

COOPERATIVE FEDERALISM VIS-À-VIS ESTABLISHMENT OF AUTHORITIES UNDER CONSUMER PROTECTION ACT, 2019

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ABSTRACT

‘Federalism isn’t about protecting States’ rights. It’s about dividing power to better protect individual liberty.’

- Elizabeth Price Foley

India takes pride in the democratic structure of the country. However, democracy is effective only when it is shaped in a federal way, where the power to govern is shared between the Centre and the States. It ensures that the voices of all the parties are heard, whether they are in majority or minority. Cooperative federalism is not a modern concept but has been in use since ancient times. It is a concept in furtherance of social justice and equality as enshrined in the Constitution of India. Where on one side, the institution of democracy advocates majority opinion, federalism on the other side, ensures that the minority opinion is also adjusted with the former, giving effect to social justice. Redistribution of powers from the Centre to States and consecutively to Panchayats and local bodies facilitates to further the principles of Constitution, namely unity, social justice and democracy. This leads to the harmonious operation of the whole system.

Maintaining strong Centre-State relations is the key to national development. Coordination and cooperation between the Centre, States and local bodies must be ensured at each and every sphere of governance. Establishment of authorities and allied powers of bodies at state and national level must be undertaken with the participation of both levels of governments. This is a requisite for representation of the diverse interests of the population of a country like India.

In this article, the authors seek to study the provisions of the Consumer Protection Act, 2019 (“CPA”) with respect to the establishment of authorities in light of the Constitutional principle of cooperative federalism. In this paper, the authors have firstly

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studied the concept of cooperative federalism in India. Secondly, the provisions of the aforesaid CPA which are in conflict with the concept of cooperative federalism, have been analyzed. Lastly, the authors in the conclusion discuss the importance of co-operative federalism and raise certain important questions in terms of the distribution of powers between the Centre and the State.

I. CONCEPT OF CO-OPERATIVE FEDERALISM IN INDIA

Federalism is one of the salient features of the Constitution of India (“**Constitution**”). While, the term ‘federalism’ itself is nowhere directly mentioned in the Constitution, there are several provisions in the Constitution that indirectly connote the existence of a federal character of the structure of Government in India. The multi-cultural, multi-religious and multi-lingual nature of the country justifies the federal character of the governmental structure in order to represent the interest of the diverse population of the nation.

Article 1¹ of the Constitution describes India as a ‘Union of States’. This shows that India is not completely federal in nature but can be said to be ‘quasi-federal’ or ‘semi-federal’ or ‘a federation with strong unitary features’. In order to balance the diverse interest, it is essential that there is coordination between the Centre and the States. Therefore, the concept of cooperative federalism bears immense importance for good governance of the State. Strong Centre is the essence of cooperative federalism as it ensures the strength of the states.

Cooperative federalism means a combination of cooperation and inter-dependence between the Centre and the States to ensure smooth governance of the country. This is effective in maintaining cordial relations within the diverse population of the country and ensuring that such interests do not clash with each other. Within the state also, cooperative federalism requires the coordination between the State Governments and other Local Government bodies like panchayats, municipal corporations, etc. Such cooperation is required to give all governmental bodies a broader national market and natural resources and provide a national platform for

¹ Art. 1, the Constitution of India.

human capital to bring prosperity to the nation as a whole. The existence of such cordial relations is evident through the Constitutional provisions enshrined in the Preamble, Directive Principles of State Policy and through the establishment of bodies like the Inter-State Council (Article 263²), National Development Council, Zonal Councils (7th Constitutional Amendment), Finance Commission, Planning Commission and like bodies. The Zonal Councils divided the country into five zones for better governance and representation of varied interests. The Constitution enlists the legislative and taxation powers of the Central and State Governments through division into three lists – Union list, State list and Concurrent List.³ The concept of cooperative federalism grew in significance in the 1990s when the coalition government was formed in the Centre with the national and regional parties. However, in the recent years, the power has shifted more towards the Centre and created an imbalance in the cooperative nature of Union-State relations.

