EVOLUTION OF FISCAL FEDERALISM IN INDIA

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I Introduction

Federalism is the theory or advocacy of federal political orders, where final authority is divided between sub-units and a center. Unlike a unitary state, sovereignty is constitutionally split between at least two territorial levels so that units at each level have final authority and can act independently of the others in some area. As a theory of nation-building, federalism seeks to define state-society relationships in such a manner as to allow autonomy of identity of social groups to flourish in the constitutionally secured and mandated institutional and political space. The federal constitution recognizes the special cultural rights of the people, especially the minorities. Federalism tries to facilitate the sociopolitical cooperation between two sets of identities through various structural mechanisms of 'shared rule'.

There are provisions which don't make Indian Constitution to be a federal in the sense of American Constitution. Though, it is said that within India, neither the Union nor the states enjoys [absolute] internal sovereignty due to the division of powers between the Union and the States in which both the Governments have plenary power within their assigned sphere, there exist certain provisions in the Constitution which are considered to be going against the principle of federalism.

For example, article 200 of the constitution in which it is said that certain bills passed by state legislatures may be reserved by the governors for the consideration of the president of India. The another article which is considered to be a deviation from the principle of federalism is Articles 356, 352 and 360 which gives the power to the president to declare emergency, which can transform federal system into a unitary system; however the provision is meant for temporary and can be used only under certain exceptional situations under certain restrictions created through judicial intervention, there are many circumstances in which the central government has used this power to dissolve the state governments of the opposite parties and to remain in power at the centre.

In fiscal parlance, a Federation pre-supposes two coalescing units: the Federal Government/center and the States/Provinces. Each is supposed to be supreme in the sphere allotted to it/them. Power to tax is an incident of sovereignty. Basic premise is that one sovereign cannot tax the other sovereign. Articles 285 and 289 manifest this mutual regard and immunity but in a manner peculiar to our constitutional scheme. While the immunity created in favour of the Union is absolute, the immunity created in favour of the States is a qualified one.

This paper is organized as follows: Section1: Fiscal Federalism, Section 2: Emergency provisions under Indian Constitution, Section 3: Amendment power of the Constitution, Section 4: Separation of Powers. Section 5: Citizenship, Section 6: Structure of judiciary and concludes.

II. Indian Position

Section 1: Fiscal Federalism

1. Evolution of fiscal federalism in India

A federal system is one which provides a mechanism which unites separate politics within an overarching political system so as to allow each unit to maintain its fundamental political integrity. In other words, federalism provides for a convenient and workable arrangement to units political forces with certain 'non-political' forces such as sociological, psychological, economic etc. The traditional theory on federalism ignores such inter-dependence of the centre and the various units since it paid scant regard to the direct influence of government's policy output on the policy outputs of other government's through persuasion, influence and bargaining and implicitly assumed that the demands made by each electorate on its respective governments were separate and independent as between governments. The modern feature of federalism is markedly different from the traditional theories since the decision making and the decision executing processes are influenced and determined by means of bargaining power, influence and skill in the midst of supreme position of centre. The Centre in the present scenario has an unmistakable tendency to centralize power and superior capacity of

units inter se by virtue of their respective proposition – demographic, strategic, economic, political etc. besides the traditional notion of mutual participation of national and regional governments.

This form of new federalism has been part of a worldwide trend during the last century wherein federal authorities regulate all aspects of a citizens life and federal prominence has become the dominant socio-legal theme in countries like USA, Australia, Canada and India. But the Indian Constitution provides for a flexible framework within the jural postulates which the community is expected to realize and cherish the values of democracy by making it more meaningful by direct and responsible participation through the process of decentralization. Maximization of decentralization of the developmental functions has formed the basis of the Indian body politic. It is the Indian Constitution which could envisage an administration with elected bodies controlling the permanent services at the centre and State level.

The growth of fiscal autonomy of the states could be described as a process of evolution from status to contract and from contract to contribution. The history of financial relations in India starts from the year 1858, when the Secretary of State-in-council exercised absolute control over the expenditure of revenue in India, which was one and indivisible and negative the concept of provincial revenue. If the year 1933 marks the beginning of the process of centralization of finance in India, the year 1858, marks the beginning of gradual process of devolution of financial powers from the centre to the states. In the year 1870, the provinces were given fixed grants and in the year 1882, a system of allocation of a portion of revenue to the provinces was adopted. The principle adopted in 1882 contained the genesis of the present system of fiscal relations in India.

A. <u>Public finance</u>

The question of distribution of resources between the Centre and the units has always presented unusual difficulties in all Federations. The difficulties experienced by the fathers of the Australian Constitution owing to intense jealousy of independent states with pronounced economic interests show that economics unite as well as divide communities and countries. I

India, thanks to the adoption of the proposals of Montague-Chelmsford Report, provincial system of finance have been gradually built-up. In required supervision by the Centre then and even now.[1]

The Indian constitution envisages a four fold classification of Tax sharing viz. Arts. 268, 269, 270 and 272. The proceeds attributable to the share of states under the third category viz. Art 270, tax on agricultural income excluding Corporation Tax though levied and collected by the union government has to be shared, do not form part of the consolidated fund of India. While, under the fourth category i.e. Art. 272 by which Excise Duty levied and collected by the Union Government, any share to be given to the states has not to be taken out of the Consolidated Fund of India, except appropriation Acts passed by the Parliament. In the words of Granville Austin, these provisions make the Union Government a banker, collector and distributor of taxes and as the donor of grants.

The merit of Indian scheme of allocation of taxing powers is that it seeks to avoid the complexity of overlapping and multiple taxation such as have arisen in other federations. The key note of the Indian Constitution is to secure an almost complete demarcation and dichotomy between the taxing powers of the Centre and the states so that the tax leviable by the Centre is not leviable by the States.

B. <u>Indian constitution-organic federalism</u>

"India would not be a federal state but a decentralized unitary state."

- BN Gupta

The consensus in the Constituent Assembly in favour of a federal polity was so overwhelming that, despite the departure from the original intention of creating a federatopjn with minimum central interference, the object of the constitution makers remained use of the language adopted in a famous privy council judgment "neither to weld the provinces into one nor to subordinate the provinces to the Central authority, but to create a federal government in which they should be respected"[2]. However, it has not prevented or stopped the political

[1] May R.J., Federalism and Fiscal adjustment (Oxford, 1969), p.161
[2] D.K. Sen, A Comparative Study of the Indian Constitution, Vol-1, Calcutta, 1967, p.27

leaders and Constitutional experts from continuing to debate the question, whether or not Indian Constitution is federal. Alexandrowicz stated that, "India is undoubtedly a federation in which the attributes of sovereignty are shared between the state and the centre. The supreme court of India has treated the Constitution of India as a Federal Constitution."[3]

On the other side, the federal character of the constitution has been disputed by some people namely – K.C. Wheare (who described the Indian Constitution as quasi-federal), later even followed by Sir Ivor Jennings and Allen Gledhill. Mr. Krishna Mukherjee on the contrary contended that, Indian Constitution is definitely un-federal or unitary Constitution".[4]

Under the Constitution, there is a three-fold distribution of legislative powers between the Union and States viz. Union list, State list and Concurrent list. The Parliament has exclusive power to make laws on subjects enumerated in list-I or Union list, states are competent to make laws on subjects enumerated under list-II or state list while both the Parliament as well as the State legislature has the power to legislate on subject covered under list-III or concurrent list.

