

A REALITY CHECK ON COOPERATIVE FEDERALISM

Relevant for: Indian Polity & Constitution | Topic: Issues and challenges pertaining to the Federal Structure

Since at least 1974, when the Supreme Court commented on the Constitution envisaging a cooperative federal structure, federalism has come a long way in India. In relation to the imposition of President's rule under Article 356 of the Constitution, federalism is far more mature. Between 1947 and 1977, there were 44 instances when the power to impose President's rule was exercised.

Federalism and fairness

Between 1977 and 1996, the power was exercised almost 59 times. Prime Minister Indira Gandhi's cabinet resorted to the power an estimated 50 times in her 14 years. The fact that it includes 15 instances between 1980 and 1984 after the Supreme Court held federalism a basic feature of the Constitution is quite telling. From 1991 till 2016, there have been 32 instances of the exercise of this power — compared to 92 instances in the preceding period. In *S.R. Bommai v. Union of India* (1994), the limitation laid down by the Supreme Court might have placed gentle breaks on exercise of this power, but the Centre continues to wield superior legislative powers, including residuary powers and legislative precedence.

These are powers the Central government enjoys under the Constitution and States' legislative powers have routinely yielded to the Centre. Given this constitutional framework, what is the cooperative federalism that one can hope for?

Recently, in *Govt. of NCT of Delhi v. Union of India*, the Supreme Court gently tilted the balance of executive power in favour of the Government of the National Capital Territory *vis-à-vis* the Lieutenant Governor (and by extension, the Centre). However, the court's observations on cooperative federalism were stating the obvious considering members of both cabinets take an oath to uphold the Constitution. The facts behind the case and the acrimonious litigation, which the Supreme Court did not examine in its July 2018 ruling, clearly bring out the yawning gap between the Constitution's intent and political reality.

Taxation powers are another contentious issue and the Central government has won most of the disputes purely due to express provisions in the Constitution. In the Goods and Services Tax (GST) scenario, States have foregone some taxation powers (octroi, entry tax, luxury and entertainment taxes, etc.) but have powers to levy taxes through panchayats and municipalities.

Federalism that's not cooperative

Such powers can result in an anomalous situation of a transaction being taxed under GST laws and a local law, and this is yet to be tested in court. After the GST amendments to the Constitution, States have power to levy tax on sale of petrol, diesel, etc. and these would be revenues of the respective States. However, the GST Council is yet to recommend inclusion of these items under GST.

This brings us to another key dynamic that defines the Centre-State relationship — sharing of taxes. The southern States have been vocal about the false positives and negatives from tax sharing and this mechanism is largely subject to the recommendations of the Finance Commission (FC) and action by Parliament. State levies and State GST form part of a State's revenue. Under Article 269A(1) the GST Council — and not the FC — has the powers to make recommendations in relation to sharing of taxes from inter-State trade.

The distant goal of cooperative federalism

This is important since States have a vote in the GST Council. However, Articles 270(1A) and 270(2) provide that taxes levied under the GST laws will be shared in the manner 'prescribed' in Article 270(2) — which takes us to the FC, and not the GST Council. The possible anomaly between roles and powers of the FC and the GST Council has not been tested but it may make sharing of these revenues subject matter of the FC and Parliament rather than the GST Council, where States have more power.

States don't merely seek parity with each other, historically States have also sought parity with the Centre (Sarkaria and Punchhi Commissions). Recommendations of the FC are placed before Parliament and States have no role in the debate. There is no provision for an aggrieved State to challenge the FC report or seek its enforcement. If the Centre refuses to make allocations as per the GST Council, or if a State is aggrieved by the recommendations itself, an aggrieved State would have to litigate in the Supreme Court as it appears that the GST Council is yet to establish a mechanism for resolving differences in terms of Article 279A(11). In 68 years of the Constitution, there is limited precedent for such extreme actions. In an era of coalition politics, this would be a true test of cooperative federalism.

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