INDIA

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I. OVERVIEW

The historical foundations of Indian federalism derive from a disparate range of factors. First, during British colonial rule, control was divided between direct rule of British provinces and indirect rule of Indian princely states. The British provinces retained considerable political and economic autonomy, and although the princely states were in practice subject to British authority, they were politically quite diverse. The creation of Pakistan and the departure of the Muslim League from Indian politics removed the most powerful voice for a weak central government and autonomous sub-national units, and the dominant Indian National Congress strongly preferred a centralized institutional structure. But the integration of the princely states into independent India, the legacy of provincial discretion, and the adoption of the framework of the Government of India Act of 1935 all contributed to the development of constitutional provisions for a federal system.

Within the federal framework, however, there were historical precedents and institutional mechanisms that provided opportunities for centralizing power in the national government, especially in the judicial and legislative arenas. Despite the lack of an indigenous apex court until 1937 -- appeals from the provincial High Courts were heard by the Privy Council in London -- the judiciary had been integrated for nearly a century. After the establishment of India as a Crown Colony of the British Empire in 1858, the East India Company courts and the British Crown courts were unified into a single hierarchy in each British province. The Government of India Act introduced an apex court, the Federal Court of India, to hear disputes among provinces and the princely states, and the new Constitution of India essentially transformed this court into the Supreme Court of India, retaining its justices, its conditions of judicial appointment, and its jurisdiction.

Just as unification of the judiciary was achieved by wholesale adoption of the colonial judicial structure, the harmonization of Indian law has been aided by the continuation of British common law and the Penal and Civil Codes introduced in the nineteenth and early twentieth centuries, as well as by the constitutional primacy of national legislation. Yet, an important exception to this centralization of judicial and legislative authority can be found in policies that recognize ethnic diversity. For example, although most religious communities are subject to secular common law, Indian Muslims are still governed by Islamic Law (sharia) in areas of personal law. In addition, several Indian states have established their own policies for low-caste groups known as Other Backward Classes (OBCs), and these policies can diverge widely because they reflect historical and contextual characteristics. Nevertheless, despite the religious, linguistic, and economic diversity that characterizes Indian society, the overall tenor of Indian law and legislation reflects a centralized authority that allows sub-national units autonomy in a highly circumscribed set of policy areas.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

Articles 245 and 246 of the Constitution stipulate the distribution of legislative powers between the central government and the states. These powers are enumerated in Lists 1, 2 and 3 of the 7th Schedule of the Constitution. List 1 specifies those matters over which the Union Parliament has full and exclusive power to legislate. It comprises 99 items, including defense, military forces, defense industries, international affairs, major ports, communication (posts, telegraphs, and broadcasting), interstate commerce, regulation of trading corporations and multi-state companies, insurance, trademarks and patents, acquisition of property, industries “in the public interest,” mines and oilfields, interstate rivers,

higher education standards, major monuments and archaeological sites, union and state elections, taxes on non-agricultural income, customs and excise taxes, corporate taxes, and estate taxes.

The most important and most frequently used sources of central power are trade and commerce, taxes, acquisition of property, defense, Article 356 (president's rule), preventive detention, Scheduled Caste/Schedule Tribe affairs, patents, trademark and copyright, mining and oil, customs and excise, income tax.

List 2 of the 7th Schedule enumerates 61 items which are within the states' exclusive powers to legislate. They include maintenance of public order, police, judicial administration below the High Court level, prisons, public health and sanitation, regulation of alcohol production, sales, and consumption, land reform, water, intrastate trade and commerce, universities, betting and gambling, agricultural income taxes, property taxes, *octroi*, sales taxes, and luxury taxes. The most important areas of exclusive component state regulation are the areas of public order, police, sales and *octroi* taxes, land reform, agricultural regulation, administration of justice, and universities.

