scope for innovation and experimentation that a unitary system may not have time for. Justice Louis Brandeis once said “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹² One of the advantages of federations, according to John Stuart Mill, is that they decrease the number of weak States, which lessens the incentive to act aggressively because federations only employ their powers defensively. Through discussion and offices in both member units and central bodies that enable character building through political involvement among more citizens, federal orders may also improve the opportunity for citizen participation in public decision-making. Additionally, federations can enhance economic prosperity by eliminating trade obstacles inside their own borders, achieving economies of scale, or growing to a significant enough size to influence international trade agreements. Most federal systems are in countries that are large and diverse. Federalist Papers¹³ (1787-88) argued that the size and diversity (geographic, religious, ethnic and linguistic) made federalism especially apposite for USA. The same applies for India.

2.1 Requirements for Federal Setup: There are differences of opinion as to the indispensable features of a federal State. A minimalist approach calls for the following to be incorporated in a federal setup:

- a) Written Constitution which is considered the supreme law of the land and provides for clear cut demarcation of powers between the Centre and the State.
- b) The constitution should be rigid so that unnecessary amendments are not made to completely alter the distribution of powers as originally envisaged. The division of power is deeply entrenched in a constitution which neither a constituent unit nor the federal government can alter unilaterally. Independence¹⁴ and coordination¹⁵ between the two levels of government are the two acid tests for a true federal structure. They reconcile two conflicting forces.
- c) Independent and unbiased judiciary to resolve disputes that may arise because of some ambiguity in the distribution of powers or because of varying interpretations to the constitutional provisions of given by the respective governments.

2.2 Kinds of Federalism:

Having thus charted out the list of essential features of federalism, the paper now proceeds to discuss its myriad versions. Hereunder are the various versions of federalism that are found globally. These typologies are not mutually exclusive, and in many countries a blend of these can be seen. The various versions of federalism are:

- i. Competitive Federalism- The various constituents compete with each other to gain the maximum share of the resources and powers. Horizontal and vertical competition is quite manifest in such types of federalism. Generally the Centre is more powerful and the constituents vie for the attention of the federal government. The American federation was conventionally based on the competitive model.

- ii. Cooperative Federalism- This model of federalism provided for a strong central authority “not only to take care of its own responsibilities but to guide and co-ordinate the activities of the units while allowing the latter, in normal times, to act independently in a designed and by no means insignificant area of government.” It becomes challenging to distinguish between the powers of the federal and state governments when they become entwined. For example, many federal programmes are managed by state and municipal governments, and states primarily rely on federal funding to sustain their own initiatives. There is a multi-faceted positive relationship of shared action.¹⁶ In this the federal government may involve member units in central decision-making. Indian federalism is based on this model. This is also called ‘marble cake’ federalism or interlocking federalism.
- iii. Fiscal federalism- This deals with the devolution of financial powers between Centre- States. Powers of the centre and the States regarding taxation and their responsibility for incurring expenditure are clearly delineated. Indian constitution also provides for fiscal devolution. However in India great vertical and horizontal imbalances exist. The Centre’s revenue base is far wider and more overwhelming than the State’s, though the domain of State expenditure is much more expansive. Also, great disparities exist in between the States. Not all States have the same revenue generation capacity and very often these resource constrained States have maximum expenditure to incur.
- iv. Coming Together Federalism- In such federalism independent States aggregate by ceding their erstwhile sovereign powers in specific domains for the sake of security or economic prosperity, which would be unattainable if they were to operate individually. This kind of federal setup emerges when disparate units, formerly independent of another, unite and form a compact. They want to merge into a bigger whole, but not be completely assimilated. In entering a compact, they maintain their distinct identity. Examples include the present USA, Canada, Switzerland, and Australia.
- v. Holding Together Federalism- This kind of a federal setup emerges when historically the setup was unitary, but for administrative convenience or to alleviate threats of unrest or secession by territorially clustered minorities, the federal government decided to devolve authority and arrange them into distinct constituents. The national government may agree to grant particular domains of sovereignty e.g. over language and cultural rights, on the constituent units. Examples include India, Belgium and Spain.
- vi. Green federalism- This is an example of fiscal federalism in action, wherein environmental externalities are appropriately recognised through financial transfers. For example, states with substantial forests should get payment for the public goods or environmental services they provide to the whole federation. Likewise, states with significant hydropower potential ought to receive payment for supplying the federation with sustainable energy.¹⁷

Having thus seen the pre- requisites of federal setup and the variegated forms of federalism seen across the globe, the researcher now attempts to briefly capture the growth and evolution of federalism in the world as well as in India¹⁸.

