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Federalism, Democracy and Human Rights: A Fresh Look at the Constitution of India

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ABSTRACT

In India, colonial history plays a significant role in the drafting of the constitution. This appears to be true for federalism as well. India although is a torch bearer of federalism in south Asia, however, the Indian constitution itself presents a weak federalism. This could be traced in the colonial past of the state. The freedom fighters have always asserted that individual rights are more significant than group rights. Hence, right of self-determination shall prevail over human rights. It was essential to counter Churchill's idea of human rights over India's freedom. However, this idea continues in post-colonial states as well and can be found in Indian federalism. The Indian union is quite cautious over the power it gives to the state and leaves no opportunity to limit those powers. It leads to violation of human rights and democracy. The states power is so restricted that they cannot even adopt rules and principles of international law which may enhance the dignity and human rights of the individual. The union runs the territory of India. Therefore, it may be possible that on occasions it might not be suited to decide complex scenarios faced by a small part of territory. In this paper the author will try to understand how historical events impacted the development of federalism in India and how limited federalism in India restricts the application of power of state to incorporate international human standards. The author shall also make a of federalism in India and America and also analyse how a state and local governments in America can make local law to include international human standards simply by enacting legislation reflecting these norms.

I. INTRODUCTION

The concept of federalism is something which has numerous interpretations and also huge number of literatures. As the Constitution of United States is the first constitution which adopted the federal features and hence also introduce the concept of the federalism to the world. The American constitution has also defined and elaboratively explained the context of federalism to the world. After the concept of federalism was included in the American constitution, the other nations of the world also while drafting the constitution adopted federalism as its features. But the term “federalism” that was taken from the American Constitution remained same but the

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concept specifically in context to form of division and distribution of power remained different amongst the country who adopted the federal features. The constitution of American is the precursor to the concept of federalism but not the sole federal constitution in the world. The concept of federalism that was introduced by the American Constitution found its place in the various constitution of the world and it fitted according to the needs of the nation. So, the concept of federalism can itself adapt to the diverse culture, language, ethnicity of regional government and every nation that has adopted a federal feature has an essence and concept that resemble very less to the federal structure of American Constitution.

So, there are numerous researchers who have undertaken the research to understand the essence and the true feature of federalism. And in one of the searches, Dicey laid down two preconditions for the creation of a federation: (1) existence of a body of countries “so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants an impress of common nationality” and (2) the inhabitants of these countries “must desire union and must not desire unity”.² Dicey found “three leading characteristics of a completely developed federalism, the supremacy of the constitution, the distribution among bodies with limited and co-ordinate authority of the different powers of government, the authority of the courts to act as interpreters of the constitution”.³ According to Dicey these features did not exist to the same extent in the constitutions of Canada and Switzerland as in the Constitution of the United States, yet the former fell as much in the category of federal constitutions as the latter.⁴ Later, showing substantial agreement with Dicey and basing, like him, his analysis on the Constitution of the United States, Wheare famously found the essence of federalism in the “federal principle” which he defined as “the method of dividing powers [between the general and regional governments] so that the general and regional governments are each, within a sphere, co-ordinate and independent”.⁵

A democracy is a form of government that gives the people to exercise political control, and hence limits the power of the head of state. It also separates the powers between governmental entities, and protects the natural rights and civil liberties. Federalism and regional autonomy which is demanded based on language, culture, ethnicity took its shape, blossomed and eventually grew in countries that are democratic and where the human rights and its principles are respected and was available to its citizens and rather it did not develop or flourish in non-democratic countries and where there is no recognition of human rights. Human rights are the

² A.V. Dicey, *Introduction to the study of the law of the constitution* 141 (10th ed.1959).

³ *Id.* at 144.

⁴ *Id.* at 165-171

⁵ K.C Wheare, *Federal Government* 10 (4th ed.1963).

basic rights which has the aspect of equality and fairness. These rights have universal application as they apply to all the people regardless of nationality, ethnicity, gender, religion etc.

Indian Constitution is federal in nature in which there is a division of power between the central government and the regional government. The division of power between the centre and the regional government also hence forth also distributes the power amongst them. The division allows for decentralized decision-making power over certain areas. The federal feature in Indian constitution was to recognize and protect the diverse population of the country also becomes the path bearer of local self-governance and which eventually gives power to the states to meet the needs of the population of their region. Therefore, leads to the protection of human rights of the people for giving space for making policies in the local level and also the address the problems and issues faced by different communities. The concept of democracy, human rights and federalism are connected in a sequential manner. Federalism allows the division of power between the state and central government, democracy give the power to the people to choose its representatives and which therefore leads to the protection of human rights. In a federal form of government, there is a state human rights commission hand in hand with National Human Rights Commission. The state human rights commission address the human rights issues properly at the regional level.