It is pertinent to note that the parliament has residuary powers to make laws on any matter not enumerated in the state list or the concurrent list. Such powers include the powers to make laws for imposition of tax not stated in either of the above lists.

The constitution has to a large extent followed the allocation of revenue between the centre and the states on the lines as provided under the Government of India Act, 1935. With the entry of the former Indian states into a federation, the question of both allocation of revenue and distribution of grants-in-aid has become difficult and of vital importance. The allocation of revenue under the Indian Constitution is as under:

Union List/ List-I

1. Taxes on income other than agricultural income. (Entry 82)
2. Duties of customs including export duties. (Entry 83)
3. Duties of excise on tobacco and other goods manufactured or produced in India except—

[3] Alexandrowicz C.H. Constitutional developments in India, Madras 1957, p.169
[4] Krishna P. Mukherjee "Is India a Federation?" Indian Journal of Political Science Vol XV No.3, July, Sept. 1956 p.177

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. (Entry 84)

4. Corporation tax. (Entry 85)
5. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies. (Entry 86)
6. Estate duty in respect of property other than agricultural land. (Entry 87)
7. Duties in respect of succession to property other than agricultural land. (Entry 88)
8. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights. (Entry 89)
9. Taxes other than stamp duties on transactions in stock exchanges and future markets. (Entry 90)
10. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. (Entry 91)
11. Taxes on the sale or purchase of newspapers and on advertisements published therein. (Entry 92)
12. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. (Entry 92A)
13. Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce. (Entry 92B)

Besides the above-list, the other sources of revenue of the Union are as under:

1. Railways (Entry 22)
2. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and

regulation of such education and training provided by States and other agencies. (Entry 29)

3. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication. (Entry 31)
4. Property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save in so far as Parliament by law otherwise provides. (Entry 32)
5. Public debt of the Union. (Entry 35)
6. Foreign loans. (Entry 37)
7. Reserve Bank of India. (Entry 38)
8. Post Office Savings Bank. (Entry 39)
9. Lotteries organized by the Government of India or the Government of a State. (Entry 39).
10. Fees in respect of any of the matters in this List, but not including fees taken in any court. (Entry 96).

On the other hand, the sources of revenue for the states as enlisted under the State list/ List-II could be enumerated as under:

1. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues. (Entry 45).
2. Taxes on agricultural income. (Entry 46).
3. Duties in respect of succession to agricultural land. (Entry 47).
4. Estate duty in respect of agricultural land. (Entry 48).
5. Taxes on lands and buildings. (Entry 49).
6. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. (Entry 50).
7. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—
8. (a) alcoholic liquors for human consumption;

9. (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. (Entry 51).
10. Taxes on the entry of goods into a local area for consumption, use or sale therein. (Entry 52).
11. Taxes on the consumption or sale of electricity. (Entry 53).
12. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. (Entry 54).
13. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television. (Entry 55).
14. Taxes on goods and passengers carried by road or on inland waterways. (Entry 56).
15. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III. (Entry 57).
16. Taxes on animals and boats. (Entry 58).
17. Tolls. (Entry 59).
18. Taxes on professions, trades, callings and employments. (Entry 60).
19. Capitation taxes. (Entry 61).
20. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. (Entry 62).
21. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. (Entry 63).

The list of entries enlisted under the concurrent list could be enumerated as under:

1. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied. (Entry 35).
2. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty. (Entry 44).
3. Fees in respect of any of the matters in this List, but not including fees taken in any court. (Entry 47).

The very categorization of the taxing powers between the Centre and the states demonstrate a novelty in form of federation adopted under the Indian Constitution demonstrates a novel approach. The states which are not self-sufficient so far as their finances, certain tax revenues which are raised by the Centre are then are shared with the states. In this regard, Article 268 to 281 is very significant.

Article 268 and 269 refers to duties levied by the Union but collected and appropriated or assigned to States. The proceeds so collected by the Central Government do not form part of the Consolidated Fund of India and has to be assigned or appropriated by the states respectively.

Article 270 contemplates Taxes levied and distributed between the Union and the States. As prescribed by the President by order after considering the recommendations of the finance commission. The tax buoyancy under the Constitution could be augmented by the Union in exercise of its powers to levy surcharge on certain duties and taxes which shall form part of the Consolidated Fund of India.

Article 274 of the Constitution provides that any Bill, which purports to amend or vary Union Taxes or Duties in which the States are interested, can be moved in the Parliament only on the recommendation of the President of India. The States are interested in all the Union Taxes and Duties except the surcharge on such taxes and duties. Article 274 speaks only about the Bill to amend or vary the Union Taxes and Duties. It doesn't impose any restriction on the Union Government's executive power to reduce or exempt any tax or duty to any class of persons or transactions. Exemption or reduction in the rates of taxes or duties is ordinarily granted through Government Notifications in exercise of the executive power of the Union Government. Plenty of notifications are issued by the Union Government granting exemptions or reduction in the rates of taxes or duties to various classes of taxpayers. The mandate under Article 274 is circumvented by the exercise of the executive power of the Union. Since the exemption or reduction is done through the Government Notifications, the States are unaware of it and they art: ignorant about the amount involved in such exemptions and reductions. Unless some check is imposed on this power, the purpose of Article 174 will

not be served. The Union Government should not have any executive power to exempt or reduce the rates of any tax or duty through a Government Notification. Any such exemption or reduction could be granted only through the Finance Act of the Union. A separate chapter in the Finance Act can be devoted solely for this purpose. The provisions in the Union enactments, which empower the Union Government to issue notifications to exempt or reduce the rates of taxes to any particular class of taxpayers, could be deleted.

Grants-in-aid have been provided in the Indian Constitution under various Articles. Article 275 is intended to be permanent and is also, partially, in the purview of the Finance Commission (Article 280). Article 275 provides for the payment of such sums as Parliament may by law provide as grants-in-aid to such States as Parliament may determine to be in need of assistance. Different sums can be toed for different States. These grants are to be in the nature of capital end recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by it with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State.

In respect of Assam the 2nd Proviso requires the payment of grants, capital and recurring, equivalent to the area excess of expenditure other the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the Tribal Areas specified in Part A of the table in paragraph 20 of the Sixth Schedule, and the cost of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of these areas to that or the administration of the rest of the areas of that State. The amounts of such grants are to be determined by on order of the President until provision is made by Parliament. After a Finance Commission has been constituted the grants will be made by the President on the recommendations of the Finance Commission.

Article 280 provides for transfers from the Centre to the States in the form of tax devolution and grants-in aid through the institution of CFC constituted every five years. Dr. Ambedkar

in his PhD thesis of 1923 titled "*The Evolution of Provincial Finance in British India" provided academic basis for the Finance Commission of India which was subsequently established through Article 280 of the Constitution to address problems of vertical and horizontal imbalances in finances.*" [5] Article 280 is the only difference between the Government of India Act, 1935 and the Indian Constitution with regard to the distribution of financial powers between the Central and the State governments. The Commission is visualized as a semi-judicial body and is entrusted with the twin responsibilities of apportioning Central Government revenues between the Centre and the States on the one hand and among the individual States on the other. But, over the years, the impartial arbitrator's role of the FCs is being undermined by the Central Government in a number of ways. The turf of this constitutional body had been encroached upon to a large extent, by the Planning Commission, an extra constitutional body and the Union Ministries during the plan era.