1. Punchhi Commission

The Punchhi Commission on Centre-State relations in its report⁴ observed that there has been a tilt in the distribution of legislative, administrative and financial powers in favor of the Centre. It stated that while in matters of security it is justified for Centre to bear more powers, in other matters such as development, the Centre must respect the autonomy of the State and Local Governments. In such matters, the Centre's role must be limited to framing broad policies, allocating funds and coordination while giving the States and Local bodies the autonomy of implementing. There are several instances of conflicts between the lists where the powers of Centre and State both extend. Such conflicts are resolved by applying the doctrine of repugnancy under Article 254(1)⁵ of the Constitution. There are numerous

² Ibid, Art. 263.

³ A. S. Reddy, *Union state relations in India need for cooperative federalism a selective study*, Sri Krishnadevaraya University, available at <https://shodhganga.inflibnet.ac.in/handle/10603/86844>, last seen on 14/09/2020.

⁴ The Commission on Centre-State Relations, *Volume-II: Constitutional Governance and The Management of Centre-State Relations*, available at <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume2.pdf>, last seen on 14/09/2020.

⁵ Supra 1, Art. 254 (1).

instances where the Centre has encroached upon the powers of States, education being one area. No state has the authority to make any law which is inconsistent with All India Council for Technical Education Act, 1987, which is the central legislation. This shows how the Centre is increasingly becoming dominant in governance. Executive coordinative federalism is ensured through inter-governmental delegation of powers (Articles 258⁶, 258A⁷ of the Constitution), directives given to the States by the Centre (Articles 256⁸, 257⁹ of the Constitution), All India Services (Article 312¹⁰ of the Constitution) and Inter-State Council (Article 263¹¹ of the Constitution). The Commission recommended that in matters of List-III, the Centre and States must reach some agreement. Further, it was recommended that in case of emergency, provisions under Articles 352¹² and 356¹³ of the Constitution should be used only as a 'last resort' and a proper independent statute must be framed for governing the legal framework. This was suggested in light of the stringent limitations imposed on State autonomy under aforesaid articles, besides curtailing the freedom of the people. Therefore, an independent legal framework would be preferable to tackle situations wherein Central intervention is required but strict boundaries of Articles 352 and 356 are not essential. Lastly, the Commission has suggested for maintaining the balance of powers between the Centre and States in order to eliminate the increasing dominance of the Centre.

2. Judicial Stance

The Apex Court had interpreted the federal nature of India in the case of *S.R Bommai v. Union of India*¹⁴, wherein it said that “*the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact*”.

⁶ Ibid, Art. 258.

⁷ Ibid, Art. 258A.

⁸ Ibid, Art. 256.

⁹ Ibid, Art. 257.

¹⁰ Ibid, Art. 312.

¹¹ Supra 2.

¹² Ibid, Art. 352.

¹³ Ibid, Art. 356.

¹⁴ S. R. Bommai v. Union of India, (1994) 3 SCC 1.

Further, the Court went on to say that “*Democracy and federalism are the essential features of our Constitution and are part of its basic structure*”.¹⁵ While the Apex Court did not specifically make use of the term ‘cooperative federalism’ in this case, it indirectly upheld its spirit by saying that:

Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the Centre and the States which are the structural units operating on balancing wheel of concurrence and promises to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people.¹⁶ The division of power between the Union and the States is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule of law requires that there should be a responsible Government.¹⁷

The Supreme Court of India has interpreted the concept of cooperative federalism in recent cases as well. In *Jindal Stainless Steel v. State of Haryana*,¹⁸ the Apex Court reiterated the principles of cooperative federalism in India by saying that

the Union and the States are coequal in the Indian federal structure. Our framers created a unique federal structure which cannot be abridged in a sentence or two. The nature of our federalism can only be studied having a thorough understanding of all the provisions of the Constitution.¹⁹

Further, the Supreme Court in *Swaraj Abhiyan v. Union of India*²⁰ stated that:

The principle of federalism as present in India cannot be explained in a sentence or two; rather a detailed study of the each and every provision of the Constitution would inevitably point that India has divided sovereignty in the form of Centre on one hand and States on the other. Each power house is independent in its own terms. The constitutional scheme invariably leads to the conclusion that at times these institutions meet and interact at various levels to achieve the cherished constitutional goal of cooperative federalism.²¹

¹⁵ Ibid.