The central government has given very less powers to the regional government and the constitution itself has put limitation to the power that are given in the regional level. The regional government cannot address many issues to human rights even though there are various mechanism that the democracy has given. The regional government does not have any power to even adopt rules and principles of international law which therefore enhance the dignity and the human rights of the individuals. So, the state government has very huge limitation and it is out of their reach to address human rights issue of their small territory.

II. Development of federalism in India

It is very important to reflect on the history of the country in understanding the features that are added in the constitution. The concept of federalism existed in bits and parts from the time of kautilya and then it existed in the times of Mauryan Empire, Gupta Dynasty, the Mughal dynasty. After the British took over the power in India, the Indian Council Act, 1861, the Government of India Act, 1909, the Government of India Act, 1919, Government of India Act, 1935 which was brought by them, had the essence and similar in features of federalism.

The cabinet mission plan came with a plan in which there shall be a central government with

limited powers and which was not agreed by the Muslim League and Indian National. So therefore, the first report of the Constituent Assembly showed a glimpse of a weak centre as because of the influence of Cabinet Mission Plan. It was the passing of India Independence Act and the subsequent partition of India which made the Constituent Assembly to balance the power between the Centre and the State, and India became an “Union of States ‘and the union is indestructible. The structure prescribed for Union as well as State governments with a single citizenship policy rather than dual citizenship.

In India, colonial history plays a significant role in the drafting of the constitution. This appears to be true for federalism as well. India although is a torch bearer of federalism in south Asia, however, the Indian constitution itself presents a weak federalism. This could be traced in the colonial past of the state. The freedom fighters have always asserted that individual rights are more significant than group rights. Hence, right of self-determination shall prevail over human rights. It was essential to counter Churchill's idea of human rights over India's freedom. However, this idea continues in post-colonial states as well and can be found in Indian federalism.

In fact, the colonial context is what specifically comes to mind when the right to self-determination is brought up and it is the colonial aspect of the right to self-determination that is uncontested, for the right to self-determination consists of many elements and it has several aspects⁶. The interesting thing about this right is the fact that it is linked to many of the most important and fundamental principles of public international law and that it incarnates the concept of the right of peoples to determine their own destiny without outside interference or subjugation, presupposing all peoples are equal.⁷ The post-war period marks the downfall of colonial rule and thereafter there was a huge amount of protest and demands for Independence. The right of self-determination was synonymous with independence during the colonial rule. But the right of self-determination took a front seat over the group rights at the time of independence due to historical and political reasons. India is a diverse country so regardless of religious, linguistic, ethnic difference, the people have the right to determine their destiny. The right to self-determination was chosen rightly by the freedom fighters to promote unity and harmony amongst the diverse population of the countries that allows the people of the nation to fight for independence solely and not get diverted in group rights. The concept of right of self-determination was found in Woodrow Wilson's Fourteen which gain its popularity after 1st

⁶ Maya Abdullah, *The Right to Self-Determination in International Law: Scrutinizing the Colonial Aspect of the Right to Self-determination* (University of Gooterborg, 2006) 4 available at <<https://gupea.ub.gu.se/bitstream/agu...pdf>> accessed on 6 July, 2023

⁷ Ibid

world war and also encourage the demand of independence. India gained independence in the year 1947 and after the constitution came into force, the federal feature divided the power between centre and state. There came a shift of right to self-determination to regions which was divided on the basis of language, ethnicity, culture etc. The constitution also included the provisions for the protection of group rights due to various historical reasons.

III. CONSTITUTION OF INDIA AND THE INTER-RELATIONSHIP OF DEMOCRACY, FEDERALISM AND HUMAN RIGHTS

The drafting committee of the constituent assembly while drafting the constitution of India was well aware that a federalism is not a rigid and is an adaptive concept. Believing that each federation had responded to its own situations and India had unique problems not confronted by other federations in the history, they “produced a new kind of federalism to meet India’s peculiar needs”.⁸ They started their deliberations under the pre-independence constraints which envisaged a central government with enumerated powers leaving the residue to the states.⁹ And the federal structure with a strong centre was accepted as a feature in the Indian Constitution. They “refused to adhere to any theory or dogma about federalism”¹⁰ and acknowledged that the Constitution could be “both unitary as well as federal according to the requirements of time and circumstances”¹¹.