From philosophy underlying federalism to the historical evolution of Federalism Globally, with special reference to India

Many people credit Johannes Althusius as the founder of contemporary federalist philosophy. In *Politica Methodice Digesta*¹⁹, he argued against the Catholic Emperor and in favour of Emden's autonomy from its Lutheran provincial ruler. A doctrine of resistance to tyranny was created by Calvinism, which had a great influence on Althusius. It emphasized on sovereignty in the social circles subordinate only to divine laws. Althusius developed an areligious, contractual theory of federations that militated against State intervention and he used the term '*pactum foederis*' (a compact entered by people to live together in mutual benevolence) to describe a federal setup.

David Hume in “Idea of a Perfect Commonwealth”²⁰ recommended a federal arrangement for deliberating on laws by involving central legislature as well as the State legislatures. According to him such a diverse, geographically spread out system would outperform small cities in preventing decisions based on “intrigue, prejudice or passion” against the public interest.

3.1 Evolution of Federalism in the USA²¹:

But the real watershed in the development of federal thought came in 1780's when the American constitution was being drafted. The debates and deliberations about the nature of U.S. political arrangement marked a clear development in federal thought. In contrast to confederations, federations were now thought to unite not just their member entities but also the general populace. The Articles of Confederation of 1781 had proposed a feeble national government which was virtually impotent²² for the purpose of law enforcement, defense and for securing inter-State commerce. The Philadelphia Convention of 1787- 89, recommended fundamental changes and sought to find a middle path between the Federalists and the Anti- Federalists, by assuaging on the one hand the fears of the Anti-Federalists²³ who were opposed to undue centralization and placating the Federalists²⁴ on the other, who believed that by dividing sovereignty between member units and Centre would also protect individuals' rights against abuse by authorities at either level. Madison supported giving component units some authority because they would be the most qualified to handle regional issues that the Centre would otherwise overlook. Along with advocating for the necessity to overcome the issues of coordination and partial compliance through two novel approaches—centralized enforcement and the direct application of centrally made decisions to specific individuals—he also pushed for centralised powers of defence and interstate commerce. He warned against granting veto power to the constituent units, since that would enfeeble the centre and cause “tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.”²⁵ However, in order to assuage the fears of anti-federalists, Madison argued for a more representative constitution of the Central Legislature. The US constitution eventually classified powers into several heads: Enumerated powers (given specifically to the Congress); residuary (allotted specially powers to the States) and prohibited powers (which are banned from being exercised by both the Congress and the State legislatures). In the initial years of the coming into existence of the American federation there were many ambiguities, since it wasn't clear whether the American federal government was more powerful than the State governments. It was only after the American Civil War of 1861- 1865, that the paramountcy of the federal government became an established fact.

The federalism in America has evolved gradually and there has been a paradigmatic shift in the nature and character of American federalism. Taking cue from American federalism, several other nations too have emulated the American model, though with some necessary adaptations, so as to suit their needs. India too has incorporated several such features.

3.2 Emergence of the federal setup in India

- Government of India Act and its Impact: Federalism per se isn't new to Indian nation. It was in a way seen in ancient and medieval times too.²⁶ But the modern version as is existing now is the product of British rule. The mould for a federation was created by the Government of India Act, 1935. Two things were implied by the Government of India Act of 1935, which established a strong central government and some degree of provincial autonomy. First, the Government of India Act of 1935, which gave the Centre its own authority, was to be the source from which the Provinces received theirs. Second, responsible provincial governance was suggested by autonomy. An executive branch that answers to the legislature and the people ultimately would handle topics falling under the purview of provincial government. On April 1, 1937, the Act of 1935 became operative. Since the States decided not to join the federation, the portion of the Act that considered including the princely States was never implemented.²⁷ Even the federal scheme envisaged in the government of India Act, failed in 1939 when the Congress Ministries resigned in protest of British Crown's decision to make India a part of its efforts against the Axis powers in the World War II.
- Subsequent Constitutional developments before the coming into force of Indian constitution and their impact: After that the Cripps Mission under Stafford Cripps was also sent to India to resolve the constitutional deadlock. However even that failed to meet its target. Eventually a Cabinet Mission was sent to resolve the deadlock. The Cabinet Mission rejected the demand for partition and recommended the creation of a Union of India, which would handle foreign affairs, defence, and communications. The provinces would be given all residual powers and be tasked with raising money for these areas.²⁸
- Constitutional Assembly Debates: With the formation of the Constituent Assembly, there were several debates about the nature of Indian administrative and political framework. Given the circumstances of the day, a sizable portion of the Constituent Assembly believed that a centralised republic with a powerful

