

ASYMMETRICAL FEDERAL MODE OF ACCOMMODATION IN INDIA; WITH REFERENCE TO JAMMU AND KASHMIR

Dr. Md. Reyaz Ahmad,

Department of Public Administration,
Babasaheb Bhimrao Ambedkar (central) University,
Lucknow.
Email: dr_reyaz_ahmad@yahoo.co.in

Dr M. Shafi Bhat,

Deptt. Of Political Science,
Govt. Degree College Bijbehara Anantnag
Jammu & Kashmir.
Email: mshafihu@gmail.com

ABSTRACT

We come across a wide variety of federal arrangements in different parts of the world. Both symmetrical and asymmetrical federal modes of accommodating diversity and differences are applied in case of diverse societies. There are wide range of variations in the nature, extent and degree of application of symmetry and asymmetry in the constitutional designs of different federal countries. However, it is important to note that asymmetry constitutes an important issue of debate in the federal discourse, including India. In fact the assertion and advancement of multicultural discourse in recent decades has repositioned the debate around asymmetry as principle of addressing the issue of difference and inequality. India is an important case wherein both the federal principles of symmetry and asymmetry are applied for responding to the issue of deep diversity. The asymmetrical form of accommodation, among others, is substantiated through the constitutional provisions incorporated more specifically under Article 370, 371, 371 A-I of the constitution of India on the one hand, and the elaborate provisions of the tribal self- rule under the Sixth Schedule of the constitution, on the other. It is hereby argued that the groups and communities unequally placed in a society need to be treated in a way they do not remain excluded but included in the power sharing arrangements. Asymmetry is one such federal principle that attempts to provide space for recognition and representation.

ASYMMETRY IN INDIAN FEDERAL STRUCTURE

The constitution of India promotes both the symmetrical and asymmetrical distribution of competence. Asymmetry is on account of the special provisions made for certain class of states. There are many provisions which allow for a special type of union- state relations. The constitution of India rationally provides for not one but many sets of federal alternatives and arrangements for

harmonious blending of autonomy and integration. In India, the use of asymmetry has enabled it to accommodate internal diversities, especially of the smaller states composed of minorities.ⁱ However, to this general pattern of relatively successful use of asymmetry, the particular case of Jammu and Kashmir and North- Eastern states do represent qualifications. The founding fathers of the Indian Constitution drew from Euro- American federal traditions and from their own intellectual exposure to the theories of dual federalism and co- operative

federalism. This was critically tempered by the then continuing federal administrative arrangements under the Government of India Act 1935 and by concern for the future requirements of Indian nation- building. From this emerged the Indian model of federalism, unique in many respects, particularly with regard to its in- built mechanism of centralization and regionalization. The Union is a framework of federal nation- building wherein the autonomy of the constituent units is moderated circumstantially and in accordance with the imperatives of the national and large public interest.ⁱⁱ

Indian federalism is known for the “differential loadings” and varied arrangements of power distribution.ⁱⁱⁱ The Seventh Schedule of the constitution broadly divides and distributes competences treating states on an equal basis. Articles 370, 371, 371 A-G, further modify this generality in order to provide for special arrangements of power distribution between the federal government and a particular class of states. The purpose of this is to accommodate features of regional and ethnic governance. In many respects, these articles restrict the applicability of federal laws in a “Special Class” of states. The powers of governors in these states are different from those of their counter parts in the other states of Indian Union. In many such states, federal law is subject to the legislative sanction and approval of the concerned legislatures. The Fifth and Sixth Schedules of the constitution provides for the creation of autonomous councils for tribal- ethnic people. Regional or autonomous councils cut into the legislative, administrative and financial domains of the concerned states. The special provisions allow for a special type of union- state relations. Furthermore, these provisions restrict the applicability of many laws, delimit the territorial extent of the application of parliamentary acts having bearing upon the law making powers of Parliament and the concurrent state legislature and bestows upon the governor of that state with some special powers. Thus, federalism in India is fine-