And in 1973 in the famous *Kesavananda Bharati v. State of Kerala*,¹² federalism was included among the basic features of the Constitution which could not be changed even by an amendment of the Constitution, in subsequent cases involving specifically the Centre-State relations, the Court doubted whether the Constitution was federal¹³. With the turn of events in the political realities since 1989, the Court has since 1994 again returned to federalism as one of the basic features of the Constitution.¹⁴ Though the federalism is the basic feature of Indian Constitution but the states are not given with wider powers which therefore make them dependant on centre on various aspects. Two amendments of the Constitution in 1992 have also introduced a third level of local governments in the federal structure at the village and municipal levels requiring the states to ensure the democratic functioning of these governments and to share some of their

⁸ G Austin, *The Indian Constitution: Cornerstone of a Nation*, 186 (1966).

⁹ See, the Statement by the Cabinet Mission and Viceroy May 16, 1946”, paragraphs 15(i) to (iv) in Shiva Rao, B. (ed.), *The Framing of India’s Constitution*, vol. 1, 209 at 213 (1996)

¹⁰ Austin, n. 15 above.

¹¹ Ambedkar while moving the Constitution for adoption in the Assembly, *Constituent Assembly Debates*, vol. VII, 34.

¹² *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

¹³ See, e. g., *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, 1382 and *Karnataka State v. Union of India*, AIR 1978 SC 68, 89, 111, 151 and 160.

¹⁴ See, *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

powers with them.¹⁵ In the year 1967, there was a one-party rule at the centre and the states also started becoming power less due to emergence of large number of regional parties. But in the 1980's the essence of federalism was restored and states also started to feel that they have powers. The central government have wider power and more of decision-making powers. Any country that has that kind of diversity and hardly any country at this moment is free from diversity and plurality must develop a robust federal structure ensuring enough scope for national unity consistent with regional autonomy, which cannot be fixed for ever but has to be a flexible and dynamic process.¹⁶

The constitution of India has dual government, one at the centre and one at the state. The states are the regional units in which the country is divided and so the India has been characterized as the Union of States under Art. 1 (1) of the Constitution of India. The Indian federal system has a strong centre, flexible federal features and a cooperative federalism. The central government has wider power in legislative, financial and emergency powers. For the efficient functioning of the centre and the state, there are three list i.e., Union list, State list and concurrent list. The division of power in the India constitution is in the area of legislative, administrative, financial and emergency area.

But in the today's times though there is a distribution of powers between centre and state but the concept of cooperative federalism is growing at rapid pace. The concept of federal features was added in the constitution to accommodate the diverse population of the country. So, for the purpose of proper governance of the nation and also to protect the diverse population of the country the state and the centre cannot act as a water tight compartment so therefore the grown of cooperative federalism has started.

Democracy is as much, if not more, elusive as federalism¹⁷. Federalism does not have any role in the governing of the society and the rights of the people to choose their representatives, democracy plays an important role and comes under the periphery that a democracy is a good form and an ideal form of government. The origin of democracy can be traced back to the classical Greek city-states where there was the rule of Demos- which also called as citizens body. The democracy the representation is chose through election and the election should be free and must be held within a fixed time. Democracy is based on the theory of the citizen have

¹⁵ See the Constitution (Seventy-third) Amendment Act, 1992 introducing the Panchayats and the Constitution (Seventy-fourth) Amendment Act, 1992 introducing the municipalities.

¹⁶ For a cautious approach on decentralization see Serna de la Garza, J. M., "Constitutional Federalism in Latin America", 30 *California Western Int'l Law Journal*, 277, 301 (2000)

¹⁷ For a brief but not so recent variants of democracy see, Macpherson, C. B., *The Real World of Democracy* (1972).

some certain basic rights and such rights will be found in the constitution. The democracy as a form may successfully be found in unitary and federal government but the existence of federalism without democracy will be of no value. Several European unitary constitution and federal constitution of USA, Canada, Switzerland have always imbibed the democracy as its feature because the federal constitution will lose its essence without democracy. Democracy is about participation in the decision making and to have a right to elect its representatives which can bring stability in the society and federalism is also a form of government which tries to protect the diverse population of the country and also give better protection to their identity. The concept of federalism is much larger than the distribution of power between the two level of government, it is the better representation of the people who have been divided into a unit.

The Indian constitution is founded on the pillar of democracy and the concept of federalism was their choice. Democracy was a part and parcel of Indian Constitution. Unlike federalism it has always been recognized as one of the basic features of the Constitution ever since the Supreme Court read the concept of basic features in it.¹⁸ The constitution of India has adopted all methods to ensure democracy when they imbibed the concept of Universal adult franchise in the constitution and there the Right to vote became a constitutional right. The elections are held in both the level along with the third tier after every five years. The conducting of election in a free and fair manner and for the purpose of supervision, organizing in a phase manner is on the Election Commission and they have full independence as provided in the constitution. There is also an election commission in every state who have a responsibility to conduct and supervise the elections of municipalities and panchayats. There is also a provision for secret ballot for conducting election in a free manner and fair. The growth of federalism has strengthened the democracy.