Centre was necessary. On June 6, 1947, the Union Constitution Committee made the provisional decision that there should be a federal system with a strong centre and that the Constitution should create three broad legislative lists: federal, provincial, and concurrent. The centralising forces that emerged from the National Movement and the British government had a significant impact on the characteristics of Indian federalism.²⁹ The Indian Constitution also envisioned a welfare State. Only a centralized government 'with effective control over the economic and fiscal fields could have effectively undertaken this Herculean task of National reconstruction.' The circumstances prevailing in 1947³⁰ weighed with the framers of Indian Constitution and thereby goaded them into 'opting for a maximal rather than a minimal federation.' A federal pattern was adopted which provided for a strong central authority "not only to take care of its own responsibilities but to guide and co-ordinate the activities of the units while allowing the latter, in normal times, to act independently in a designed and by no means insignificant area of government."

3.3 Comparative Perspective- India and USA³¹:

The Indian federation is not an exact replica of the American federalism and has several innovative features so as to suit the needs of the Indian nation. It is because of this reason that it has very often been termed 'sui generis' federation. Federalism in the Indian Constitution is not just a matter of administrative convenience, but 'it is one of principle - the outcome of our own historical process and recognition of the ground realities.' There is also a divergence of opinion as to the fact whether Indian setup is quasi federal, uni- federal or unitary in nature. Going by the express wordings of the Constitution one can reasonably infer that the Indian setup is actually federal in nature. Provisions in Art. 246, Schedule VII, Arts. 248, 249, 250, 252, 253, Chapter on Administrative Relations etc., clearly reflect that Indian Constitution is federal. However Unitarian features come to the forefront in case of emergencies like war, armed rebellion etc. During such times the federal provisions are eclipsed by the Unitarian features. However this is just an extraordinary phenomenon.

3.4 Bommai Case and thereafter: A note of caution was amply reiterated in SR Bommai case³² wherein the Court held: "It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States. It is equally necessary to emphasize that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation."³³ Post Bommai judgment several new trends are discernible. One being that the misuse of Art 356 has diminished greatly. It is no longer a tool used to harass the State governments which was earlier being misused with great impunity by the Central government. Also the tyranny of majority over minority has also declined.

Having thus captured the evolution of federalism across the globe and more particularly in India, the researcher discusses briefly the emerging challenges to the federal setup in India.

Emerging Challenges and new Discourse on Federalism

As we have seen in the above segment that the Indian federal setup is a unique and innovative variant of federal scheme. In the initial years after the formation of modern Indian Republic, India seemed to have a more or less unitary form of government. Though the constitutional scheme expressly provided for a federal government, the extra- legal factors like the political exigencies of those times, called for a unitary form of government. There was a single party rule across the country, with Congress at the helm of all national and provincial affairs. The centralizing tendency was clearly discernible during those years. However, with the coming of the coalition era, in a rudimentary form in the post emergency years, i.e. 1977- 1980, and which became firmly entrenched in our political setup ever since 1990's, the federal scheme of our Constitution has been shining brightly. Even the Supreme Court, which is the final interpreter of our Constitution, has reiterated in a catena of cases that India is a federation.³⁴ The emergence of coalition politics has brought forth new challenges. Now the authority of the Centre is at times seriously challenged by the federating units. According to some political thinkers and legal experts, such a trend is portentous and isn't good for the integrity of the Indian nation. They are skeptical of the rising powers and influence of the States. Rising powers of the States means that they can 'arm twist' the Centre to accede to their parochial and narrow demands which are region specific at the cost of national interests. Very often it is seen that the government at the Centre, survives on a 'wafer- thin' majority, staying in power with the support of the regional parties. So the Central Government very often panders to the illegitimate claims of some of the

influential States as well, which have increasingly become the 'king makers' in Indian politics.³⁵ This sets a dangerous precedent for other States which may resort to similar tactics to get their demands approved. There are a plethora of examples to highlight this growing trend of arm twisting by the States even in those domains which were hitherto the exclusive preserve of the Centre.

Apart from this arm twisting by the States, there is to be seen a constant saber- rattling between the Centre and the States. The States allege that the Centre has devious plans of relegating the States to 'glorious municipalities' without any real powers. While the Centre makes a counter allegation that the States are trying to split the nation by exceeding their constitutionally permissible powers. This is an unhealthy trend and needs to be remedied at the earliest. In the succeeding section, we shall see the recent examples of encroachment by States in the domain of the Federal government.