List 3 of the 7th Schedule enumerates 52 items over which the central and state governments have concurrent powers. They include criminal law, preventive detention at the state level, marriage and other personal law, bankruptcy, revenue and special courts, civil procedure, regulation and maintenance of forests, trade union and industrial disputes, charitable institutions, workplace regulation, education, and contracts. The exercise of central concurrent power does not prevent the states from exercising their concurrent power. Nevertheless, with a very limited exception, state laws must be in harmony with central legislation. Article 248 stipulates that residual power resides with the Union Parliament.

Article 254(1) states that with regard to List 3, where the Union and State Legislatures have concurrent powers, if a State law relating to a concurrent subject is "repugnant" to a Union Law relating to the same subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. The one exception to this doctrine can be found when the President of India has assented to the state law: the State Act will prevail in the state and overrule the provisions of the Central Act in the applicability to that State only.

There are three levels of municipal government in India: *panchayats* at the village level, municipal councils for small towns, and municipal corporations for cities. These governments do not have significant law-making power, and they are dependent on financial and legal authority to be allocated to them by the state. They have no independent revenue authority.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *Legal Unification through the Exercise of Central Power (Top Down)*

via directly applicable constitutional norms

The Constitution of India is the only constitutional document; there are no state-level constitutions, and citizenship inheres only at the national level rather than coexisting at the state and national levels. The allocation of residual power to the center, the greater allocation of exclusive powers of legislation to the center, and the doctrines of repugnancy and severability all serve to harmonize legislation and statutes according to the preferences of the central government. Articles 249 and 250 specify the conditions under which the Union Parliament is empowered to pass legislation that is ordinarily allocated exclusively to the states in List 2 of the 7th Schedule. Responsibilities for the protection and implementation of the Fundamental Rights and Directive Principles of State Policy, enumerated in Parts I, II, and IV of the

Constitution (Articles 12 through 51) lay with the central government, as does the ultimate responsibility for the protection of minority groups.

While the states and the center have concurrent powers over criminal and civil procedure, the Codes of Civil and Criminal Procedure, the Indian Penal Code, and other administrative and legal statutes derived from the colonial Anglo-Indian codes are all promulgated and revised at the central government level.

The Supreme Court's appellate jurisdiction requires it to consider and reconcile contradictory decisions that are issued by the High Courts, which are the equivalent of State Supreme Courts. In India's integrated judicial system, there is no appellate judiciary separate from the High Courts.

2. *Unification through Formal or Informal Voluntary Coordination among the Component States (Bottom Up***)**

There are no formal mechanisms for coordination among the states, and there appear to be relatively few informal mechanisms as well. Yet High Court justices of a component state will regularly refer to the decisions of their counterparts in their opinions.

3. *Unification through Non-State Actors*

By far the most important non-state institution contributing to legal unification is the Law Commission. The Law Commission of India was established in 1955 and given responsibility to recommend revisions of laws inherited from the colonial period. Since that Commission concluded its three-year term in 1958, sixteen Commissions have succeeded it, issuing over 200 reports with recommendations for revisions that include harmonization and unification of existing laws. The Commission considers, among other issues, disparities among High Court decisions: for example, Report #136 examined "Conflicts in High Court Decisions on Central Laws - How to foreclose and how to resolve."

In addition to the Law Commission, there is also the Indian Law Institute, which is a quasi-independent research and training institute with university-level status. It trains LLM and PhD students, holds workshops and seminars, and publishes a law journal.

4. *The Role of Legal Education and Training in Unification*

Legal training in India contributes to the unification of law. There are two forms of legal training in higher education, the traditional three-year law curriculum and the more recently established specialized law institutes. The curricula of both types of institutions are regulated and supervised by the Bar Council of India. Legal education focuses almost exclusively on system-wide law.

As with other institutions of higher education, law colleges tend to attract students from the states in which they are located. The specialized law universities draw students from throughout the federal system.

