Federalism in India

Part I:
Features of the Constitution

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Federalism in India, a Study

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As part of our work on the theme of Constitutional Values and Democratic Institutions and the theme Governance and Development, the RGICS had commissioned a study on Federalism in India. It was conducted by Arnab Bose, Sr Research Associate, RGICS, with support and guidance from the undersigned. The study is in four parts, as follows:

Part 1 - Features of the Constitution
Part 2 - Union, State and Concurrent Lists and the Judiciary
Part 3 - Fiscal Relations
Part 4 - Inter-State Coordination and Dispute Resolution

Each part deals with the provisions on federalism as laid down in the Constitution, and reviews their status in actual practice, documenting several examples where the original provisions have been diluted or ignored in practice.

The study is timely given the contemporary turmoil in the relations between states and the Centre, as witnessed in the recent developments in Delhi on the one hand and Kerala, Tamil Nadu and West Bengal, among others, on the other hand. The fiscal relations between the Centre and the states have also undergone a sea change since the introduction of the GST.

We present this study to serve as a basis for discussion to correct the anomalies, but have refrained from offering any recommendations on the way forward as the matter requires serious discussion among political leaders and constitutional scholars. We hope, however, that this overview study will help inform that debate.

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Contents

1 Introduction

Federalism is a basic feature of the Indian Constitution. Both the Centre and the States in India are co-operating institutions having independence, and are required to exercise their respective powers with mutual understanding and accommodation. However, Indian federalism is often characterized as a paradox of it being a centralized federalism. This paper outlines some of the basic features of India's federal system and seeks to explain their effectiveness in terms of managing center-state relations. The paper begins by providing a brief description of federalism. The next section highlights some of the key federal features of the constitution while bringing out its centralizing character. The third section describes how the federal process in India has led to the formation of states. The next two sections discuss some special provisions which have often been used to undermine the federal process in the country. The sixth section describes the special case of Jammu and Kashmir and the final section highlights some special provisions with respect to certain backward states. The main focus of the paper is in highlighting the dynamics between the federal and centralizing aspects of the Indian Constitution.

2 Understanding Federalism

A federal political arrangement is a political organization, typically within a territory, that is marked by a combination of shared rule and self-rule between various constituent units.[1] The theory or advocacy of such an arrangement, including principles for dividing final authority between the units, is called federalism.[2] In modern nation states the term federalism refers to the constitutionally allocated distribution of powers between various levels of government.[3] The most salient aspect of a federal system is that the governments at various levels function in their respective jurisdictions with considerable independence from one another. Thus, sovereignty in a federal system is non-centralized, with each level being self governing in certain areas and having shared rule in certain other areas.[4] At present the most well known form of federal organization is the federation.[5]

A Federation is defined as a system in which at least two territorial levels of government share sovereign constitutional authority over their respective division. Thus, it involves a territorial division of power between constituent units, sometimes called 'provinces', 'cantons', 'cities', or 'states', and a common government.[6] The division of power is typically derived from a constitution which neither a member unit nor the common government can alter unilaterally.[7] There are typically three models of formation of Federations.[8]

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1 *Watts, Ronald L., 1998, "Federalism, Federal Political Systems, and Federations," Annual Review of Political Science, 1: 117–37*

2 *Ibid*

3 *George Anderson, Federalism: An Introduction, (Newyork: Oxford, 2008)*

4 *Elazar, Daniel J., 1987, Exploring Federalism, Tuscaloosa: University of Alabama Press.*

5 *Ibid*

6 *Watts, Ronald L., 1998, "Federalism, Federal Political Systems, and Federations," Annual Review of Political Science, 1: 117–37*

7 *Ibid*

8 *Stepan, Alfred. Arguing Comparative Politics. Oxford: Oxford University Press, 2001.*

First, they can be formed from previously independent states that decide to voluntarily "come together" to form a strong union. The US is a classic example of such a coming together model of federation of states.[9] Second, a federation can develop through the transformation of a vast and diverse unitary state, where it gives autonomy to its provinces for administrative convenience and regional representation. This model of federation is called the "holding together" federation.[10] Indian federalism has been broadly designed based on this model. The third formation is a federation "put together" by force.[11] This is a coercive approach and the prospects for democratization of such coercively put-together federations are not good.[12] An important example of the third type is that of the US having "put together" Bosnia and Herzegovina.[13]

Traditionally, there have been many arguments advocating for a federal system which include promoting various forms of liberty in terms of non-domination, and enhanced opportunities.[14] When considering the reasons, the arguments can broadly be put in two categories: Arguments favoring a federal system over having completely independent sovereign states; and arguments supporting a federal system over a centralized unitary state.

Some reasons for having a federal system over separate states:

- Federations foster peace and prevent fears of war in several ways. States can join a federation to become jointly powerful to dissuade external aggressors as well as prevent aggressive and preemptive wars among themselves. Many European federalists had argued that only a European federation could prevent war between totalitarian, aggressive states.[15]
- Federations can promote economic prosperity by removing internal barriers to trade, through economies of scale, by establishing and maintaining inter-member unit trade agreements.[16]
- Federal systems may protect individual rights against state authorities by constraining state sovereignty by placing some powers with the center. Entrusting the center with authority to intervene in member units may help protect minorities' human rights against abuse by member units.[17]
- Federations can facilitate coordination and fulfilling of certain common objectives of sovereign states by transferring some powers to a common central body.[18]

Reasons for preferring federal systems over unitary states:

- Federal systems may protect against central authorities by securing rights for minority groups or nations. Constitutional allocation of powers to a member unit protects individuals from the center as well as allows influence on central decisions via member unit bodies.[19] Thus, federal arrangements can accommodate the preservation of culture, language or religion of minority nations.