Recent examples of encroachment by States in the domain of the Federal government

There are examples galore which go on to show that the provincial governments have been hobnobbing with subjects earlier assigned to the Central government. List I of the VIIth Schedule of Indian Constitution, allots certain subjects of national importance to the Centre. These subjects are exclusively reserved for the Union government which has plenary powers over these. Some of the subjects reserved for the Centre are as follows:

Foreign Affairs

The Indian Constitution's Schedule VII, Entry 10 to 14, covers the following topics: foreign affairs; trade, diplomatic, and consular representation; matters relating to UN membership; participation in international conferences, associations, and other bodies and carrying out decisions made there; signing treaties and agreements with foreign nations and carrying out treaties, agreements, and conventions with foreign nations. We can thus infer that the Constitution framers deemed it fit to allot matters pertaining to foreign affairs, defense etc. to the Centre and not to the provinces. As per K C Wheare, one of the main arguments for establishing a federation is usually that it will provide a single unified foreign policy, with Central government having a predominant role to play, if not the sole role to play. As per the conventional wisdom, foreign affairs are national affairs. Another widely accepted fact is that 'the States are unknown to foreign nations.' Even the most ardent champions of federalism seem to conform to this view. India as a nation establishes relations with the other countries and not the federating units constituting the Indian Union as 'foreign affairs are national relations'. The power to establish diplomatic relations with other members of the international community is a necessary mark of external sovereignty.³⁶ This mark of external sovereignty is the sole prerogative of the Federal government. Had the above Entries not been expressly provided, even then these powers would have vested with the Centre only. What the above mentioned entries merely do is to recognize the powers of the Centre explicitly. They do not confer such powers on it. It is also pertinent to note that the provinces during the British rule never possessed international powers. So when there was a transfer of power from the Crown to the Indian Government, even the powers to enter into diplomatic relations passed to the government at the Centre and not the provinces. A similar view was taken by Justice Sutherland in *United States v. Curtiss Wright Export Corporation*³⁷, wherein he said that with independence the former colonies became a sovereign nation. The powers of the 'internal sovereignty' lay with the provinces while that of 'external sovereignty' were with the federal government, representing the United States of America. It can also be said that the powers of a nation to conduct its foreign relations are inherent in the concept of national sovereignty, they do not derive from the Constitution and so it is not advisable to trace them exclusively to the Constitution. It isn't necessary that all foreign affairs related powers be exhaustively enlisted in the Constitution and those not enlisted fall outside the purview of the Centre. One may delve into political philosophy, principles of international law and practices of nations to cull out more manifestations of these powers. Further, it will not be prudent to subject the foreign affairs related powers of a State to doctrines of interpretation and implied limitations. The widest possible construction ought to be given to these. Thus we see that be it the wordings of the constitution or the history of the Constitution framing, provinces have always been denied the authority to participate in foreign affairs. They merely have some say in the ratification of the signed treaties, but no other role to play.³⁸ The Courts have also interpreted the constitution in such a way that States have minimal say in foreign affairs. But this is only the theoretical aspect. The reality is rather different. Foreign relations are not insulated from the States. There is considerable scope for provincial interference. The provinces may not implement the treaties signed by the national government, thereby leading to non- compliance with the international obligations. They may also fail to provide safety and protection to the aliens. Any remedy that may be forthcoming will generally be inordinately delayed. Another trend seen these days is that the State legislatures pass resolutions on foreign issues. This has a great potential to scuttle any negotiations going on with any foreign