Article 281 stipulates that, the recommendations of the Finance Commission alongwith an explanatory memorandum as to the action taken thereon needs to be laid before each House of Parliament.

Article 282 provides that, both Union and the States have the authority to make "any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case maybe may make laws", this was put among "Miscellaneous Financial Provisions", and was not thought of as the main or even principal provision to ensure the appropriate financial relationship between the Union and the States. It is also well-known that Article 282 closely follows Section 150 of the Government of India Act (1953), which section was also placed under "Miscellaneous Financial Provisions". The main use which was made of this Section, it is also well-known, was for granting special assistance by the Central government to Bengal in connection with the famine of 1943. Ad hoc grants were also later on given under this Section for purposes like

[5] Speech by the President of India, Shri Pranab Mukherjee delivering Dr. B.R. Ambedkar Memorial Lecture 2014 on 'vision of india in 21st century, as envisaged by DR. Ambedkar' at Vigyan Bhavan, New Delhi: September 4, 2014

growing more food, post-war development, and relief and rehabilitation. It is thus obvious that this provision, which is virtually repeated in Article 282, was always meant to serve the purpose of ad hoc grants which had to be made for contingencies and unforeseen requirements. If there was any idea that grants on regular footing were to be made by the Union government to the State governments which would lie outside the scope of the Finance Commission, such provision should have logically been made in that part of the Constitution which deals with the "Distribution of Revenue between the Union and the States", and surely not under "Miscellaneous Financial Provisions".[6]

C. <u>Inter-governmental tax immunities</u>

The doctrine of immunity of instrumentalities, applied in all federations to some extent, may be characterized as the doctrine of good neighborliness. With two tiers of government having autonomous powers working side by side in the same community, it is possible that their operations may cross and intersect each other at some points., Sometimes, powers of one government may be exercised in a manner as to cause hindrance to the activities of the other. It is to avoid some of these contingencies, which may otherwise cause irritations amongst the governments in, a federation, that the doctrine of immunity has been evolved. It was first expounded by the U.S. Supreme Court in ***McCullocb v. Maryland***[7] to protect the Central Government, then rather a weak entity, from hostile action of the State Governments. The general nature of the theory of inter-governmental tax immunity and its historical background in India under the Government of India Act, 1935, the position under the Constitution of India under Article 285, the immunity of the Union Government, immunity in relation to railway property and the immunity of State Governments under Article 289 are all subjects of study in Part V. The question whether such immunity from taxation is available to statutory corporations, created by the Parliament and State legislatures, the narrow meaning given to the term "property" appearing in Article 289 by the Supreme Court of India and the other constitutional provisions dealing with immunity from taxation are dealt with.

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[6] The Task of the Ninth Finance Commission The Planning Commission Tangle, H.K. Paranjape

[7] 4 Wheat. 316 (1819)

Property of the Central Government, whether used for business or government purposes, is immune from the State taxation except where Parliament provides otherwise. On a reciprocal basis, the Centre is barred from levying a tax on State property and income, excluding the property used for trade or business or income derived therefrom, but Parliament may declare any trade or business as incidental to government and thus make it immune from the Central taxation. There is an interesting difference between the exemptions granted to the Centre and the States from each other. While all types of property of the Centre are exempt from the State taxation, commercial property of the States is not so exempt from the Central taxation. Also, while State income is exempt from the Central taxation, a similar immunity has not been extended to the income of the Centre from the State taxation, the reason being that the States have no power to tax income except agricultural income, and so the Centre needs no such protection.[8] A few other restrictions imposed on the States may be noted.

A State law levying a tax in respect of water or electricity stored, generated, consumed, distributed or sold by any authority established under a law of Parliament, needs the assent of the Centre.[9] Generally, the States are to exercise their executive power so as to comply with the Central laws and are not to impede or prejudice the exercise of the Union executive power[10], and the Central Government is entitled to give any directions to a State for the purpose, The Centre can thus remove any Obstruction caused by a State in the way of its exercising its legislative or executive power. As a matter of abundant caution, it has been laid down that when a government carries on a business outside its law-making powers, it would be subject to the lawmaking powers of the other government having such powers)[11].

The courts in India have refused to extend the area of exemptions in favour of the Centre or the States beyond what the above-mentioned provisions specifically lay down. The matter was raised in the leading case, ***West Bengal v. Union of India***)[12] The Union Parliament enacted the Coal Bearing Areas (Acquisition and Development) Act, 1957, authorizing the

[8] Arts. 285 and 289;
[9] Art. 288; Similarly, the States are barred- from levying a tax on electricity consumed by the Government of India or consumed in running railways by that Government except to the extent provided by law by Parliament
[10] Arts. 256 and 257;
[11] Art. 298; note 95
[12] AIR 1963 SC 1241.

Centre, to acquire coal bearing lands including those vested in the States. The validity of the Act was challenged by the State of West Bengal, the main issue being whether the Centre could acquire State-owned lands. By a majority, the court ruled that it could. Under entry 42, List III, Parliament has power to legislate with respect to acquisition and requisitioning of property.

The power is plenary and is subject to express, and not any implied, interdicts. The court refused to read any restriction on this power on the ground of the doctrine of immunity of instrumentalities)[13].

In re Sea Customs Act, S. 20 (2)[14], the question raised was whether exemption granted to the State property from Central taxation would extend to immunize imports and manufactures by the States from Central customs or excise duties. Answering in the negative, the court held that the constitutional exemption in regard to the State property extended to a tax levied directly on property and did not cover a tax affecting the State property indirectly. The duties of customs, held the court, were not a tax on property but an impost on imports which formed an essential aspect of the Central power to regulate foreign trade. Similarly, excise is not a tax on property but on the process of manufacture and production. In taking this approach, the court was helped by similar views propounded by the courts in Canada and Australia)[15].

The scope of exemption of State income from Central taxation was tested in ***Andhra Pradesh State R.T. Corp. v. Income-tax Officer***)[16], in which the court held that a corporation had a personality of its own, distinct from its shareholders and so also from its creator, the State. Therefore, the income derived by a corporation could not be regarded as the income of the

[13] Justice Subbarao, in his dissenting judgment pleaded for the operation of the implied doctrine that the Centre and the States "cannot encroach upon the governmental: functions or instrumentalities of the other, unless the Constitution expressly provides for such interference";
[14] AIR 1963 SC 1760
[15] In Canada, implied theory of immunity was rejected by the Privy Council, Bank of Toronto v. Lambe, 1887 A.C. 575. In Australia the High Court first applied the doctrine but then rejected it: Amalgamated Society of Engineers v. Adelaide Steamship Co., 28 C.L.R. 129. In both countries, property of governments are exempted from taxation, but this has been held as not exempting imports from levy of customs duty: Att. Gen. of Br. Columbia v. Att. Gen. of Canada, 1924 AC 222; Att. Gen. of N.S.W. v. Collector of Customs, 5 C.L.R. 818. Also, M. P. Jain S.N. Jain, Intergovernmental Tax Immunities in India, 2 Jl. of ILI, 101 (1960)
[16] AIR 1964 SC 1486

State, and the constitutional provision exempting State income from Central taxation could not be extended to grant exemption to the income of a corporation. It made no difference that under the relevant law the corporation was required to turn over a part of its income to the State to be spent on road development, as this did not render the corporation's income as that of the, State. The above cases reveal that the judicial attitude has been to interpret the exemptions from Central taxation granted to the States rather restrictively so as not to hamper the Centre in the collection of its tax-revenue. Vice-versa, a similar interpretation would be placed on the exemption granted to the Centre from State taxation, but the matter has not been tested in a court as yet.