tuned to accommodate ethnic regionalism or sub-nationalism.^{iv}

Under Article 371 A, 371 B & 371 G, a greater degree of autonomy is ensured wherein no act of Parliament in respect of religious or social practices of Nagas & Mizos apply. There are limits of application of the Parliamentary Acts with respect to customary law and procedure. No act of Parliament relating to administration of civil & criminal justice involving decisions according to their customary laws, ownership & transfer of land & its resources shall be applicable in these states unless the concerned state legislature by resolution so decides.^v Other special provisions in this part of the constitution such as Article 371, 371 C, etc seeks to ensure equitable growth through specially constituted development boards or committees for the people of Vidarbha, Marathwada, Saurashtra, hill areas of Manipur and Andhra Pradesh. Besides, the Fifth & Sixth Schedules of the constitution make special provisions for the administration and control of scheduled caste and scheduled tribes, mostly in the North- Eastern states. The Sixth Schedule of the constitution institutionalizes the notion of regional autonomy by making provisions for the creation of regional councils, constituted for the purpose of promoting community autonomy and governance, especially for those ethnic communalities that are territorially concentrated. This Schedule introduces the notion of autonomous regional & district sub-state units of administration & governance. These councils have developmental & regulatory functions, which include the allotment & use of non- reserved land, dairy development, agricultural promotion, fisheries, communication, primary health care, hospitals & dispensaries, industry, trade and commerce & money lending. Other functions include identity- specific rights such as the regulation of the tribal practices of jhum (shifting agriculture), appointment or succession of chiefs or headman, property inheritance, marriage and divorce, social customs, and the administration of justice in accordance with customary law by a specially created village council.^{vi} In order to particularly compensate for their administration

costs, the autonomous councils are empowered to assess & collect land revenue and to impose taxes on:

- Professions, trades, callings & employment.
- Animals, vehicles & boats.
- The entry of goods into a market for sale therein as well as tools on passengers & goods carried in ferries, and
- The maintenance of schools, dispensaries or goods.^{vii}

Another source of revenue for the councils is royalties on the prospecting for or extracting the minerals in that region. Provisions have also been made to restrict the application of federal and state laws on the areas in which a council possesses the competence of framing and extending rules.

SPECIAL PROVISIONS WITH RESPECT TO CERTAIN STATES & TERRITORIES

Article 371 enables the President to lay special responsibility on the Governor of Maharashtra or Gujarat for the development of certain areas. The Regional Committees set up by the original article have been abolished. Article 371 A is a special provision for the state of Nagaland. It contemplates a different treatment of backward tracts of Assam and the differences between the needs of social conditions in Nagaland and the various stages of development of different parts. Article 371 B facilitates, by way of 22nd amendment in 1969, the creation of sub- state Meghalaya. Article 371 D is a special provision in respect of the state of Andhra Pradesh, empowering the President, having regard to opportunities and facilities for the people belonging to different parts of the state, in the matter of employment, education and different provisions may be made of various parts of the state.^{viii}

ADMINISTRATION OF SCHEDULED AREAS AND TRIBAL AREAS

There are some provisions under the Fifth and Sixth Schedule of the constitution for the management and governance of tribal areas in two categories of states. The Fifth Schedule identifies the scheduled areas in the states other than Assam, Meghalaya, Tripura and Mizoram which are inhabited by the tribes. The President of India is authorized to declare any area as scheduled area as it was done by the Scheduled Areas Order 1950 mainly due to its backwardness. The Sixth Schedule identified the tribal areas in the state of Assam, Meghalaya, Tripura & Mizoram. Both the Fifth and Sixth Schedules of the constitution makes special arrangements for the administration in the above-mentioned areas. The union government shall extend to giving directions to the concerned states in the domain of administration. The Governors report to the President annually or whenever so required by the President about the administration of the area. If the President so directs, the state shall constitute Tribal Advisory Committee to suggest welfare measures for the Scheduled Tribes.^{ix} The Governor is the constitutional authority to make regulations:

- To bring peace and good governance in any scheduled area.
- To prohibit or restrict the transfer of land by or among members of the Scheduled Tribe therein.
- To regulate the allotment of land to members of ST.
- To regulate the carrying of business as money lender by persons who lend money to members of the ST in such area.^x