power. So long as foreign affairs do not affect the interests of the provinces, they do not meddle with the foreign affairs. The problem however arises when the foreign negotiations, alliances and deals have an impact on the regional/ local interests.³⁹ In the recent times State advocacy in matters pertaining to foreign affairs has become stronger than before. This is all the more true of the border-states which have considerable potential to determine the course of foreign policy. Kincaid coined the phrase “constituent diplomacy”⁴⁰ to define the international activities of subnational groups/ provinces and asserted that constituent diplomacy is on the rise. Kincaid delineates a number of subjects⁴¹ which were traditionally thought of as belonging exclusively to the federal government, but some of which have at times required the participation of provinces. According to Kincaid, only a small number of border-states are often motivated to engage in foreign policy advocacy because of shared ethnicity, religious beliefs, and economic development phases. When certain laws weren't in the best interests of the border-states, these states have forced the centre to change them. Also, the implementation of many such acts lies in the hands of the States and the States have the potential to affect the efficacy of these policies by hobnobbing with the implementation part of it. For example, recently the Tamil Nadu Government coerced the Central Government to shift the training of Sri Lankan troops from Tamil Nadu to Karnataka. Ideally, this decision ought to have been the prerogative of the Central government, but by means of extra- constitutional agitation the Tamil Nadu government succeeded in coercing the Centre to modify its plans. Another striking example of the increasing influence of States in foreign policy is the Indian vote against Sri Lanka at Geneva. As per India's long standing foreign policy, India had so far refrained from negative vote against any of its neighbours in matters pertaining to their domestic affairs. But this tradition was broken because of the arm twisting done by one State. This is rather unfortunate, as it sets a wrong precedent for the other States to emulate from and leads to further acrimony between India and its neighbor, Sri Lanka, with which India once had cordial relations. Another burning example of States interfering unduly in foreign policy is the adamant attitude of Mamta Banerjee in the Teesta River negotiations. Her unflinching position has put a spanner in all negotiations regarding Teesta River waters and the Tipaimukh Project, thereby leaving the Centre red- faced.⁴² The Centre ought to act decisively, without giving in to the unreasonable demands of one State, when the interests of other States too are in jeopardy. The Centre should at all times be cognizant of the fact that a piecemeal approach in foreign policy, just to appease one State at the cost of national interests leads a nation nowhere, but only creates a muddled foreign policy.

The Indian constitution doesn't ride rough shod over the interests of the States as regards foreign policy is concerned. There is a provision in the Constitution which says that for a treaty to come into force, it needs to be ratified by the Parliament.⁴³ This requirement of ratification takes care of the State interests too, because Parliament is nothing but a microcosm of the State units. Any foreign policy as reflected in the treaties entered with countries and international institutions, which don't conform to national aspirations (which is nothing but a cumulative product of regional aspirations) will fail to muster the required majority for ratification. This is an adequate safeguard for the stability of foreign relations and protection of interests of federating units.

It is not completely unjustified that States have a say in foreign policy when any aspect of it has implications for the State as well. What is to be guarded against is that the parochial, narrow interests of one State do not adversely affect the interests of the other States. In any foreign policy, national interests are to be kept at the highest pedestal. Then the regional interests may be considered and only after that the individual State interests ought to be considered.

Trade and Commerce with Foreign Countries

Regulation of trade and commerce⁴⁴ with foreign nations as well as between the states was also traditionally the exclusive preserve of the Centre. The logic behind this was that only the Centre can effectively deal with such matters and create a uniform policy, thereby leading the nation to economic progress and prosperity.⁴⁵ But in present times, the States have had a considerable say in these matters. Their rising influence can be seen by the fact that the Central Government has in its Foreign Direct Investment Policy in retail made it optional for the States to go in for FDI. There is no coercion for the States to allow foreign players into the retail sector. It is not unnatural for the States to have a say in the foreign trade policies of a country, provided the interests of one region completely overshadow the national interests. States have a legitimate say in these matters, because any policy initiated by the Centre, would have huge ramifications for the States. Thus it is important for the Centre, to take

into confidence the various federating units, by holding discussions and conferences with them.⁴⁶ Failure to take into confidence the States can cause irreparable loss of faith on part of these constituent units towards the Centre as was seen in 1993, post India becoming a member of the World Trade Organization.⁴⁷

5.3 Other issues:

The following are some more areas in which State power has noticeably returned:

The Ministry of Home Affairs' proposed National Counter Terrorism Centre plan has been shelved, mainly due to strong opposition from the States who are suspicious of the Center's intentions. The NCTC would report to the Intelligence Bureau (IB) and be responsible for conducting threat assessments, maintaining pertinent databases, developing appropriate responses, and analysing intelligence related to terrorism and related criminal activity.

States have several misgivings about this proposed entity. Some of the main grounds of opposition are:

- i. It is likely that the government at the Centre in New Delhi may use the NCTC to harass the State governments where the ruling party is different. For them the intent behind NCTC seems dubious. Its draconian powers may be used to harass the opposition parties having governments in the States.
- ii. The issue stems from the organization's additional authority granted by the Unlawful Activities (Prevention) Act, 1967 to make arrests and conduct searches without consulting the State Governments.
- iii. The absence of legislative oversight over the activities of the intelligence agencies has also strengthened fears of States that these powers could be exercised in an arbitrary fashion.