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[9] *Ibid*

[10] *Alfred Stephan, "Federalism and democracy: Beyond the US model". Journal of Democracy Vol 10(4), (1999):19–34.*

[11] *Ibid*

[12] *Stepan, Alfred. Arguing Comparative Politics. Oxford: Oxford University Press, 2001*

[13] *Cohen, Lenard J. "Fabricating Federalism in "Dayton Bosnia": Political Development and Future Options." In Federalism Doomed? European Federalism between Integration and Separation, edited by Andreas Heinemann-Grüder, 116-45. Oxford: Bergahn Books, 2002.*

[14] *Elazar, Daniel J., 1987, Exploring Federalism, Tuscaloosa: University of Alabama Press*

[15] *1941 Ventotene Manifesto*

[16] *Keohane, Robert O., and Joseph S. Nye, 2001, Power and Interdependence: World Politics in Transition (3rd Edition), New York: Longman*

[17] *Watts, Ronald L., 1998, Comparing Federal Systems, Montreal: McGill-Queens University Press.*

[18] *Ibid*

[19] *Goodin, Robert, 1996, "Designing constitutions: the political constitution of a mixed commonwealth," Political Studies, 44: 635–46.*

- Federal systems may increase the opportunities for citizen participation in public decision-making by having decision making bodies much closer to them within the member units, rather than having just one centralized decision making body at a distance.[20]
- Federations may facilitate efficient and preference driven decision making. Local decisions can prevent overload of centralised decision-making, and local decision-makers may also have a better grasp of affected groups, allowing for better decisions than would be made by a central government that tends to ignore local preferences.[21]
- Federal systems can protect minority groups with preferences that diverge from the majority population so that they are not subject to majority decisions contrary to their preferences. Federations thus minimize coercion and are able to be responsive to as many citizens as possible.[22]
- Federal arrangements may promote mobility and hence territorial clustering of individuals with similar values and preferences. Such mobility may further add to the benefits of autonomy over decision making by accounting for preferences.[23]

Source: https://leverageedublog.s3.ap-south-1.amazonaws.com/blog/wp-content/uploads/2020/09/09204227/federalism-class-10-notes.jpg

While federal systems have many advantages over other forms of political arrangements, it has been observed that they face a specific challenge of stability. Federations often tend to drift toward disintegration in the form of secession, or toward centralization in the direction of a unitary state.[24] The main reason for such instability is the underlying tensions between the minority and majority regional communities, which is the reason for forming a federation in the first place.[25] Federal political orders are therefore often marked by a high level of 'constitutional politics'.[26]

Political parties often disagree on constitutional issues regarding the appropriate areas of member unit autonomy, the forms of cooperation and how to prevent fragmentation. Many authors have noted that the challenges of stability must be addressed not only by institutional design, but also by ensuring that citizens have an 'overarching loyalty' to the federation as whole in addition to loyalty toward their own member unit.[27] Therefore, a related concern for federal systems is the basis for division of power between member units and central bodies, to safeguard against the risks of instability. While federations do not guarantee stability, they still provide the best protection against secession, as well as provide ways of achieving autonomy that respect the rights of peoples.[28]

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[20] *Mill, John Stuart, 1861, Considerations on Representative Government, New York: Liberal Arts Press, 1958*

[21] *Smith, Adam, 1776, An Inquiry into the Nature and Causes of the Wealth of Nations, London: Dent, 1954.*

[22] *Elazar, Daniel J., 1968, "Federalism," International Encyclopedia of the Social Sciences, New York: Macmillan, p. 356–361*

[23] *Buchanan, James, 1999/2001, Federalism, Liberty and the Law, Collected Works (Volume 18), Indianapolis: Liberty Fund.*

[24] *Simeon, Richard, and Daniel-Patrick Conway, 2001, "Federalism and the Management of Conflict in Multinational Societies,", in Gagnon and Tully 2001, 338–65.*

[25] *Ibid*

[26] *Ibid*

[27] *Linz, Juan J., 1999, "Democracy, multinationalism and federalism," in A. Busch and W. Merkel (eds.), Demokratie in Ost und West, Frankfurt am Main: Suhrkamp, 382–401.*

[28] *Ibid*

3 Federalism in the Indian Constitution

At the time of independence, the framers of the Indian Constitution recognized that in a territorially vast and culturally diverse country like India, federalism was not merely necessary for administrative purposes but for the very survival of the nation.[29] Thus, they wanted federalism as an instrument for creating a strong and cohesive nation. However, at the same time, anxious that the newly independent country should not fall apart due to disunity and secessionist tendencies, they refrained from creating a fully federalised system.[30]

This belief was further strengthened by the recent partition of the country. Therefore, adequate precautions had to be taken against any such future contingency. This was done by having a strong central government. During the Constituent Assembly debates, Jawaharlal Nehru had observed that "it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere."[31]

While the center had been assigned a larger role than the states, this did not detract from the federal character of the constitution.[32] The fundamental principle of federalism is that the legislative and executive authority are partitioned between the center and states, not by means of ordinary law, but by something more enduring, such as the constitution. This is what the Indian constitution does.[33] Under ordinary circumstances, the states do not depend on the center and the center cannot intrude on their domain. Dr. B R Ambedkar had assured the constituent assembly of the federal nature of the constitution by stating "The Constitution is a Federal Constitution…The Union is not a league of states…nor is the states the agencies of the Union, deriving powers from it. Both the Union and the states are created by the Constitution; both derive their respective authority from the Constitution."[34] Thus, to govern India, a quasi-federal structure was adopted.[35]