The Sixth Schedule deals with the administration of Tribal Areas in Assam, Meghalaya, Mizoram and Tripura. The tribal areas shall be autonomous direct with the right of self- governance. In case of different Scheduled Tribes in an autonomous

district, the Governor, may by notification, divide their area or areas into autonomous regions. This power of the Governor does not depend upon the sanction of legislation by Parliament. Therefore, no Parliamentary confirmation is required to create a new or to divide an existing autonomous district. The Sixth Schedule possesses important provisions for the creation of district councils (for autonomous districts) and regional councils (for autonomous regions) armed with certain legislative and judicial functions. The councils shall have the power, under paragraph 3 of the Sixth Schedule, to legislate on the ownership of land by the inhabitants provided such laws do not prevent the Government for the acquisition of land for public purposes or for any other purpose. This power of the councils is also implied for levying taxes. The councils may also constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas and may appoint suitable persons to be members of such village councils/courts to presiding officers of such courts and may also appoint such officers to as may be necessary for the administration of the laws under paragraph 3 of the Sixth Schedule. The district councils may establish and manage primary schools, dispensaries and waterways in the district, and with the prior approval of Governor, may make regulations for their regulation and control. The council may also prescribe the language and the manner in which primary education shall be imparted in the primary schools of the district. The councils shall have the power to assess and collect revenue whose regulations require the approval of the Governor. His discretion (as final) is involved in the settlement of disputes over the share of royalties in respect of exploitation of minerals between the council and the state government. He may annul or suspend an act or resolution of a council if he is satisfied that it is likely to endanger the safety of India or is likely to be prejudicial to public order (paragraph 15 of the Sixth schedule). Any such order of the Governor shall be laid before the state legislature as soon as possible and it may continue to be in force for twelve months unless revoked by the legislature.^{xi}

PROVISIONS WITH RESPECT TO THE STATE OF JAMMU AND KASHMIR

Jammu & Kashmir enjoys a special status in Indian federal framework under Article 370. The special status was granted to accommodate different identity aspirations of various groups. Article 370 of the constitution of India contains what it calls "Temporary Provisions" which provides that the legislative powers of the Parliament of India shall "correspond to matters specified in the instrument of Accession" of the state to the Indian Union, and any other matter" with the concurrence of the government of the state". It is worthwhile to mention here that under the Indian Independence Act 1947 passed by the British Parliament, the princely state of Jammu & Kashmir was freed from the paramountcy of the British Crown and was granted the option to stay independent or to join India or Pakistan.^{xii} The Dogra Hindu Maharaja Hari Singh of this predominantly Muslim state decided to exercise the first option, but under a veiled aggression from Pakistan asked for military assistance from India, Lord Mountbatten, who was still the Governor General of India, the government of Jammu and Kashmir signed the Instrument of Accession with India to clear the way for India's military intervention in the situation. However, before India could liberate the entire territory occupied by Pakistani raiders, the United Nations managed to declare a cease fire. Accession of Jammu & Kashmir with Indian Union was conditional on retaining its distinct cultural and regional autonomy. Jammu & Kashmir involved a variation of federal principles the constitution of India envisaged, as it symbolized a federal relationship which was based upon the recognition of special political identity of the state for its Muslim majority character. The special status granted to the state of Jammu & Kashmir owes its existence to this peculiar circumstance of its integration with the Indian Union. Since its accession, the state has been increasingly integrated with the Indian federation. This is the only state in Indian union which has its own constitution framed in 1956 by the Constituent

Assembly of Jammu & Kashmir convened for this purpose in November 1951. The most notable feature of asymmetrical relationship is that an act of Parliament does not apply to this state unless & until it is endorsed by the state legislature.^{xiii}

INDIRECT ELECTION TO THE HOUSE OF PEOPLE OF THE STATE OF JAMMU & KASHMIR

The object behind enacting Article 370 (I) was to recognize the special position of the state of Jammu & Kashmir and to provide for the special position by giving power to the President to apply the provisions of the constitution to that state with such exception and modification as the President might by order specify. The power to make exceptions implies that the President can provide that a particular provision of the constitution would not apply to that state & therefore the power is given to the President to efface in effect to any provision of the constitution altogether in its application to the state of Jammu & Kashmir. He is also given the power to make modifications. That power should be considered in its widest possible modifications. The effect of the modification of Article 81 made by the President is that the six seats to the house of the people from the state of Jammu & Kashmir will be filled by indirect election and not by direct election that Supreme Court in *Puranlal Lakhanpal*, held that Para 5 (c) of the constitution (application to Jammu & Kashmir) under 1954 made by the President under Article 370 (I) of the Article 81 was not unconstitutional. The court held that widest effect should be given to the meaning of the term "modification" used in Article 370 (I) to include such modifications which do not make any radical transformation. The President has the power to make modification in Article 81 introducing indirect election.^{xiv}