D. <u>Conflicts in Union-State fiscal relations</u>

The Indian Constitution has all the features of a federation with the specification of financial powers and functional responsibilities of the Centre and the States and the institutions needed for a federal structure and a well defined mechanism for intergovernmental transfers to address vertical and horizontal imbalances which characterize most federations.

Inter-Governmental sharing of financial powers and the resultant fiscal transfers has always been controversial in a federal system. To some extent, the issue is unavoidable. The transfers are needed not only to correct the inherent fiscal mismatch between the revenue sources and expenditure needs of the federating units, but also to reduce the possible inequalities with respect to their revenue-capacities and unit costs of providing public goods and services. Several transfer methods are in vogue in countries that have explicitly adopted the federal form of the government. Yet, the issue of devising an appropriate transfer mechanism aimed at reducing the fiscal imbalances - vertically between the central government and provincial governments, and horizontally among different provincial jurisdictions - remains controversial. In several cases the transfers are subject to a great deal of experimentation and frequent modification. Often, the lack of agreement on the criteria has led to dominance of political considerations rather than economic rationale. In India, the determination of the fiscal transfers is a quinquennial ritual undertaken by successive Finance Commissions constituted for the purpose. Yet, the debate shows that an objective transfer

mechanism has eluded the policy-makers so far. Although significant efforts have been made by the last two Finance Commissions to integrate the system of tax devolution and enlarge the divisible pool to include all union taxes, with regard to the horizontal revenue sharing however, not much attention has been paid.

Some of the important and contentious issues raised by States and other stakeholders in the area of Centre-State fiscal relations are discussed below.

a) <u>Vertical Imbalance in Resource Sharing</u>

The States have been nursing a feeling that the resource transfers to them have not been commensurate with their growing responsibilities. As most areas contributing to a broad based growth like agriculture, education, skill development, provision of health services, welfare of weaker sections, etc., are in the realm of States, there is a clear need for assessment of resources in favour of States. The shift in expenditure in favour of the social sectors has added to the expenditure commitments of States. The main issues boils down to the differences in the shares in respect of the two major shared taxes, income tax and the union excise. The differences, to some extent, emanate from the constitutional provision itself (of mandatory sharing of the former and the discretionary sharing of the latter).

For example, the recommended vertical share of income tax went up from 85 per cent (First Commission) to 85 per cent (Seventh Commission) and remained so until the Tenth Commission changed it to 77.5 per cent. As regards the union excises, the recomended vertical share initially went down from 40 per cent (First Commission) to 20 per cent (Third Commission) partly because of the widened divisible pool due to increased coverage. However, as the states dependence on the centre went up, the Seventh Commission thought it fit to restore the share to 40 per cent.[17] The vertical imbalance is closely associated with the issue of non-inclusion of other taxes for transfers which more productive and buoyant.

[17] Federal Fiscal Relations in India: Issues of Horizontal Transfers, JVM Sharma, EPW, 12th July, 1997

b) Regional Imbalances

Growing regional imbalances both inter-State and intra-State are matters of major concern and are counter to the objective of realising the goal of inclusive growth. The National Committee on Development of Backward Areas (B. Sivaraman Committee) drew attention to the large variations in climate, rainfall, topography and soil conditions across the underdeveloped regions and called for a differential approach to address the problems confronting them. The Committee also observed that special area development programmes were more in the nature of palliatives that failed to tackle the root of the problem and that most of the backward regions had potential for growth which could be tapped of certain special initiatives were taken. The Committee recommended that it should be the task of planning to identify the special initiatives suited to each backward region.[18]

A large part of the population lives in the less developed regions in the country resulting in increased migration with its resultant consequences. With public investment constituting less than 20 per cent of aggregate investment in the country, there should be a paradigm shift in the role of the States from being undertaking direct investments to that of facilitating investments in backward regions. The States need improved infrastructural facilities - both physical and human. Since resources at the command of the States are limited, higher central transfers to backward States should be implemented.

c) Compliance and Enforcement Cost of Central Legislation

There are a number of Central legislations, the compliance and enforcement cost of which are entirely borne by the States. Central legislations, such as, the Environment Protection Act, the Wildlife Protection Act, the Forest Conservation Act, the Biodiversity Conservation Act, the Tribal Conservation Act and many other national policies require compliance on the part of States. At present, States are not compensated for the cost of compliance and the revenue loss on account of compliance.

[18] Planning Commission, "Report on General Matters Relating to Backward Areas Development," National Committee on Development of Backward Areas. 1981

The Right of Children to Free and Compulsory Education (RTE) Act, 2009 has mandated provision of free and compulsory education to all the children in the age group of 6 to 14 years. The Act also contains provisions relating to the responsibilities of the Central Government, State Governments and local authorities. The Central Government is entrusted with the responsibility of creating a national curriculum, developing and enforcing teacher training standards and providing State Governments with technical assistance for innovation, research and capacity building.

The main responsibilities assigned to State Governments and the local authorities are provision of free and compulsory education for the children in the age group of 6-14 years, ensuring compulsory admission, providing for the availability of neighboring schools, preventing discrimination of children from weaker sections, provision of infrastructure facilities and maintaining quality of education.

The RTE Act mandates the Central Government to provide grants-in-aid to States towards meeting a percentage of expenditure as may be determined from time-to-time in consultation with the States. Under section 7(4) of the RTE Act, the Central Government may make a request to the President to make a reference to the Finance Commission to examine the need for additional resources to be provided to any State Government so that the said State Government may be provided its share of funds for carrying out the provisions of the Act. The RTE Act has broken new ground in clearly delineating the functional and financial responsibilities of the Central and State Government. There is no such clear delineation of financial responsibilities in other Central legislations, where the States are entrusted with their implementation. Such a model should be adopted for future Central legislations wherein a cost-sharing formulae is envisaged as in the case of the RTE Act. Existing Central legislations where the States are entrusted with the responsibility of implementation could be suitably amended providing for sharing of costs by the Central Government.

d) Service Tax

Service tax is being levied since 1994 by the Centre under its residual powers relating to subjects that are not specified in any of three lists in the Seventh Schedule to the Constitution. With the 88th Amendment of the Constitution, service tax was brought under the purview of Article 268 A (3) under the Union List. Article 268 provides that taxes on services shall be levied by the Government of India and such tax can be collected and appropriated by the Government of India and the States. The Article further provides that the principles of levy and appropriation shall be determined by Parliament.

Till now the sharing of the service tax is on the basis of the recommendations of the Finance Commissions. Once the Constitutional amendment is notified, taxes under Article 268-A would be excluded from the purview of the Finance Commission. Such exclusion of the proceeds of service tax from the purview of the Finance Commission would amount to reversing the pooling of all Central taxes facilitated by the 80th Amendment of the Constitution.[19] With the proposed introduction of GST, service tax will be subsumed under the GST. Therefore, it is unlikely that the 88th Amendment would be notified. In such a situation, any legislation passed by Parliament with respect to appropriation of service tax proceeds should ensure that the revenue accruing to the States through any proposed changes should not be less than the share that would accrue to them, had the entire tax proceeds been part of the divisible pool.

e) Profession Tax

Under Article 276 (2), tax on professions, trades, callings and employments shall not exceed Rs. 2,500 per annum. The limit was raised to Rs. 2,500 by a Constitutional amendment in 1988 from Rs. 250. The Sarkaria Commission recommended raising of the then existing limit of profession tax. As income and salary levels are increasing, a limit on the profession tax constraints revenue mobilizations. In most States, proceeds from profession tax are devolved to the local bodies. There exists a consensus on the need to empower local bodies in terms of financial resources to enable them to discharge their responsibilities.