Some of the important federal features of the Indian Constitution:

i. Dual Polity:

The pivotal point of a federal constitution is the division of powers between the centre and the states. There is a supreme government at the centre and there is also a provision to establish an independent government at the state level. The whole structure of the federal system revolves around this central point. The Indian Constitution provides for a dual polity[36] with the Union Government at the Centre[37] and State Governments in various states.[38]

ii. Supremacy of the Constitution:

Supremacy of the Constitution: Federal Constitutions follow the principle of Suprema Lex, that is, the Supremacy of the Constitution.[39] The States' existence and its powers are derived from the Constitution. All laws enacted both at the Centre and the State ought to be in line with the Constitution. India's Constitution is also considered supreme. If for any reason any organ of the State violates any provision of the Constitution, the courts are empowered to ensure that dignity of the Constitution is upheld.[40]

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29 *Mohit Bhattacharya, "The mind of the founding fathers," in Federalism in India: Origins and Development, ed. N. Mukarji & B. Arora (Vikas Publishing House, 1992), 87–104.*

30 *Ibid*

31 *Constituent Assembly Debates, Volume V, 20 August 1947.*

32 *Chaubey RK. Federalism, Autonomy and Center State Relations. Allahbad: Satyam; 2007.*

33 *Ibid*

34 *Constituent Assembly Debates, Vol. VIII, 33.*

35 *Wheare, K.C., 1951, India's New Constitution Analyzed, Federal Government.*

36 *Schedule 7 of the Indian Constitution.*

37 *Article 79, Ibid.*

38 *Article 168, Ibid.*

39 *https://pib.gov.in/PressReleasePage.aspx?PRID=1553845*

40 *Article 32 of the Indian Constitution*

41 *Article 368, Ibid.*

iii. Written Constitution:

A Federal nation cannot exist without a written Constitution. This is important because the division of powers between various levels of government needs to be explicitly mentioned. Therefore, a written constitution is mandatory. The Indian Constitution is a written document containing 395 Articles and 12 schedules, thereby fulfilling the basic requirement of a federal constitution.

iv. Rigid Constitution:

Rigidity in amendment is a distinctive feature of a federal constitution. The Indian Constitution is largely a rigid Constitution. All the provisions of the Constitution concerning Union-State relations can be amended only by the joint actions of the State Legislatures and the Parliament. Such provisions can be amended only if the amendment is passed by a two-thirds majority of the members present and voting in the Parliament (which must also constitute the absolute majority of the total membership) and ratified by at least one-half of the States.[41]

v. Division of Power:

In a federation, there should be clear division of powers so that the centre and the states can enact and legislate within their sphere of activity and none encroaches upon the functions of others. This requisite is evident in the Indian Constitution. Part XI of the Indian Constitution is titled "Relations between the Union and the States".[42] Chapter I relates to legislative relations. An important provision in the chapter is Article 246 which provides the subject-matter of laws made by the Parliament and the State Legislatures.[43]

The article provides for a three-fold distribution of legislative powers between the Union and the states. The gist of the article is that Parliament has complete and exclusive power to legislate with respect to matters in List I (Union List), and also has the power to legislate with respect to matters in List III (Concurrent List). The State Legislature, on the other hand, has complete and exclusive power to legislate with respect to List II (State List), and has concurrent power with respect to matters included in List III. The provisions of Article 246 are to be read with the entries in the Union List, State List and the Concurrent List in Schedule VII.

vi. Bicameral Legislature:

A bicameral system is considered essential in a federation because it enables the states to be given direct representation in one of the Houses of the parliament. The Constitution of India also provides for a bicameral Legislature at the Centre consisting of Lok Sabha[44] and Rajya Sabha.[45] While the Lok Sabha consists of the elected representatives of people, the Rajya Sabha mainly consists of representatives elected by the State Legislative Assemblies.

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[42] *Part 11, Ibid*

[43] *Article 246, Ibid*

[44] *Article 81, Ibid*

[45] *Article 80, Ibid*

[46] *Wheare, K.C., 1951, India's New Constitution Analyzed, Federal Government*

[47] *Jennings, I.W., 1953, Some Characteristics of the Indian Constitution.*

In the opinion of Kenneth Wheare, the Indian constitution is "quasi-federal"… a unitary state with subsidiary federal features, rather than a federal state with subsidiary unitary features.[46] Similarly, I. Jennings has characterized India as a federation with a strong centralizing tendency.[47] A.V. Dicey holds the view that the extent of federalism in India is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically, and economically coordinated and socially, intellectually, and spiritually uplifted.[48] Thus, Indian federalism is unique because of its quasi federal character. It is to be noted that term "Union of States" and not federation of states is used in the constitution.[49] In addition, the units have no right to secede.[50] The Indian constitution enshrines the principle that in spite of federalism, the national interest ought to be paramount.[51] Thus, the constitution is mainly federal with unique safeguards for enforcing national unity.