It is on account of these things that NCTC has yet not seen the light of the day. Only when the Centre assuages the feelings of the States will this salubrious idea concretise and become a reality.

Another issue wherein the States have successfully managed to oppose a Central initiative is the issue of Lokpal. They demand that states too must have say in the selection of the Lokpal if that institution is to affect the interests of the State too. Not giving them representation tantamount to ignoring their legitimate expectations as constituent units. One of the reasons why Lokpal institution hasn't yet come into existence is the opposition from the States.

In recent times the States have also interfered with other domains which were hitherto the sole preserve of the Centre. For example, agitations on part of the State units have coerced the Railway Ministry to relocate several projects from one State to the other or from one region of a State to the other region even when it was economically not feasible. Such a trend is to be guarded against.

Conclusion and Suggested Amendments

On the concluding note, the researcher again reasserts the emerging trend of State intervention in matters hitherto reserved for the Centre. This intervention is most visible in the domain of foreign policy, defense and economic matters. Though the conventional wisdom was that if the unity of a nation is to be preserved federating units should have minimal say in these matters. But with the emergence of cooperative federalism it seems advisable that even the States should have some say in these matters, if the legitimacy of Centre's policies are to be enhanced and the policies are to be effectively implemented. It is not in every case that the demands of the States are unwarranted and illegitimate. When foreign policies of a nation have a potential to impact interests of the federating units, it is natural for them to voice their concerns and opinions. Need is to confer with these units, before entering into any treaty. As per the Constitutional scheme, Union has exclusive treaty making powers, which has given rise to anxiety about Central domination of States, especially within a contemporary global context in which so much is ordained through multilateral treaties.⁴⁸ Thus, in the opinion of the researcher the fears of the States can be allayed if a provision for mandatory consultation with the States is incorporated in the Constitution, along with a provision for mandatory concurrence of the Inter State Council. This will go a long way in reinvigorating the Indian federal setup. One should always be cognizant of the note of caution sounded by Justice Sarkaria when he said that "There is considerable truth in the saying that undue centralization leads to blood pressure at the Centre and anemia at the periphery. The inevitable result is morbidity and inefficiency. Indeed, centralization does not solve but aggravates the problems of the people".⁴⁹ It thus seems advisable that even in those matters where Centre ought to have a predominant say, harm wouldn't be caused if the States too are involved in the discussions. These consultations with the States would go a long way in remedying the trust deficit which has so far been endemic to the Indian federal setup. As a last concluding statement, the researcher feels that it is too early in the day to say that Indian federalism is on the verge of transforming into a confederation. All that the States want from the Centre is to be consulted in those matters which pertain to their interests. They do not want a predominant role in policy making. All they want is to be treated with dignity, as coordinate partners

of the federal machinery. Steps ought to be taken to win their confidence and deter them from going on divergent paths, contrary to national interests.