[19] 12th Finance Commission Report, Govt. of India

f) FRBM Legislation

Parliament passed the Fiscal Responsibility and Budget Management Act (FRBM), to establish a broad framework for the conduct of fiscal policy by setting a medium term target to guide fiscal policy formulation. The framework places an increased emphasis on transparency in budget formulation, implementation and assessment. The FRBM requires the Central Government to eliminate the revenue deficit of GDP. Towards this, the Central government needs to fix annual targets indicating the path of adjustments and required policy measures.

Section 2: Emergency provisions under Indian Constitution

'Emergency Provisions' as laid down in Part XVIII of the Constitution. On the occurrence of certain specified situations, these provisions empower the President to assume various facets of the legislative and executive power of the Union or States (as the case may be), such as would not ordinarily vest with him, in order to combat the given expediency.

The specific situations are as follows: (a) A situation of grave emergency whereby the security of India or any part of its territory is threatened by war or external aggression or armed rebellion. (Art. 352 and related Articles viz. Art. 353, Proviso to Art. 83(2), and Arts. 250, 354, 358 and 359); (b) A situation involving breakdown of constitutional machinery in a State, i.e., where the Government of the State cannot be carried on in accordance with the provisions of the Constitution (Arts. 356 and 357); (c) A situation of 'external aggression' and/or 'internal disturbance' which is not grave enough to satisfy the requirements of either Art. 352 or Art. 356, but nevertheless, calls for other action by the Union pursuant to the first part of Art. 355; and (d) A situation where the financial stability or credit of India or any part thereof is threatened (Art.360).

Dr. Ambedkar when speaking in the context of the proclamation under Art. 356, expressed his views on its use as under: "*I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the*

first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this article."[20]

1. <u>Political Correctives, Warnings and Advisories</u>

Along the same lines as the aforequoted view, the Sarkaria Commission felt that the use of the power under Art. 356 would be improper if the President gives no prior warning or opportunity to the State Government to correct itself, and such warning could be dispensed with only in cases of extreme urgency where immediate action is the only feasible option available to the Union.[21]

The Union may also warn a given State Government that if it does not take some steps to set right a situation moving towards constitutional breakdown, the President would be compelled to intervene under Art. 356.

2. **<u>Actions available to the Governor before Recommending Article 356 Action</u>**

More than one course of action is open to the Governor before submitting a report recommending President's Proclamation under Art. 356. If there is a failure for any reason by one party to obtain the required majority in the Assembly, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. Thus, if there is a doubt as to a ruling party's majority in the Assembly, the Governor may ask the said party to prove its majority by a 'floor test', as recommended by the Supreme Court in the S.R. Bommai. In the Karnataka Assembly situation, the Union while declining to issue a Presidential proclamation under Art. 356 requested the Governor to direct a floor test in October, 2011.22 If such measures prove to be unfruitful, the Governor may consider dissolving the Assembly so that fresh elections may be held, thereby leaving any political deadlock to be resolved by the elector ate. Though the power of dissolution of the Assembly is to be exercised by the Governor on the advice of his Ministry, such advice ceases to be binding on him as soon as the Ministry

[20] 9 Constituent Assembly Debates 133 (1949) note 177
[21] Sarkaria Commission Report, Note 21
[22] CNN-IBN Live, Karnataka CM Agrees to 2nd Floor Test, available at http://ibnlive.in.com/news/ktaka-cm-agrees-to-2nd-floor-teston-oct-14/132891-37.html (Last accessed on November 21, 2014)

loses majority support and the requirement of Art. 164(2) that the Ministry shall be collectively responsible to the Legislative Assembly is no longer fulfilled.

Thus, as per the views of the Sarkaria Commission, if the Governor finds that it is not possible for such a government enjoying majority support to be installed, and if on consultation with the Chief Election Commissioner it is found that it is feasible to hold fresh elections without avoidable delay, he may ask the outgoing Ministry to continue as a caretaker Government. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker Government should be allowed to function, as a matter of convention, in a manner as to merely carry on the day-to-day government and desist from taking any major policy decision.

In the case of ***H. S. Jain v. Union of India***,[23] the Governor's responsibility to take all available measures for the resolution of a deadlock in the Assembly was emphasized, and on finding on the facts that the Uttar Pradesh Governor ignored several legal and constitutional measures to institute a Government with majority support and instead hastily recommended the President's action under Art. 356, the Court set aside the President's proclamation made on the basis of his report. Thus, the President must apply his mind to the Governor's report and examine whether alternative courses of action are available, per the mandate of Art. 355, as was done in October, 2011 when the President directed the Governor to have the majority in Karnataka proved by way of a floor test.[24]

Section 3: <u>Amendment power of the Constitution</u>

Article 368 of the Constitution of India provides for 'Power of Parliament to amend the Constitution and procedure therefore'. An analysis of the procedure prescribed by article 368 for amendment of the Constitution shows that:

[23] (1997) 1 UPLBEC 594

[24] Times News Network, Karnataka Governor Terms Trust Vote Farce, Offers CM Another Chance, available at http://timesofindia.indiatimes.com/india/Karnataka-Governor-sets-Oct-14-as-deadline-for-second-floortest/articleshow/6734816.cms (Last visited on November 21, 2014)

(i) an amendment can be initiated only by the introduction of a Bill in either House of Parliament;

(ii) the Bill so initiated must be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. There is no provision for a joint sitting in case of disagreement between the two Houses;

(iii) when the Bill is so passed, it must be presented to the President who shall give his assent to the Bill;

(iv) where the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States;

(v) such ratification is to be by resolution passed by the State Legislatures;

(vi) no specific time limit for the ratification of an amending Bill by the State Legislatures is laid down; the resolutions ratifying the proposed amendment should, however, be passed before the amending Bill is presented to the President for his assent;

(vii) the Constitution can be amended: (1) only by Parliament; and (2) in the manner provided. Any attempt to amend the Constitution by a Legislature other than Parliament and in a manner different from that provided for will be void and inoperative.

In Golak Nath's case, the Court held that an amendment of the Constitution is a legislative process. A Constitution amendment under article 368 is "law" within the meaning of article 1338 of the Constitution and therefore, if a Constitution amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void.

The Court was also of the opinion that Fundamental Rights included in Part III of the Constitution are given a transcendental position under the Constitution and are kept beyond the reach of Parliament. The incapacity of Parliament to modify, restrict or impair Fundamental Freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

In ***His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala*39**, the Supreme Court reviewed the decision in the Golak Nath's case and went into the validity of the 24th, 25th, 26th and 29th Constitution Amendments. The case was heard by the largest ever Constitution Bench of 13 Judges. The Bench gave eleven judgments, which agreed on some points and differed on others. Nine Judges summed up the 'Majority View' of the Court thus:

1. Golak Nath's case is over-ruled.

2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.
3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.

4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.