Source: https://blog.ipleaders.in/distribution-legislative-powers-union-states/

The following are some areas in which the Indian constitution modifies the strict application of the federal principle by having the balance of power tilted towards the center. This highlights the centralizing tendency and the quasi federal character of the constitution.

i. Legislative Power:

Under Article 249, the parliament is empowered to make laws with respect to every matter enumerated in the state list, if it is necessary in the national interest.[52] Such laws can also be legislated at a special request of a group of states. In case of an overlap between the matters of three lists, i.e., union, state, and concurrent list, predominance has been given to the union.[53] The Center also enjoys residuary powers i.e. the power which allows the Centre to make laws on subjects not mentioned in List II and III.[54] Laws of investigative agencies not mentioned in any of the lists empower the Parliament to make laws on the same.[55] Further, during President's Rule in a state,[56] all the bills pending in the dissolved State Legislature are moved to the Parliament which then takes a decision on the bill.

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[48] *Kadian O, Pandey M. Fundamentals of Indian Constitution. New Delhi: Gaurav Books; 1993*
[49] *Article 1(1) of the Indian Constitution.*
[50] *Kadian O, Pandey M. Fundamentals of Indian Constitution. New Delhi: Gaurav Books; 1993.*
[51] *Ibid*
[52] *Article 249 of the Indian Constitution*

ii. Emergency Power:

Only the Centre has the power to impose emergency under Articles 352, 356 and 360. Emergency under Article 352 can be imposed only when the nation is threatened by external aggression or armed rebellion.[57] Such an emergency was imposed in the 1970's during Indira Gandhi's tenure as Prime Minister. President's rule proclaimed due to failure of Constitutional Machinery in a State can be imposed under Article 356. This has been one of the most controversial provisions due to the abuse of power by the Centre.

iii. Power to form States:

The Parliament has power to form new states and alter boundaries of existing states.[58] Thus, the very existence of a state depends on the will of the union.

iv. Existence of Union Territories:

Union territories are regions directly governed by the central government.[59]

v. Appointment of Governors:

The governors of states are appointment by the president and are answerable to him.[60] There are provisions in the constitution under which the governor is required to send certain state laws for the assent of the president.[61]

vi. Armed Forces:

The Armed Forces can be deployed in the States at the Centre's will without consultation with the State Government. [62]

4 Formation of States

Article 1(1) of the Indian Constitution declares that India shall be a Union of States. In describing India as a Union of States, the Drafting Committee of the Constituent Assembly followed the language of the Preamble of the British North America Act, 1867. Explaining[63] the use of the expression Union instead of the expression Federation, Dr. B.R Ambedkar said that the phrase was adopted to indicate two things: [64]

- That the Indian federation is not the result of an agreement between the units it is constituted of and,
- That the component units have no freedom to secede from the Union so created.

Thus, the States form an integral part of India as a Union. They represent their unique identities and play a vital role in securing and preserving the Federal Structure in India.

The authors of the Constitution recognized that the States in India are not static, but may evolve and change over time, and hence made provisions for the creation of new States in the Union.[65] New states in India are created following the provisions as prescribed under Articles 2, 3 and 4 of the Constitution.

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[53] *Article 246, Ibid*

[54] *Article 248(2), Ibid.*

[55] *Article 248, Ibid.*

[56] *Article 356, Ibid.*

[57] *Article 352, Ibid.*

[58] *Article 2, Ibid.*
Article 239, Ibid

[59] *Article 155, Ibid*

[60] *Article 200, Ibid.*

[61] *Article 355, Ibid.*

[62] *Narendra Kumar, 2014, Constitutional Law of India.*

[63] *Ibid*

[64] *Suvir Raghuvansh, 2016, Creation of new States in India.*

[65] *Article 2 of the Indian Constitution.*

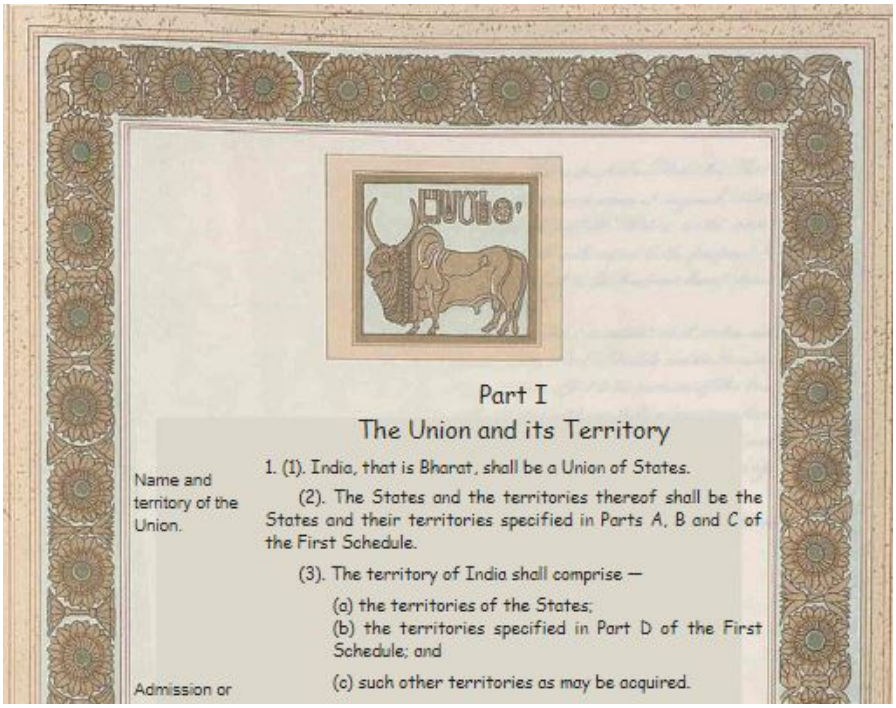
[66] *Article 3 of the Indian Constitution*

Article 2 of the Constitution vests in the Indian Parliament the exclusive power to admit or establish new states into the Indian Union on such terms and conditions as the Parliament may provide for.[66] This authority is with the Indian Parliament only and the State legislatures have no power to frame laws on this subject matter.