References

1. Known as Landers in Germany, Cantons in Switzerland and States in India and provinces in Canada.
2. Justice Madan Mohan Punchhi, *Report of Commission on Centre- State Relations*, Volume 1, 2010. It was a 5 member committee headed by Justice Punchhi. Other members were: Shri Dharendra Singh (Former Secretary to the Government of India), Shri Vinod Kumar Duggal (Former Secretary to the Government of India), Prof. (Dr.) N.R. Madhava Menon (Former Director, National Judicial Academy, Bhopal and National Law School of India, Bangalore) and Dr. Amaresh Bagchi (Emeritus Professor, National Institute of Public Finance and Policy, New Delhi- later replaced by Amitabh Pande, IAS due to his sudden demise). Although the announcement to that effect was released in 2005, the commission was actually established in 2007. In March 2010, the eight-volume report was turned in. A major part of this Commission's mandate was to review and examine how the Union and States currently operate in compliance with the Constitution, court decisions, and precedents. It also addressed the growing challenges of maintaining good governance to promote the welfare of the people while maintaining the unity and integrity of the country. The Center's role, responsibility, and jurisdiction with regard to States during major and prolonged outbreaks of communal violence, etc.; the planning and implementation of large-scale projects such as the interconnection of rivers; the promotion of the effective transfer of authority and autonomy to Panchayati Raj Institutions and Local Bodies; the establishment of a link between the performance of the States and various forms of Central assistance; and the implementation of strategies and policies that prioritise positive discrimination in favour of underdeveloped States will all be of particular interest to the Commission. The Commission will also investigate the necessity of establishing a Central Law Enforcement Agency with the authority to initiate suo moto investigations into offences that have significant effects on national security and involve interstate or worldwide ramifications.
3. A constitutional breach occurs when one level of government usurps the authority granted to another level of government. This is a matter that can be brought before the courts, who are supposed to act as impartial arbiters and interpret the Constitution in a way that is appropriate.
4. MP Jain, *Indian Constitutional Law*, (Wadhwa and Company, New Delhi, 5th Edition, Delhi, 2006).
5. Though the framers of the Constitution drew inspiration from several federal constitutions like USA, Canada and Australia, they tried to avoid the flaws found in these systems, after studying the difficulties faced and solutions crafted to overcome the frictions that arose. The Indian federal setup is indeed unique and innovative, breaks new ground and contains some novel provisions that can't be found in other federations.
6. The modern idea of what federal government is has been determined by the United States of America as per Prof. Kenneth C. Wheare in *Federal Government*, (Oxford University Press, Oxford, 4th edition, 1964).
7. Balveer Arora, "India's Experience with Federalism: Lessons Learnt and Unlearnt", A paper presented at an international seminar on "Constitutionalism and Diversity in Nepal", organized by Centre for Nepal and Asian Studies, in collaboration with MIDEA Project and ESP-Nepal, 2007.
8. *Supra* note 3
9. Ronald L. Watts, "Federalism, Federal Political Systems, and Federations," *Annual Review of Political Science*, 1: 117–37, 1998; cited in *Stanford Encyclopedia of Philosophy*, available at the link: <http://plato.stanford.edu/entries/federalism/>; (visited 5th May, 2024).
10. John Stuart Mill, *Considerations on Representative Government*, originally published in 1861; (Liberal Arts Press, New York, 1958).
11. Kenneth C. Wheare says that some factors leading to formation of a federation are: need for common defense, desire to be independent, territorial contiguity and the hope for economic advantage to the constituent units.
12. *New State Ice Co v. Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting).
13. Series of documents and public letters written by American statesmen who were in favour of giving more powers to the Central government vis- a – Vis the States, so as to keep the United States of America intact and eliminate chances of it being splintered and balkanized. The whole object was to convince the people of America that for better governance strong federal government was a must.
14. M.I.C. Vile in his book, *The Structure of American Federalism (1961)* has defined federalism as a system of government in which neither level of government is wholly dependent on the other nor wholly independent of the other. The two levels of government are inter- dependent.
15. R. K. Chaubey, *Federalism, Autonomy and Centre- State Relations*, (Satyam Books, Delhi, 2007).
16. Prof. Michael D. Reagan, *The New Federalism*, (1972).
17. This concept was advocated by Vijay Kelkar in his address at the International Development Research Centre (IDRC), Canada on "The Recent Evolution of Indian Federalism".
18. This concept was advocated by Vijay Kelkar in his address at the International Development Research Centre (IDRC), Canada on "The Recent Evolution of Indian Federalism".