The movement for human rights in an organised manner started only after two world war occurred where human dignity and basic human rights were violated. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. India was an original member of UN and a member state who voted for the adoption of Universal Declaration of Human Rights. The Indian Constitution has not used the term Human Rights but it has recognised and gave effect to the human rights if we read the constitution as a whole. Federalism and Human rights are interlinked to each other but the relation between federalism and democracy or democracy and human rights is much clear and simple. The federal countries such as US, Canada, Australia and Switzerland have a better human right data but the benefit

¹⁸ See, *Kesavananda v. State of Kerala*, AIR 1973 SC 1461 and other later cases on the basic features, particularly, *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 412

of doubt revolve around the idea that whether the good human right data exist because of democracy or federalism. The concept of separation of power and the government at two levels is actually a better hope for a people for protection of their human rights. The power is divided between the different areas of the government and also between the regional government divided on the basis of their language, identity, ethnicity. The main reason for introduction of Bill of Rights in the US constitution was to give the citizen better protection against the tyrannical behaviour of the federal government but it was the states who lead the rank in violating Human rights of citizens. The history behind the feeling of need of introducing bill of right in India started when the British took the control of India. In India the need of Bill of rights started once the British took over India. The bill of rights was included in the Indian Constitution because the federal structure was not in a position to protect the rights of the diverse population of the country and also the different groups. The bill of rights binds centre and the state equally. The violation of rights of the citizen are mostly complained with respect to centre rather than states. As India has a single constitution so the same judiciary can interpret laws. In *A.D.M. Jabalpur v. Shivkant Shukla*¹⁹ related to emergency or national security where the High Courts took more liberal view of the rights than the Supreme Court. But many examples could be found of High Courts taking a narrow view of the rights in denying the remedies to the victims of those violations which in many cases were corrected by the Supreme Court.

IV. CONCLUSION

The concept of federalism is different from state to state and it can easily adapt itself according to the need of the country. As the concept of federal and unitary form of government is different from each other and they are not interlinked to each other. The division and distribution of power in a federal structure is also totally dependent on the constitution of its own country. The federal idea that has its place in the different constitution of the world has different method of distribution of power. The distribution of power also brings the concept and idea of sharing of power. The centre and state share the powers amongst each other and also helps in the smooth functioning of democracy. The idea of sharing also bring a concept of respect, negotiation, disputes into the picture. And this concept interrelates federalism to democracy and human rights. The effective running of federal form of government is also dependent on democratic process and respect for human rights. An existence of federalism also side lines the emergence of autocracy or tyranny. Federalism and Autocracy are two different concepts.

While both India and United States is a democratic state and in which federalism is a form of

¹⁹ *A.D.M. Jabalpur v. Shivkant Shukla* AIR, 1976 SC 1207

government. But the history of emergence of federalism in India and USA is different from each other. In India the Central government has a full power to make laws with regard to Human rights and the central government is supreme in matter of implementation of human rights. The state or a regional government has no power to adopt or implement any laws with regard to human rights. The bill of rights was included in the Indian constitution looking

into the human rights angle of the citizens. Where the violation of bill of rights can be brought against the centre and the states. But if the states want to make any local law for better implementation of Human rights looking at the human rights issue related to that particular state than they are powerless and have no authority to do that. The constitution of America has given the power to adopt and implement treaties to the federal government but states and local government can also include international human rights treaties by bringing a local law through enactment of legislation. If a power to adopt a human right treaty are given to the states than the states shall have a right to adopt treaties which has a beneficial need in that particular state. The central/federal government will never look into in detailing of any violation of human rights in individual state and adopt the convention and the treaties keeping that into account. The emergence of regional government was also to meet the needs of people in that particular state and to address the issues in depth of that particular state. Like take an example of San Francisco, where their federal government did not ratify the Convention on the elimination of All forms of Discrimination Against women, the state of San Francisco included the principles and brought a local law. This therefore cites that the regional government if given a power to adopt treaties and convention then they can bring a local law into effect which eventually gives greater security to the population to that particular area and the matter of human rights can be properly addressed at the regional level with issues affecting them. If in a similar manner if the states in India are given power to adopt treaties or incorporate the provision of international treaties or if allowed to sign a memorandum of understanding the protection of rights would have been better. India is a diverse country and the states that are formed on the basis of language, ethnicity or culture if given power to adopt human rights treaties according to the problem faced by different states, the violation of human rights would be limited. If this power is given to the states in India, then many human rights violation issues in North-East India, Kashmir and other states could be properly address by the local laws of that state. As the problem of violation of human rights differ from state to state in India.