Article 3 of the Constitution of India further authorises the Indian Parliament to alter the area, boundaries or names of existing states by legislation.[67] The parliament, under this Article, is empowered to form a new state by separating a territory from any state or by uniting states or parts of States or by uniting any territory to a part of any state. It is also empowered to increase or diminish the area of any state or to alter the boundaries or the name of any state. It should be noted that in clauses from (a) to (e) under Article 3, the expression 'State' includes a Union Territory.[68]

There is a clause attached to Article 3 which provides that any legislation framed upon the provisions of Article 3 shall not be introduced in either House of the Indian Parliament, except when it is first recommended by the President of India.[69] This clause further provides that where such legislation affects the area, boundary or the name of any existing State, then such a legislation shall not be introduced in either House of the Parliament unless, views of the affected State legislature are first acquired.

It is to be noted that the views by the State legislature needs to be communicated to the Parliament within a time period as allowed by the President. Only if the Centre accepts the State's recommendation, a bill can be introduced in either House of Parliament. Before drafting the Bill, the Center can appoint a Commission to fix the boundaries, for sharing of waters, for providing the location of capitals, High Courts and to fulfill all other requirements of the States that is to be formed.[70] It is only on receipt of a report of the Commission that the President may recommend a Bill, on the advice of the Union Council of Ministers.[71] However, the Parliament is also not bound to accept or act upon the views of the State legislature, even if such views are received in time. Therefore, even if there is opposition to a referred Bill, the parliament can go ahead with the formation of a new State.[72]



Source: https://life.futuregenerali.in/media/nqfbbwh5/what-are-the-benefits-of-paying-income-tax.jpg

[68] *Clause (e), Ibid*
[69] *Ibid*
[70] *Narendra Kumar, 2014, Constitutional Law of India.*
[71] *Ibid*
[72] *Ibid*

Article 4 of the Indian Constitution provides a mandatory limit to the Parliament while framing laws under Article 2 and 3.[73] It directs the Parliament to frame laws which only contain such provisions for the amendment of the First Schedule and the Fourth Schedule, which may be necessary to give effect to the law. Further, it may also contain such supplemental provision (such as provisions for representation in the Parliament and in the State Legislature of the affected state) as the Parliament may deem necessary.[74] However, the Article bars the Parliament to frame laws intending to be an amendment to the Constitution for the purposes of Article 368.[75] The First Schedule of the Indian Constitution enlists the names of the States and the Union Territories which are included in the expression 'Union of States'.[76] The Fourth Schedule prescribes the allocation of seats in the Council of States.[77]

The federal structure in India has accepted as a useful and working system in conflict situations such as issues of separation, division of large regions, diverse culture etc.[78] It is within this federal framework that the inter-state boundaries among Indian states have continuously been reorganized since the 1950s.

At the time of independence in 1947, India consisted of more than 500 disjointed princely states that were merged together to form 27 states.[79] The grouping of states at the time was done on the basis of political and historical considerations rather than on linguistic or cultural divisions, but this was a temporary arrangement.[80] On account of the multilingual nature and differences that existed between various states, there was a need for the states to be reorganized on a permanent basis.

In 1948, the SK Dhar Committee was appointed by the government to look into the need for the reorganization of states on a linguistic basis.[81] However, the Commission preferred reorganisation of states on the basis of administrative convenience including historical and geographical considerations instead of on linguistic lines. Later, in December 1948, the JVP Committee, comprising Jawaharlal Nehru, Vallabh bhai Patel and Pattabhi Sitaramayya was formed to study the issue.[82] The Committee rejected the linguistic basis for reorgansation but said that the issue could be relooked at in case of public demand.[83] Both these committees also expressed concern over the new forms of inequalities based on the disproportionate spread of linguistic majority and minority groups in the reorganized provinces.[84]

In 1953, Andhra Pradesh, the first linguistic state for Telugu speaking people was born. Faced with prolonged agitation including the death of an activist, Potti Sriramulu, during a hunger strike the government was forced to separate the Telugu speaking areas from the state of Madras.[85] Consequently, there were similar demands from other parts of the country. Later in December 1953, Jawaharlal Nehru appointed the States Reorganization Committee under Fazl Ali to look into the issue of reorganization of states.[86]

The committee submitted its report in 1955 recommending some basic principles for reorganization such as strengthening the unity and security of India, linguistic and cultural homogeneity, and financial and administrative efficiency.[87] Based on this it suggested that the whole country be divided into 16 states and three union territories.[88] However, the government divided the country into 14 states and 6 union territories under the States Reorganisation Act, passed in November 1956.[89] The states were Andhra Pradesh, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. The six union territories were Andaman and Nicobar Islands, Delhi, Himachal Pradesh, Laccadive, Minicoy and Amindivi Islands, Manipur and Tripura. Thereafter, in 1960 the state of Bombay was divided to create the states of Gujarat and Maharashtra[90] and in 1963 Nagaland was created for the Nagas, taking the total states to 16.[91]