5. The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid.

6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The theory of basic structure of the Constitution was reaffirmed and applied by the Supreme Court in ***Smt. Indira Nehru Gandhi vs. Raj Narain*** case and certain amendments to the Constitution were held void.

The concept of basic structure has since been developed by the Supreme Court in subsequent cases, such as Waman Rao case, Bhim Singhji case, Transfer of Judges case, S.P. Sampath

Kumar's case, P. Sambamurthy's case, Kihota Hollohon case, L. Chandra Kumar case, P.V. Narsimha Rao case, I.R. Coelho case, and Cash for Query case.

The Golak Nath case in 1967 had ruled that 'Article 368 as an extension of legislative power under Part XI of the Indian Constitution'. Eventhough that construction was categorically overruled in Kesavananda Bharati's case, Article 368 from thereon began to be largely understood as the repository of constituent power. This view could have been possible on account of the constitutional amendment leading to the inclusion of words 'constituent power' in the text of Article 368 to counter the judgment in Golak Nath. What is truly surprising is how easily these readings of Article 368 could go on to suggest the legislative nature of power or the constituent character of it, but comfortably ignored the very patent and hardly ambiguous amending power that reflected right through the provision. Part XX of the Indian Constitution talks about the amendment of the Constitution and the long title of Article 368 clearly says that Article 368 discusses the "power of Parliament to amend the Constitution and procedure therefore". Because without the Parliament telling us what constituent power is and what are its frontiers, nothing apart from our own conscience prevents us from reaching the conclusion, that the power to divide India, or to make it a Hindu state or even to segregate the Indians on caste is the same as the power of changing salaries of public officials. Similarly, what made the judiciary believe that Article 368, which had till now been used for constitutional amendments, could be at first, a legislative power and then, a constituent power but never an amending power. Many questions to this effect remain unanswered.

Section 4: <u>Separation of Powers</u>

The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the function of another.

In Constituent Assembly Debates Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads:

"There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."[25]

Kazi Syed Karimuddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof. K.T. Shah.

Dr. B.R. Ambedkar, one of the important architect of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus:

"There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature..... There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature."[26]

With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negatived i.e. turned down. In Indian Constitution there is express provision that "Executive power of the Union shall be vested in the President,[27] and the executive power of the State shall be vested in Governor." (Article 154(1) of Indian Constitution). But there is no express provision that legislative and judicial powers shall be vested in any person or organ.

[25] Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959
[26] Ibid 967, 968
[27] Article 53(1) of Indian Constitution

Now we have to see what is the real position in India regarding the separation of powers? President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate Ordinances in order to meet the situation as Article 123(1) says "If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require".

When Proclamation of emergency has been declared by the President due to failure of Constitutional machinery the President has been given legislative power under Article 357 of our Constitution to make any Law in order to meet the situations. A power has also been conferred on the President of India under Article 372 and 372-A to adapt any Law in country by making such adaptations and modifications, whether by way of repeal or amendment as may be necessary or expedient for the purpose or bringing the provisions of such Law into accord with the provisions of the Constitution.

The President of India also exercises judicial function. Article 103(1) of the Constitution is notable in this connection. According to this Article "If any question arises as to whether a member or either of House of Parliament has become subject to disqualification mentioned in clause (1) of Article 102, the questions hall be referred for the decision of the President and his decision shall be final". Article 50 lays emphasis to separate judiciary from executive. But in practice we find that the executive also exercises the powers of judiciary as in appointment of judges. (Articles 124, 126 & Article 127). The legislative (either House of Parliament) also exercises Judicial function in removal of President (Article 56) in the prescribed manner.14 Judiciary also exercises legislative power, High Court and Supreme Court are empowered to make certain rules legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy it declares the same null and void, and then amendments may be incorporated in the Legal System. Some time High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character.

In re Delhi Law Act case[28] Hon‟ble Chief Justice Kania observed:

"*Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?*" To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon‟ble Chief Justice B.K. Mukherjea observed:

"Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?" To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon‟ble Chief Justice B.K. Mukherjea observed:

"*The Indian Constitution has not indeed recognised the doctrine of separation of powers in the absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State of the functions that essentially belong to another."*

In Ram Krishna Dalmia v. Justice Tendolkar reported in AIR 1958 S.C. 538 at p. 546, Hon‟ble Chief Justice S.R. Das opined that in the absence of specific provision for separation of powers

[28] AIR 1951 S.C. 332 at p.346

in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial- is nevertheless implicit in our Constitution.

Same view was expressed in Jayanti Lal Amrit Lal v. S.M. Ram, AIR 1964 SC 649. In Smt. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299 at p.2470, Hon‟ble Justice Chandrachud observed: "The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, legislative and judicial. It is essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does
not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions."

In ***Hari Shankar Nagla v. State of M.P.*** it was observed:

"*The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislature function consists in the determination of the choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."*

Virtually, absolute separation of powers is not possible in any form of Government. In view of the variety of situations, the legislatures cannot fore-see or anticipate all the circumstances to which a legislative measure should be extended and applied. Therefore, legislature is empowered to delegate some of its functions to administrative authority (executive). But one thing is notable that legislature cannot delegate its essential legislative power. On this point following cases are notable:

(1) Sri Ram v. State of Bombay, AIR 1959 S.C. 459,473,474

(2) Makhan Singh v. State of Punjab, AIR 1964 S.C. 381,401

(3) Laxmi Narayan v. Union of India, AIR 1976 S.C. 554.

Section 5: Citizenship

A classic statement of the law on this subject is that of Lord Westbury in Udny v. Udny[29]. He observes:

"*The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal statuses or conditions : one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status.*

The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend".

Under the Constitution, Article 5 defines citizenship on the basis that it is different from domicile, because under that article, domicile is not by itself sufficient to confer on a person the status of a citizen of this country.

The position is thus stated by Dicey at page 83 :[30]

"The area contemplated throughout the Rules relating to domicile is a 'country' or 'territory subject to one system of law'. The reason for this is that the object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his

[29] [1869] L.R. 1 Sc. & Div. 441

[30] D.P. Joshi v. State of Madhya Bharat, AIR 1955 SC 334

legal home or domicile within a territory governed by one system of law, i.e. within a given country, rather than within another.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, e.g. California in the United States; but in this case, such part would be pro tanto a separate country, in the sense in which that term is employed in these Rules".

The latest stage in the citizenship discourse arrived when the Citizenship Amendment Act of 2003 introduced the concept of Overseas Citizen of India (OCI) thereby instituting a version of dual/transnational citizenship. An OCI is a person who is of Indian origin and citizen of a specified country, or was a citizen of India immediately before becoming a citizen of another country (mentioned in specified list), and is registered as an OCI by the Central government.

Prima facie then, as was also being claimed by politicians across the board while debates on the OCI were taking place, the OCI embodies the conjuncture of globality and transnationality of citizenship.

Two things were noticeable in the initiative. One, that besides cultural reasons (*setu bandhan*) there were also other considerations such as "knowledge, wealth, experience and expertise" of the OCIs. And the other, that there was a differentiated approach to identify the OCIs who were confined to people belonging to a select North American, European, and Australasian (Australia, New Zealand, Singapore, and Thailand) countries. The exclusion of a large number of ethnic Indians in other relatively poorer countries from the OCI category rightly provoked a member of the African National Congress, Fatima Meer, to quip that it amounted to "dollar and pound citizenship". In essence the 2003 amendment, which was amended further in 2005, provides for a variant of dual citizenship – instead of an Indian passport it provides for a passport-like booklet titled as: "Overseas Citizen of India".