The Bar Council of India supervises and regulates admission to the bar, which is system-wide. Once an applicant has finished the legal training requirements and successfully passed the Bar Council examination, he is eligible to practice throughout India. Practically speaking, the vast majority of advocates practice in their home states and localities

The Indian Law Institute and the specialized universities have taken a leading role in providing LLM and PhD training which are more closely comparable to North American law schools. Supreme Court Justices

usually select their clerks from the specialized law universities. Justices of High Courts may sit as Acting or Additional Justices on other state High Courts (Article 224A).

5. *External Influences on Unification*

Indian Courts are frequently aware of and sensitive to international legal obligations when issuing rulings, but the overall impact is difficult to quantify. Indian legal professionals regularly participate in international projects, through the UN agencies and other organizations, but the overall impact is difficult to quantify.

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

The Constitution of India grants the Supreme Court original and appellate jurisdiction in reviewing the constitutionality of legislation, as well as disputes between the Union Government and the states or between states. It is the final appellate court for all cases arising from the states. There are subordinate courts at the state level, and each state has a High Court, which has both original and appellate jurisdiction. There are no central trial courts apart from the Supreme Court, which has original jurisdiction over a number of issues and functions as a trial court.

The Supreme Court has asserted its authority over constitutional issues from the first year of its inception, when it struck down all or part of central and state laws regarding acquisition of property and preventive detention on the grounds that they violated the Fundamental Rights provisions of the Constitution. The Courts battled the executive branch throughout the 1950s and 1960s on the issue of compensation for acquired property and asserted its primacy over constitutional issues in Golak Nath and others v. State of Punjab (1967). In that decision, the Court asserted that there was a "basic structure" to the Constitution and that Parliament's amending power did not encompass the abridging of the Fundamental Rights provisions. In 1971, after a landslide victory, Indira Gandhi's Congress-dominated Parliament responded by passing three constitutional amendments that specifically granted Parliament the rights that Golak Nath had curtailed. Two years later, in Keshavananda Bharati v. State of Kerala (1973), the Court overruled many of the holdings of Golak Nath but retained its insistence on the basic structure argument, of which the most important components were the Fundamental Rights. The Parliament retaliated by ignoring the norms by which Chief Justices were selected and by passing amendments which explicitly revoked the Court's power of judicial review. The authority that the Court lost in these amendments was restored by the post-Emergency Janata Government in 1977, and in the 1980 Minerva Mills v. Union of India case, the Court and the recently reelected Congress government compromised by accepting the basic structure argument for Fundamental Rights while removing the right to property from that list.

While the above cases have been crucial in limiting the potentially unchecked power of the Union Government, the Supreme Court has been less aggressive in challenging another arena in which the center has dominated the states. Article 356 provides for the dissolution of state governments by the President of India in the event of a "breakdown of the constitutional machinery." This Article, which was carried over from the colonial Government of India Act, was hotly debated in the Constituent Assembly amid fears that it would be used for political purposes rather than as a power of last resort. These fears have been realized, as President's Rule has been invoked to dissolve elected state governments more than 100 times; an expert observer estimates that over half of these uses have been political rather than necessary according to the stipulated constitutional conditions. Nevertheless, while the Supreme Court has occasionally challenged the imposition of President's Rule, it has done so with great caution at best and great timidity at worst.

2. *Relations between the Central and Component State Governments*

In addition to its constitutional authority to legislate on state issues, the central government has authority to legislate on issues from List 2 of the 7th Schedule that pertain to two or more states. Parliament does not have the power to compel a single state to legislate on issues relevant only to that state. Historically, the dominance of the Congress party at the central and state levels has led to uniformity between the two, but with the advent of coalition governments and strong state-centric parties, the formal boundaries may be more frequently tested.

Central government law is executed by central agencies as well as by the component states. For example, certain taxes are levied by the central government but collected and remitted back to the center by state agencies. The Finance Commission and the Planning Commission require states to execute aspects of the five-year plans, which are centrally devised. Analogously, criminal and civil procedures are concurrent list subjects, and the laws are promulgated by the center, but the judicial administration below the High Courts is the responsibility of the component states.