¹⁶ Ibid, at paragraph 165.

¹⁷ Ibid, at paragraph 169.

¹⁸ *Jindal Stainless Steel v. State of Haryana*, AIR 2016 SC 5617.

¹⁹ Ibid, at paragraph 185.

²⁰ *Swaraj Abhiyan v. Union of India*, (2018) 12 SCC 170.

²¹ Ibid, at paragraph 84.

The most recent case of *Government of NCT of Delhi v. Union of India*,²² also known as ‘Special status of Delhi case’ has also thrown light upon the concept of cooperative federalism, wherein the court took note of its own following observation in the case of *NDMC v. State of Punjab*:²³

The constitutional vision beckons both the Central and the State Governments alike with the aim to have a holistic edifice. Thus, the Union and the State Governments must embrace a collaborative federal architecture by displaying harmonious coexistence and interdependence so as to avoid any possible constitutional discord. Acceptance of pragmatic federalism and achieving federal balance has become a necessity requiring disciplined wisdom on the part of the Union and the State Governments by demonstrating a pragmatic orientation. The Constitution has mandated a federal balance wherein independence of a certain required degree is assured to the State Governments. As opposed to centralism, a balanced federal structure mandates that the Union does not usurp all powers and the States enjoy freedom without any unsolicited interference from the Central Government with respect to matters which exclusively fall within their domain.²⁴

From the above-mentioned observations of the Apex Court over the years, it can be seen that the highest tier of the judiciary has stressed upon the importance of cooperation between the Centre and States owing to the federal character of governance. It has upheld the spirit of cooperative federalism by using different terms like ‘collaborative’ or ‘pragmatic’ or ‘coequal’ and other like terms, but whose interpretation would reveal the same concept.

3. Position in the United States of America

In the United States (“U.S.”), cooperative federalism has been justified through Constitutional principles. They are threefold: the liberal interpretation of Supremacy clause given under Article VI, Clause 2²⁵ of the Constitution of the U.S.; the contention that the Necessary and Proper Clause given under Article 1, Section 8²⁶ (‘Elastic Clause’) empowers the Federal Government to make required laws in carrying out its inherent

²² *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

²³ *NDMC v. State of Punjab*, (1997) 7 SCC 339.

²⁴ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

²⁵ U.S. Constitution, Article VI, Cl. 2.

²⁶ *Ibid*, Article I, S. 8.

powers; and the narrow interpretation of the Tenth Amendment-which limits the powers of the Federal Government to only those granted to it by the Constitution and grants the States all other powers not expressly prohibited from delegation to the States by the Constitution.

II. CO-OPERATIVE FEDERALISM VIS-À-VIS APPOINTMENT OF MEMBERS OF THE STATE AND DISTRICT COMMISSION UNDER THE CONSUMER PROTECTION ACT, 2019

The provisions relating to the appointment of members of the District and State Commission in the Consumer Protection Act, 2019 (“CPA”) are in conflict with the Constitutional principle of cooperative federalism. These provisions clearly show dominance in status of Central Government in comparison to the State Governments, while the principle of cooperative federalism requires both the levels of Government to function in cooperation with each other, most of these provisions relate to the power of establishment of authorities under the CPA. These provisions are discussed below.

1. Cooperative federalism under the Consumer Protection Act, 1986

As stated earlier, cooperative federalism requires cooperation and inter-dependance between the Centre and the State, which acts as a method of check and balance to prevent the accumulation of excess power at the Centre.²⁷ In the erstwhile Consumer Protection Act, 1986 (“CPA, 1986”), the principle of cooperative federalism was more coherent than it is in the new CPA.