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[73] *Article 4 of the Indian Constitution.*
[74] *Clause (1), Ibid.*
[75] *Clause (2), Ibid.*
[76] *Schedule 1 of the Indian Constitution.*
[77] *Schedule 4 of the Indian Constitution.*
[78] *Watts, Ronald (1966). New Federations: Experiments in the Commonwealth. Oxford Clarendon Press.*
[79] *https://www.thequint.com/news/india/linguistic-division-of-states-in-india-history#read-more*
[80] *Ibid*
[81] *Virendra Kumar (1976). Committees And Commissions In India Vol. 1 : 1947-54*
[82] *Ibid*

The Punjab Reorganisation Act was passed in April 1966 based on the Shah Commission report.[92] This led to the state of Haryana getting the Punjabi-speaking areas while the hilly areas went to the Union Territory of Himachal Pradesh. Chandigarh was made a Union Territory and would become the common capital of Punjab and Haryana.[93]

In 1969 and 1971, the states of Meghalaya[94] and Himachal Pradesh[95] were formed. Thereafter, the Union Territories of Tripura, Mizoram and Manipur were converted into states, and the total number of states rose to 21.[96] In 1975, Sikkim,[97] and in 1987Arunachal Pradesh[98] also acquired the status of becoming states. In May 1987, Goa became the 25th state,[99] and in November 2000 three new states of Jharkhand, Chhattisgarh and Uttaranchal were created.[100] Finally, in 2014, Telangana officially became the 29th state.[101] At present, India has 29 states and 7 union territories.

Today, there is an increasing demand for formation of new states based on socio-cultural identities.[102] All these demands have risen from a need for better governance, equitable growth, increasing demands for participation and development at the sub-regional levels.[103] These demands are also based on issues such as the preservation of forests, welfare of tribal communities, the emergence of other backward classes and an increase in the number regional political parties within a state. This is evident from the demands for the states of Vidharba (Maharashtra), Saurashtra (Gujarat), Bodoland (Assam), Coorg (Karnataka), Harit Pradesh (Uttar Pradesh) etc.[104] The issue of state formation has also become an important part of the Indian political system due to the emergence of coalition politics.[105]

Source: https://storypivot.com/wp-content/uploads/new-map-of-India-990x660.jpg

[83] *Ibid*
[84] *Sarangi, Asha and Pai, Sudha, 2011, Interrogating Reorganization of States: Culture, Identity and Politics in India. New Delhi: Routledge Publication.*
[85] https://www.thebetterindia.com/190778/potti-sriramulu-andhra-pradesh-telugu-linguistic-reorganisation-history-india/
[86] *Chandra, Bipan; Mukherjee, Aditya; Mukherjee, Mridula (2008), India Since Independence, Penguin Books India.*
[87] *Ibid*
[88] *Ibid*
[89] https://www.casemine.com/act/in/5a979da64a93263ca60b71cc
[90] https://legislative.gov.in/sites/default/files/A1960-11.pdf
[91] https://nagaland.gov.in/pages/nagaland-profile#~:text=The%20State%20of%20Nagaland%20was,and%20Manipur%20in%20the%20South.
[92] https://indianexpress.com/article/explained/punjab-haryana-chandigarh-disputes-neighbours-7858162/
[93] https://indiankanoon.org/doc/933499/
[94] https://legislative.gov.in/sites/default/files/A1969-55.pdf
[95] https://www.indiatoday.in/education-today/gk-current-affairs/story/himchal-pradesh-305386-2016-01-25

5 The Role of Governors

In India, the President and the Governor are often regarded as titular heads of the state. Article 153 of the Indian Constitution specifies the position of a governor.[106] The Governor has been accorded a nominal status, whereas the council of ministers, headed by the Chief Minister, are supposed to run the affairs of a state. Therefore, on most issues, the governor needs to exercise his powers and functions on the advice of Council of ministers headed by the chief minister. As per Article 155 of the Constitution, the President appoints the Governor under his seal and warrant.[107] However, it is the Central government that files nominations of candidates for the position of Governor, and then the President takes a call. Article 156 of the Constitution, prescribes the Governor's term in office as being during the pleasure[108] of the President.

A state's Governor acts in a dual capacity. Firstly, he acts as the executive head of the state, and secondly, he acts as a representative of the central government.[109] The second role of the Governor often leads to friction between his position and that of the state government, especially when a party that governs a state is in opposition to the central government. The primary cause for friction is that a Governor is not elected by anybody and is still perceived as an integral part of the state.[110]

Moreover, the state government has no power to overrule the orders of the Governor, and neither is there a procedure for his impeachment. Thus, the Governor essentially has no accountability to anyone, apart from the people who have appointed him.[111] If the Governor acts in a manner against the interests of the people of the State, as perceived by the State Legislature they cannot do anything except complain to the President. Additionally, the Chief Minister is also appointed by the Governor. Under circumstances where one party gets a clear majority, the Governor may have no discretion in the matter, however, when no single party or coalition gets a clear majority, the Governor has the discretion to exercise his judgment on who should be invited.[112]

Over the years since independence there has been a rise of various regional political parties which has led to a situation that different political parties are in power in different States. In such a situation and because the Governor owes his appointment and his continuation in office to the Union Council of Ministers, in states where different parties are in power than the central government, there is apprehension that he is likely to act in accordance with the instructions, received from the Union Council of Ministers rather than on the advice of the state Council of Ministers. Consequently, they have often been pejoratively called agents of the Centre.[113]

One of the more famous examples of the controversial role played by the governor was the dismissal of the SR Bommai (Janata Dal) government in Karnataka in 1989.[114] S.R. Bommai was the Chief Minister of the Janata Dal government in Karnataka between August 13, 1988 and April 21, 1989. His government was dismissed on April 21, 1989 under Article 356 of the Constitution and President's Rule was imposed.