Section 6: <u>Structure of judiciary in India</u>

India has an integrated judicial system. At the top of the system is the Supreme Court of India which exercises jurisdiction in different forms, namely – writ jurisdiction, appellate, original, advisory and that conferred under several statutes. At the next level are the High Courts in the various states. While most states have their own High Courts, some states have common High Courts. The High Courts also exercise writ jurisdiction, regular appellate jurisdiction as well as the power of supervision over all the Courts and Tribunals located in their respective States. The third tier is that of the subordinate judiciary at the district-level, which in turn consists of many levels of judges (both on the civil and criminal sides) whose jurisdiction is based on territorial and pecuniary limits. In addition to the subordinate judiciary there are specialized courts and tribunals at the district and state levels to hear and decide matters relating to direct and indirect taxes, labour disputes, service disputes in state agencies, family disputes, motor accident claims as well as consumer complaints to name a few. While Brazil has special courts for Labour, Electoral and military related-matters, India has a much wider range of such dispute-resolution bodies. With the exception of the military courts, the decisions of all these special courts and tribunals can be questioned before the Higher Judiciary.

A. Jurisdiction of the Supreme Court: It can be conclusively said that the Supreme Court of India is the final arbiter in all constitutional controversies. Its' writ jurisdiction derived from Article 32 gives it such a status in the matter of enforcing fundamental rights. In its original jurisdiction, the Supreme Court is the only forum where disputes between states and the Union or between States themselves can be heard. The law declared by the Supreme Court is binding on all courts in India, and is the law of the land. The Court is a court of record and has the power to punish for its contempt. Since the Supreme Court of India exercises both constitutional as well as appellate jurisdiction, it is clearly different from the apex courts in Brazil where the Superior Federal Tribunal (STF) acts largely as a constitutional court whereas the Superior Tribunal of Justice (STJ) acts as the court of last resort with respect to appeals from federal courts. Our High Courts in the various states can be broadly compared to the Federal Regional Tribunals, but they handle the appellate caseload from the subordinate judiciary and tribunals in their respective states, rather than their regions. In this respect, the High Courts are structurally similar to the Tribunals of Justice that operate in each state in Brazil. The key difference of course is that the High Courts in Indian states are also guarantors of constitutional rights.10

In the Supreme Court's appellate jurisdiction, any judgment of a High Court can be brought before the Supreme Court, if the High Court certifies that the matter at hand concerns a substantial question of interpretation of law or the Constitution. However, appeal to the Supreme Court is not a matter of right. In cases where a High Court does not issue certificate of appeal, and there exists an important legal question, recourse to 'Special Leave' may be made, as per the Constitution of India. This provision (Article 136 of the Constitution) enables the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in India. This power is extremely wide and enables the Supreme Court to act as a check against improper exercise of jurisdiction by judicial or quasi-judicial bodies as well as maintain a uniformity of legal approach. In certain special circumstances, the Supreme Court can also transfer to itself any case from any of the High Courts. This usually takes place when cases are pending before the Supreme Court and High Court, or before two or more High Courts, involving similar questions of law. If the Supreme Court is satisfied either *suo motu* or on an application made by the attorney general or any party to any case that such questions are of general importance, the Supreme Court may withdraw the cases from the High Courts and dispose them itself. Thus, the Supreme Court possesses the ultimate jurisdiction over all courts and legal proceedings in India and enjoys a wide appellate power. Under Article 143 of the Constitution, The Supreme Court also exercises 'advisory' jurisdiction, under which the President of India may refer any question of law or a question of public importance to the Court for its opinion. The court also has the power to review its own decisions.

B. <u>Independence of the judiciary</u>: In order to safeguard the independence of judiciary, the appointment of judges to the Supreme Court as well as the High Courts is made on the recommendation of a 'collegium' - which consists of the Chief Justice of India and the next four senior-most judges of the Supreme Court. Appointments to the Supreme Court are made from among sitting judges of the High Courts and in exceptional cases, from amongst experienced legal practitioners as well. Appointments to the High Courts are made both from among the subordinate judiciary as well as practitioners. The subordinate judiciary in turn is constituted under the supervision of the High Courts but the respective State governments also play a role in so far as they conduct competitive examinations for judicial appointments at the lower levels.

The Indian higher judiciary has an impressive record of ensuring constitutional control over all other organs of governance viz. the legislature and the executive. Through this, the confidence of the people in the judicial system and the Constitution is constantly reinforced. It also conveys the message that mechanisms geared towards the 'rule of law' are better alternatives to violence and extremism. Such progressive methods of constitutional control are necessary to attain two goals: that each citizen believes in the worth and fairness of the Constitution and secondly, that the citizens are assured that the Courts, as guardians of all Constitutional freedoms, are going to impartially and effectively enforce those freedoms The concern with maintaining the independence of the judiciary is also interlinked with two core features of a constitutional democracy – i.e. the 'separation of powers' between the wings of government and the vigorous exercise of 'judicial review' over executive and legislative action. The fundamental rights enumerated in the Indian Constitution hence equip the constitutional courts with tangible criterion to exercise such 'judicial review' over governmental action and maintain the 'separation of powers'.

What is happening at present is that while the Supreme Court and parliament fight each other for control of the Constitution, neither helps much in educating the people in what their Constitution is all about, and voters get only one chance is so many years to help the rulers to understand what the people are all about. But some interesting attempts have been made to get us back on track and they need to be pursued. For example in *Sajjan Singh vs State of Rajasthan, 1964*, a five judge bench of the Supreme Court reiterated by a majority of three to two what the five-judge bench *in Shankari Prasad vs Union of India, 1951*, had unanimously said earlier, that parliament could 'abridge or take away' any fundamental right' under Article 368 so long as it did so by the special majorities prescribed in the provisos to that article, which really means by a majority of the whole electorate.

But the road to an enlightened public opinion does not lie through legal cloisters which are shrouded in erudition if not also in secrecy. Nor does it lie through legal coups such as 'the doctrine' against the principles and practices of open governance through open debate. Nor through battles between the Supreme Court and parliament for capturing the Constitution in the name of democracy. Amendments to the Constitution which are not supported by parliament will last only as long as laws which are not supported by the people. Protecting the people from a

parliament they have elected themselves would remain an absurdly elitist proposition so long as it did not actively engage the people in protecting it.

III. Fiscal Federalism in USA

Like in most world federations—including Australia, Canada, Germany, India, South Africa and numerous others—the United States has no system of federal equalization grants in place to reduce fiscal disparities among its sub-national governments. Only at the state level, through policies designed to mitigate property tax disparities among school districts, has equalization been tried in the United States. The federal government has never adopted, nor has it ever seriously considered, an equalization policy for the states. The origins of the federal idea in the USA are both complex and deep-rooted.

They stretch back to the seventeenth and eighteenth centuries, long before the familiar defining landmarks of 1776, 1781, 1787 and 1789, and they criss-cross three distinct dimensions to our subject, namely, Continental European philosophical thought, British imperial politics and American colonial practice.

The United States has an extreme outlier with regard to the efforts undertaken by the national government to equalize the taxing capacity of sub-national jurisdictions. Australia, Canada, Germany, India, South Africa, and numerous other federations throughout the world have in place a complex system of "equalization grants" whereby the central government makes fiscal transfers to ensure that resources available to state or provincial governments do not exhibit significant variation.