The *Rajya Sabha*, or Council of States, which is the upper house of the bicameral Union Parliament, represents the states in the central government. It is elected by members of the state legislative assemblies. The number of members per state is determined by a method of proportional representation.

Both the central and component state governments have the power to tax, but the majority of taxing authority lies with the central government. The specific areas of taxation are stipulated in the Lists of the 7th Schedule. To date, the central government's dominance in taxation has meant that multiple taxation across state levels has not been an issue. With the economic reforms and political decentralization of the last decade, however, this relationship may change.

Articles 268 through 293 specify the distribution of revenues between the central government and the states. The Finance Commission, which is a constitutionally mandated ministry, is responsible for distributing financial resources according to the mandates of the Directive Principles and other provisions in the constitution. Of historically greater importance is the Planning Commission, an extra-constitutional organization which is responsible for formulating and implementing five-year Plans. The bulk of national revenues are allocated according to Plan directives. While state leaders are frequently members of the Planning Commission and wield influence in the Plan process, there are no formal channels through which all states' interests are expressed.

3. *The Bureaucracy*

There are national Civil Services (e.g., Indian Administrative Service, Indian Police Service, Indian Forest Service) and analogous state-level bureaucracies. Members of the national civil services may be assigned either to the central government or to state-level "cadres."

There is very little mobility between the two civil service systems. The exams are separate and the status of the all-India services is much higher than that of the state services. Since exams are taken by applicants in their 20s, it is difficult to shift from one to the other.

4. *Social Factors*

India is an extremely heterogeneous nation, and its heterogeneity is one of the factors behind the founding elites' choice of a federal system. The 8th Schedule of the constitution lists 18 official languages, not including English, and this linguistic heterogeneity reflects regionally specific ethnic identities. The

Census of India enumerates six distinct religious affiliations, of which Muslims and Sikhs comprise the largest proportions. The Constitution recognizes and categorizes the lowest categories of the Hindu caste system and the aboriginal population as Scheduled Castes and Scheduled Tribes respectively; these groups are granted reserved seats in parliament as well as affirmative action in national institutions of higher education and public employment. Reservations are roughly according to their percentage of the population, which is 14 percent and 7 percent respectively. In addition, the Supreme Court, the Union Parliament, and several State Assemblies have recognized other low-caste groups, termed Other Backward Classes (OBCs) and provided affirmative action in higher education and employment at the national levels and within analogous state institutions in some (but not all) states.

Some groups are relatively evenly dispersed throughout the federation, although they are more numerous in some states than others; Muslims, Christians, Scheduled Castes and Scheduled Tribes fall into this category, since they are found in every state. Other groups are more concentrated; Sikhs, for example, are overwhelmingly found in Punjab state and more recently in Delhi state. The northeast states are disproportionately composed of Scheduled Tribes. OBC populations vary by state, and both the historical experiences and the extent of the population affect the likelihood that state-level affirmative action policies will be promulgated.

The linguistic/regional distinctions were a major impetus behind the Linguistic Reorganization of the States Act of 1956, which redrew subnational boundaries to reflect linguistic patterns of settlement. Other new states have been created in response to demands by ethnic groups, whether linguistic, tribal, or religious, most prominently the creation of the states of Punjab and Haryana and the creation of new states in northeast India.

Despite repeated statements by the central government since the 1950s to the effect that Plan expenditures are designed to ameliorate asymmetries between states, rich states have remained rich and poor states have tended to remain poor. While some poorer states have become more prosperous, the overall divisions have stayed relatively stable since independence. The central government recognizes this distinction and categorizes certain particularly disadvantaged states, as “special states” in economic statistics; this designation is correlated with greater central government support. The decentralization and economic reforms that began in the 1990s have exacerbated these differences at the same time that Plan expenditures are becoming proportionately less important and states are able to exercise more financial entrepreneurship.