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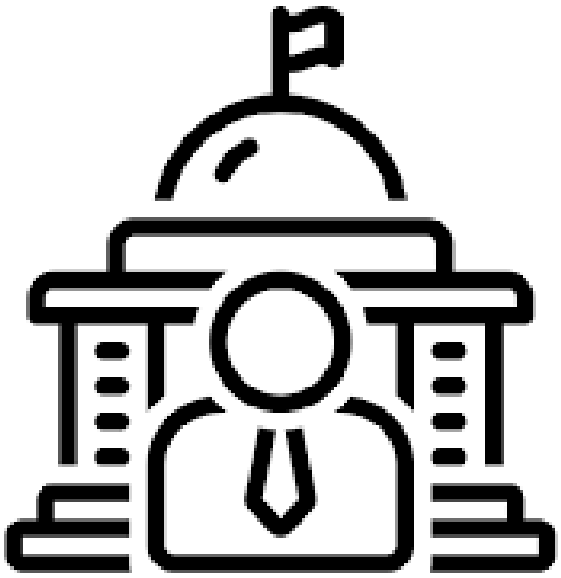
[96] https://timesofindia.indiatimes.com/city/guwahati/3-ne-states-to-complete-50-yrs-of-statehood-on-jan-21/articleshow/88984019.cms
[97] https://sikkim.gov.in/departments/sikkim-legislative-assembly
[98] https://www.firstpost.com/india/statehood-day-for-arunachal-pradesh-and-mizoram-brief-history-of-the-two-north-eastern-states-3291898.html
[99] https://www.oneindia.com/feature/goa-celebrates-its-statehood-day-2113238.html
[100] https://www.india.com/education/the-new-states-jharkand-uttarakhand-and-chhattisgarh-1590295/
[101] https://www.thehindu.com/news/national/telangana/The-story-of-Indias-29th-State-%E2%80%94-Telangana/article60507002.ece
[102] *Sarangi, Asha and SudhaPai (2009). States Reorganization: Contemporary Concerns. ESS Report, January*
[103] *Ibid*
[104] *Ibid*
[105] *Verghese, B G (2014). Interrogating Reorganisation of States: Culture, Identity and Politics in India.*
[106] *Article 153 of the Indian Constitution*
[107] *Article 155, Ibid.*
[108] *The doctrine of pleasure has its origins in English law. In England, the moral rule is that a civil servant of the Crown holds office during the pleasure of the Crown. This means his services can be terminated at any time by the Crown, without assigning any reason. Even if there is a contract of employment involving the Crown, the Crown is not bound by it. The doctrine of pleasure is based on public policy and this pleasure is absolute.*
[109] https://legalaffairs.gov.in/sites/default/files/The%20Institution%20of%20Governor%20under%20the%20Constitution.pdf

The dismissal was on grounds that the Bommai government had lost majority following large-scale defections. The then Governor P. Venkatasubbaiah refused to give Bommai an opportunity to test his majority in the Assembly. To challenge the decision of the Governor, Bommai first moved the Karnataka High Court, which dismissed his writ petition. Then he moved the Supreme Court.

On March 11, 1994, a nine-judge Constitution Bench of the Supreme Court issued a landmark judgment on the S.R. Bommai v Union of India case,[115] which put an end to the arbitrary dismissal of State governments under Article 356 by spelling out restrictions. The verdict concluded that the power of the President to dismiss a State government is not absolute. It said the President should exercise the power only after his decision is approved by both Houses of Parliament. Till then, President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly. The case put an end to the arbitrary dismissal of State governments by a hostile Central government. And the verdict also categorically ruled that the floor of the Assembly is the only forum that should test the majority of the government of the day, and not the subjective opinion of the Governor.



Source: https://lexlife68840978.wordpress.com/2021/08/03/role-of-governor-in-india-critical-analysis/

Some other instances of misuse of power by Governors:

- In Feb 1998, the Kalyan Singh led BJP government in UP lost the majority after Janata Dal and Loktantrik Congress MLAs withdrew their support.[116] Thereafter, Governor Romesh Bhandari dismissed the government and installed Loktantrik Congress' Jagdambika Pal as the new CM of the state. However, the decision was challenged by Kalyan Singh in the Allahabad HC. The court ordered a floor test to determine the real CM, and after 3 days Kalyan Singh was reinstated as the CM and Jagdambika Pal had to resign.

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[110] *Ibid*
[111] *Ibid*
[112] *Ibid*
[113] https://www.mondaq.com/india/constitutional-administrative-law/1080480/powers-of-a-governor-head-of-state-or-mouthpiece-of-centre
[114] https://www.thehindu.com/news/national/what-is-the-sr-bommai-case-and-why-is-it-quoted-often/article61834854.ece
[115] *1994 AIR 1918, 1994 SCC (3) 1*
[116] https://www.news18.com/news/politics/maharashtra-strange-floor-test-of-1998-revisiting-past-when-india-saw-a-murkier-crisis-in-uttar-pradesh-2400939.html
[117] https://www.indiatoday.in/magazine/states/story/20050314-sibu-soren-to-be-sworn-in-as-jharkhand-cm-despite-dubious-claims-of-majority-788181-2005-03-14
[118] https://www.indiatoday.in/magazine/states/story/20050328-jharkhand-political-drama-ends-with-arjun-munda-winning-trust-vote-788024-2005-03-28
[119] https://www.hindustantimes.com/assembly-elections/cong-is-single-largest-party-in-manipur-but-not-necessary-to-invite-them-to-form-govt-governor-najma-heptulla/story-XDgTIcB1wALyH0zArbeGJI.html
[120] https://thewire.in/politics/bihar-nitish-kumar-rjd-lalu-prasad-yadav-mahagathbandhan