Traditionally the US constitutions have provided for the federal government's role in formulation of broad guidelines and resources while state and local governments would be the frontline service providers. There exists a growing trend of dependence of the Federal governments on the state governments. The significant fiscal policy powers of the Federal government include ability to levy taxes, borrow funds, regulate interstate and foreign commerce, pay debts, and to provide for the general welfare. The fiscal authority of states is enshrined in the 10th amendment which grants states "residual power" regarding fiscal policy.

One major issue for fiscal federalism in the USA is the lack of a formal or informal process for effectively coordinating US intergovernmental fiscal policy. The second issue involves weakening of the state's role and authority within the US system of federalism.

Supremacy clause

The Supremacy Clause is the provision in Article Six, Clause 2 of the United States Constitution that establishes the United States Constitution, federal statutes, and treaties as "the supreme law of the land." It provides that these are the highest form of law in the United States legal system, and mandates that all state judges must follow federal law when a conflict arises between federal law and either a state constitution or state law of any state.

The supremacy of federal law over state law only applies if Congress is acting in pursuance of its constitutionally authorized powers.

Nullification is the legal theory that states have the right to nullify, or invalidate, federal laws which they view as being unconstitutional; or federal laws that they view as having exceeded Congresses' constitutionally authorized powers. The Supreme Court has rejected nullification, finding that under Article III of the Constitution, the power to declare federal laws unconstitutional has been delegated to the federal courts and that states do not have the authority to nullify federal law.

Commerce Clause

The Commerce Clause describes an enumerated power listed in the United States Constitution (Article I, Section 8, Clause 3). The clause states that the United States Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Courts and commentators have tended to discuss each of these three areas of commerce as a separate power granted to Congress. It is common to see the individual components of the Commerce Clause referred to under specific terms: The Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause.

Dispute exists within the courts as to the range of powers granted to Congress by the Commerce Clause. As noted below, the clause is often paired with the Necessary and Proper Clause, the combination used to take a broad, expansive perspective of these powers. However, the effect of

the Commerce Clause has varied significantly depending on the Supreme Court's interpretation. During the Marshall Court era, Commerce Clause interpretation empowered Congress to gain jurisdiction over numerous aspects of intrastate and interstate commerce as well as non-commerce. During the post-1937 era, the use of the Commerce Clause by Congress to authorize federal control of economic matters became effectively unlimited. Since the latter half of the Rehnquist Court era, Congressional use of the Commerce Clause has become slightly restricted again, being limited only to matters of trade or any other form of restricted area. (whether interstate or not) and production (whether commercial or not).

IV. Fiscal Federalism in Canada

The Canadian system of federal-provincial fi scal arrangements has evolved considerably over the post-war period. The enormous growth of the welfare state in the early postwar period was a joint venture with the provinces delivering the social programs and the federal government providing conditional transfers. An Equalization system was put in place whose essential features remain with us today. And, the system of income tax harmonization evolved naturally from a situation in which the federal government was the sole income tax collector during the war. Gradually and persistently, the federation has become more and more decentralized. Provincial expenditures have grown rapidly relative to those of the federal government, and more important, provinces have become more and more responsible for financing their own spending programs. At the same time, provincial economies have not grown at the same rate. Some regions have enjoyed strong growth in their goods-producing sectors, and others have enjoyed the windfall gains of natural resource discoveries. These changes, along with the impact of globalization, have put enormous pressures on the fiscal arrangements. The province of Newfoundland and Labrador has much at stake in the outcome given its recent history of being the most dependent of all provinces on fiscal transfers. Now that the prospects of the province are finally turning around, new issues arise as to how suitable are the fiscal arrangements for facilitating resource-led growth.

Constitutional imperative

There are various sections in the Constitution that have a bearing on the fiscal arrangements, and some of these are more important than others. At the core of fiscal federalism is the assignment

of legislative responsibilities, which are mainly set out in Section 91 for the federal government, Sections 92-93 for the provinces, and Sections 94 -95 for concurrent responsibilities.

Of particular relevance in the case of the provinces are two elements. The first is the exclusive provincial legislative responsibilities in health, education, and social services, and the second is the assignment to the provinces of the management of non-renewable resources in Section 92A, as well as affi rmation of their right to tax resources in any manner they see fit. The former of these elements implies that the provinces are the main providers of social programs involving public services, while the federal government is largely restricted to social programs that involve transfers, such as employment insurance, and transfers to the elderly, to families and to children. The fact that such social programs comprise a significant proportion of program spending at both levels of government underlines the importance of redistributive equity as an objective of government policy. The latter of these involving resource management and taxation is the source of much of the inter-regional conflict that animates the Canadian federal system With respect to the federal government, by far the most important of their powers is the one that is the least explicit — the spending power. It is this power that enables the federal government to make transfers of all sorts, which constitute the bulk of federal program spending.

Federal spending on goods and services is largely non-controversial from a federalism point of view. Transfers to provinces are much more controversial both with respect to the magnitude and the form of the transfers. While there seems to be some consensus that this use of the spending power is constitutional, there is nonetheless ongoing concern of a political nature as to its rationale. Until recently the main concern of the provinces revolved around the conditional nature of some federal-provincial transfers, especially where the conditions applied in the major social program areas in exclusive provincial jurisdiction. The Supreme Court of Canada will not be at the centre of the process for constitutional renewal, but it does have an ongoing and important role in the federal system. 01 Its decisions resolve disputes about jurisdiction, and it provides a method of incrementally adapting the language of the Constitution without awaiting the results of the difficult and rarely successful amendment process. Moreover, the Court's approaches to concurrency and paramount leave room for the instruments of executive federalism to address the issues of interdependence and overlap. Finally, its treatment of devices for constitutional adaptation, such as delegation and intergovernmental agreements, can facilitate

the intergovernmental relations process in important ways. Nevertheless, while federalism in Canada is under fire, the Court must be careful lest its decisions create further problems in a country struggling to find a resolution of its constitutional conflicts.

V Conclusions

'Federalism' is one of those good echo words that evoke a positive response toward many concepts as democracy, progress, constitution, etc. Federalism tries to facilitate the sociopolitical cooperation between two sets of identities through various structural mechanisms of 'shared rule'. But because of the above reasons, center- state relations and the state autonomy have become the cardinal issues of the Indian federalism.

The union government appointed Sarkaria Commission in 1983 to examine and review the working of the Indian Federalism, but this Commission doesn't make any useful recommendations for structuring the Indian federalism in a proper manner. The Union government also took in a very easy approach some of the recommendations made by this commission. This shows that even though our constitution is said to be a federal, but this overemphasis on the power of the federal government makes incapable of dealing effectively with socioeconomic challenges and strengthening national unity. Hence, it is appropriate to restructure Indian Federalism to make it more effective and promote center – state relation.

An integrated approach is needed for all the unconditional transfers and not making source-wise distinction, the selection of the criteria and their weights are determined in a more objective manner in relation to their degree of association with the net marginal benefit due to federation. However, it should be noted that the estimated model is only an illustration and, by no means, the last word. Refinements of the model are possible and need extensive experimentation. Finally, at the macro-level there is a need for fiscal rules that adjust to the business cycle, much like automatic stabilizers in bringing down the level of the fiscal deficit.