The establishment of District Forums and State Commission under the erstwhile CPA, 1986 gave more autonomy to the States. The District Forum earlier constituted of a person who is or qualified to be a District Judge as its President. The other two members were appointed by the State Government on the recommendation of the Selection Committee, which

²⁷ M. Tully, *India's far from cooperative federalism*, Hindustan Times, available at <https://www.hindustantimes.com/columns/india-s-far-from-cooperative-federalism/story-teUUoRnjTzsABfyix0y7JL.html>, last seen on 08/02/2021.

constituted of the President of the District Forum as its Chairman, the Secretary of Law Department of the State and the Secretary of Department dealing with Consumer Affairs.²⁸ The composition the State Commission had a person who is or previously was a High Court Judge as its President, who was to be appointed by the State Government, in consultation with the Chief Justice of that High Court.²⁹ The other members were appointed on the basis of the recommendation of the Selection Committee by the State Government. Such selection committee had the same members as a District Forum, except that the President of State Commission acted as its Chairman.³⁰ The appointment of members of the National Commission was done by like authorities in the Central Government. Therefore, it can be seen that the power of appointment of authorities under the erstwhile Act was distributed evenly between the Centre and the States, wherein each had autonomy in its own sphere, giving effect to the principle of cooperative federalism in the sense interpreted by the judiciary in India. As the judicial stance stresses upon the balance of powers between the Centre and the States and abstaining the Centre from indulging in unsolicited interference with the powers of the State, the erstwhile CPA, 1986 had upheld this spirit of the principle of cooperative federalism in its true sense.

2. The Present Scenario

While as per the CPA, 1986, the State Government had the power to appoint members of the District and the State Commissions, as these were the retired judges of the High Court, now, as per the new Act, the State Government can appoint these members only 'in consultation with' the Central Government, as specified under Section 28(2).³¹ The Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2019, lay down the qualifications for the appointment of the President and other members of the District Commission. As per

²⁸ S. 10, the Consumer Protection Act, 1986. (stands repealed)

²⁹ Ibid, S. 16.

³⁰ Ibid.

³¹ S. 28 (2) of the Consumer Protection Act, 2019.

the aforesaid rules, a District Judge or a person eligible to become a District Judge only, can be appointed as President of the Commission. It is to be noted here that a District Judge is appointed by the Governor of a State, in consultation with the High Court, as per Article 233³². Therefore, it is difficult to comprehend as to why the Central Government would intrude upon the State's power to appoint members of the District Commission, if the former has no role to play in the appointment of District Judges. Such central intervention curtails the autonomy of the states and over-centralizes this domain. This goes against the spirit of cooperative federalism which requires a combination of individual autonomy and cooperation of each level.

Besides the Central intervention in the appointment of the aforementioned authorities, the Central Government is further empowered to alter the pecuniary jurisdiction of the District and State Commissions under the new CPA. The Act does not involve any role of or consultation with the concerned State before taking such decisions. This, again, is an act of over-centralization.

III. CONCLUSION

Given the desired constitutional principle of spirit of mutuality between the Centre and States, it is important to understand that co-operative federalism is often a function of the Government's electoral strength in the Parliament. One must understand the nuances of co-operative federalism through a dispassionate analysis of the effects of electoral majorities by ruling dispensations in the Parliament. Thus, one needs to ask whether India is moving away from coalition politics to a majoritarian electoral politics where the tenets of co-operative federalism are shifting more towards coercive federalism. Are we reconciling conflicts between the Centre and States or are we trying to achieve a single political union despite multiple administrative and governance peculiarities?

How do we ensure that constitutionally allocated distribution of powers between one or more levels of Government are fine-balanced? Do we

³² Supra 1, Art. 233.

strengthen the Constitution or do we strengthen electoral institutions to ensure that our electoral processes do not reflect a dominant party federalism? Will regional assertions despite a strong Centre provide the answer or will regionalization be subsumed into federalization in the name of national unity?

What we must keep in mind is that whenever there is a rise of centralizing tendencies through an electoral process, there is invariably an encroaching of regional autonomy, and resultant conflictual relation between Centre and States in relation to enforcement of issues falling under the concurrent list.