19. Frederick S. Carney (transl.), Daniel J. Elazar (introd.), (Liberty Press, Indianapolis, 1995).
20. T.H. Green and T.H. Grose (eds.), *Essays moral, political and literary*; originally published in 1852; (Longmans Green, London, 1882).
21. Articles of Confederation to Philadelphia Convention to American Civil War to 1913 Constitutional Amendment to developments post the New Deal.
22. The Federal government had no powers of taxation and was thus dependent on the benediction of the States for financial contributions.
23. Unnecessary centralization alarmed the anti-federalists. They were concerned that there was insufficient restriction on the authority of the central government. Richard Henry Lee and John DeWitt were two well-known anti-federalists..
24. Federalists pushed for centralised powers of defence and interstate trade, in addition to arguing that coordination and assurance issues with partial compliance must be resolved through two novel approaches: centralised enforcement and the direct application of central decisions to individuals. Among the prominent federalists were James Madison, the eventual US president, Alexander Hamilton, the future US secretary of the Treasury under President Washington, and John Jay, the first Chief Justice of the US Supreme Court. The federalists advocated for giving the federal government more authority in order to maintain national unity and stifle all fissiparous forces.
25. Jacob E. Cooke (ed.), *The Federalist Papers*, (Wesleyan University Press, Middletown, Connecticut, 1961)
26. Even the ancient kings had appointed governors for various provinces and subas for better administration of their territories.
27. *Supra* note 2.
28. Tara Chand, *History of Freedom Movement in India*, Vol. IV; as cited in the Report of the Commission on Centre- State Relations, 2010; *supra* note 1.
29. Amal Ray, *Inter – Governmental Relations in India*; as cited in the Report of the Commission on Centre-State Relations, 2010; *supra* note 1.
30. Partition of India accompanied with the large-scale communal violence, the influx of millions of refugees, the subversive activities of extremists to destroy our nascent democracy and the invasion of Kashmir, made a strong case for a powerful Centre.
31. Some of the differences are: There isn't a system of dual judiciary in India; no concept of State citizenship; residuary powers are with the States; amendment procedure to the constitution is much more demanding and rigid.
32. AIR 1994 SC 1918.
33. *The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan* (1963) 1 SCR 491.
34. In *S R Bommai v. Union of India*, AIR 1994 SC 1918, federalism was declared to be a part of the basic structure of our Constitution. Justice P B Sawant declared it to be essential feature of our constitution.
35. States very often transgress the conventional domain that has been allotted to them and fidget with subjects which were the exclusive prerogative of the Centre.
36. This is a recognized power of the Centre throughout the world. Be it in America or in Australia and Canada, it is the Central government which dominates the field of foreign policy.
37. 299 U.S. 304; also in *Missouri v. Holland*, 252 U.S. 416 (1920) (as cited in Prof. K C Wheare's *Federal Government*, Chap IX, Federal Government and the Control of Foreign Relations, 192, 3rd Edn., Oxford university Press) and *Hauenstein v. Lynham*, 100 U.S. 483.
38. Very often we have come across instances where a State has signed an agreement with the other countries regarding matters like power purchase, border safety, river management etc. These agreements do not qualify as treaties and are thus not ultra vires. Going by this logic, only those agreements qualify as treaties which are concerned with war, peace, secession etc (those agreements which are of a political nature generally).
39. The agitation by the States regarding the Foreign Direct Investment in retail is a classic example of State interference in issues which were hitherto the exclusive domain of the Union. In order to mollify the States, the Central government made necessary changes in the notification. It has been made optional for the State governments to allow FDI in retail.
40. John Kincaid, "Constituent Diplomacy in Federal Polities and the Nation-state: Conflict and Co-operation" in Michelmann and Soldatos, *Federalism and International Relations—The Role of Subnational Units*; cited in the paper by Rafiq Dossani and Srinidhi Vijaykumar, "Indian Federalism and the Conduct of Foreign Policy in Border States: State Participation and Central Accommodation since 1990", written for the Asia- Pacific Center for Stanford University.
41. Powers to 1. Declare war; 2. Build and maintain armed forces; 3. Conduct relations with foreign nations and international organizations; 4. Appoint and receive diplomatic and consular officials; 5. Conclude, ratify, and implement treaties; 6. Assure that treaty law is supreme over any federal or constituent laws that conflict with it; 7. Control entry and exit across national borders and 8. Acquire or cede territory.

42. This recalcitrant attitude on part of West Bengal government despite that fact that as per Schedule VII, Entry 56- Regulation and development of inter-State rivers and river valleys is to be governed by Central laws.
43. Art 253: "Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."
44. Schedule VII, Entry 41 of the Indian Constitution- Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
45. A similar idea exists in US constitutional law, known as the Cooley Doctrine. It holds that the States may only regulate those aspects of interstate commerce that are so locally specific as to call for different treatment, and that Congress has the sole authority to regulate both the national and local aspects of national commercial matters under the Commerce Clause. Nonetheless, the Supreme Court has occasionally rejected this theory in a few instances where the scales were stacked further in the States' favour; see Black's Law Dictionary, Ed. Bryan A. Garner, 358, 8th Edition.
46. The need is to make the discussions in the Inter State Councils and national Development councils more meaningful and concrete. As trade and commerce with foreign countries has increased manifold since 1991, Centre has entered into several trade pacts with countries and trade bodies. These pacts have great impact on subjects which were hitherto the allotted domain of the States. So if the federal balance is to be preserved and nurtured in the true Constitutional spirit, States ought to be consulted before any pact is signed at the international level.
47. A very dangerous precedent was averted from being established when the States of Tamil Nadu and Rajasthan didn't pursue the case they had filed against the Union of India, for having entered the World Trade Organization, without seeking the opinion of the States. The States undoubtedly should have say in such matters as they will bear the ultimate brunt of any policy pursued by the Centre.
48. Article 253; see Rajiv Dhawan, "Treaties and People: Indian Reflections" *JILL*, 39 (1997): 1-46.
49. Speech of Narendra Modi, in Conference of Chief ministers on National Counter Terrorism Centre, 5th May, 2012.