There are some vital points of differences. The Union Parliament's jurisdiction extends to the union list and limited jurisdiction in subjects on the concurrent list. Residuary powers, which rest with

the Union in relation to other states, rest with Jammu & Kashmir Legislature, with the exception of certain matters specified in 1969 in which Parliament would prevail against any threat to sovereignty & integrity of the country. The state has the right to legislate for preventive detention, which belongs to the union in all other states. Article 249 is now effective vis-a-vis Jammu & Kashmir after the Constitution Order of 1986. The CAG, Election Commission & the Special leave jurisdiction of the Supreme Court are now extended to Jammu & Kashmir. The state's consent is mandatory for the Union in the case of Article 3 D and international treaty affecting Jammu & Kashmir. Consent of the state is also a condition before the Union for applying Article 352 (imposition of national emergency on the ground of internal disturbance), Article 360 (Financial Emergency) and Directive Principles of State Policy, under Part IV of the Indian constitution is not applicable to the state of Jammu & Kashmir. Article 19 is subject to special restrictions in case of Jammu & Kashmir. Permanent residents of the state have "special rights" in relation to employment & property. Jammu & Kashmir has the provision for the Governors Rule (Section 92 of state constitution) & the President's rule to meet exigencies. Effects of Article 356 are restricted. The state legislature can amend its state constitution (except those concerned with the relations with the union) by two third majority. President's assent is not required. If the bill affects the Governor or the Election Commission, it is to be reserved for the assent of the President. Any amendment by Parliament is not extendable to Jammu & Kashmir unless it is driven by the order of the President under Article 370.^{xv}

CONCLUSIVE REMARKS

Hence it is clear that there are many provisions made for certain class of states which accounts for asymmetrical federalism in India & allow for a special type of centre- state relations. The constitution of India rationally provides for not one but many sets of federal alternatives and arrangements for harmonious blending of autonomy

& integration. The use of asymmetry has enabled Indian federalism to accommodate internal diversities, regional & ethnic governance. The union

model of federalism has thus helped in maintaining unity as well as protecting diversity.

REFERENCES :

ⁱ Akhtar Majeed, Ronald. Watts, Douglas M. Brown (Edited), *Distribution of Powers & Responsibilities*, London: McGill Queens University Press, 2005, p. 161.

ⁱⁱ Ajay K. Singh, *Union Model of Indian Federalism*, New Delhi: CFS & Manak Publications, 2005, p. 32.

ⁱⁱⁱ Rekha Saxena, *Situating Federalism: Mechanisms of Intergovernmental Relations in Canada & India*, New Delhi: Manohar Publishers, 2006, p. 113.

^{iv} Ajay K. Singh, *Union Model of Indian Federalism*, New Delhi: CFS & Manak Publications, 2005, p. 32.

^v *ibid*, p. 33.

^{vi} *ibid*, p. 33.

^{vii} Kailash Rai, *Constitutional Law of India*, New Delhi: Universal Book Traders, 2001, p. 641.

^{viii} D.D. Basu, *Shorter Constitution of India*, New Delhi: Princeton Hall of India, 1988, p. 1045.

^{ix} Arvind P. Datar, *Constitution of India*, New Delhi, Nagpur, Agra: Wadha & Company Law Publishers, 2001, p. 1247.

^x Justice S. Rangarathan, *Constitution of India*, New Delhi: Bharat Law House, 1999, p. 755.

^{xi} Arshi Khan, *Indian Political System*, New Delhi: CFS & Manak Publications, 2005, p. 37.

^{xii} *ibid*, p. 38.

^{xiii} *ibid*, p. 39.

^{xiv} D.D. Basu, *Introduction to the Constitution of India*, New Delhi: Wadhwa & Company Law Publishers, 2002, p. 255.

^{xv} *Ibid*, p. 256.