- In 2005 after the elections, Governor Syed Sibtey Razi installed Jharkhand Mukti Morcha's Shibhu Soren as the new CM of Jharkhand, despite the NDA claiming the support of 41 MLAs in the 80 member assembly.[117] The matter reached Supreme Court which ordered a floor test. Soren failed to prove his majority in the house and BJPs Arjun Munda was sworn in as the CM of the state.[118]
- In the 2017 election, in the 60 member assembly in Manipur, Congress emerged as the single largest party winning 28 seats, however governor Najma Heptulllah invited BJP to prove majority.[119] Later BJP got together 4 MLAs from the National People's Party, 4 from the Naga Peoples Front and one from TMC to form the government, with BJP's Biren Singh sworn in as Chief Minister of the state.
- In 2017 in Bihar, Nitish Kumar-led JD(U) broke the alliance with Congress and RJD, and later formed an alliance with the BJP and staked claim to form the government. BJP appointed Governor Keshari Nath Tripathi ignored the single largest party RJD's claim and made Nitish Kumar the Chief Minister.[120]
- In the 2018 Meghalaya elections, Congress, despite winning more seats than any other party, could not form the government.[121] In the 50 seat assembly, the Congress won 21 seats, followed by NPP 19, and BJP and UDP, two and six, respectively. However, governor Ganga Prasad invited Conrad Sangma of the NPP to prove his majority. Sangma's NPP formed an alliance with the UDP, PDF, HSPDP, and the BJP to form the government in the state.

Over the years various commissions have attempted to understand the role of the governor in our federal democratic set up, and have recommended ways to make this institution conducive to strengthening center-state relations. The most important recommendations have come from the Sarkaria Commission of 1988.

5.1 Recommendations of Sarkaria Commission regarding the role of the Governor: [122]

- The governor should be an eminent person
- He must be a person from outside the State
- He must not have participated in active politics at least for some time before his appointment. When the state and the center are ruled by different political parties, the governor should not belong to the ruling party at the center.
- The governor should be a detached person and not too intimately connected with the local politics of the State
- He should be appointed in consultation with the Chief Minister of the State, Vice-President of India and the Speaker of the Lok Sabha;
- The State Government should be given prominence in appointing the Governor.
- His tenure of office must be guaranteed.
- After leaving his office, the person appointed as Governor should not be eligible for any other appointment or office of profit under the Union or a State Government except for a second term as Governor or election as Vice-President or President of India
- At the end of his tenure, reasonable post-retirement benefits should be provided
- The Commision also recommended that the Governor should appoint a CM who is the leader of the majority. The CM should seek the vote of confidence in the assembly within 30 days of his appointment. Further, as long as the council of ministers possessed a majority in the assembly the governor could not use his discretionary powers.

[121] *https://economictimes.indiatimes.com/news/politics-and-nation/big-jolt-to-congress-meghalaya-governor-reportedly-invites-npp-to-form-govt/articleshow/63159045.cms*
[122] *http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf*

6 Article 356: Proclamation of President's Rule in a State

The jurisdiction of the central and state governments with regard to the law-making process has been explicitly mentioned in Schedule 7 of the Indian Constitution. However, there are certain circumstances under which the central government can enter the jurisdiction of states. The Presidential proclamation of emergency in a state, under Article 356, is one of them.

Article 356 provides that the President of India can take over the legislative and executive powers of the state by imposing emergency in a state in case of "failure of the Constitutional machinery" in the state.[123] It further states that President's rule can be imposed based on a report sent by the governor, or otherwise in any circumstance that the President deems fit, upon the aid and advice of the council of ministers.[124] With the proclamation of President's rule in a state, the elected government is dismissed and the administration of the state is directly controlled by the President through his representative governor. Since the Governor acts under the pleasure of the President, who in turn acts on the advice of the council of ministers belonging to the ruling party at the center, there is a possibility of the governor's report being influenced by the ruling party's interests. Therefore, the courts have been given the power to examine the subject matter of the governor's report.[125]

The extraordinary power of imposing emergency has been provided to safeguard the state against constitutional crisis. However, since its inception, it has been a matter of great contention and debate due to its ability to hamper the federal structure of the nation. Despite the allowance of judicial review of the governor's report, there have been many cases of misuse. The National Commission to Review the Working of the Constitution (NCRWC) noted that article 356 had been invoked more than 100 times and in at least twenty instances the invocation might be termed as a misuse.[126]

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123 https://indiankanoon.org/doc/8019/
124 *K. Madhusudhana Rao, Authority to recommend President's rule Under Article 356 of the Constitution, 46 (1) Indian Law Institute 125-132 (2004).*
125 *Ibid*
126 https://legalaffairs.gov.in/sites/default/files/Article%20356%20of%20the%20Constitution.pdf
127 https://www.orfonline.org/research/the-paradox-of-centralised-federalism/#_ftn24
128 *1977 AIR 1361, 1978 SCR (1) 1.*
129 https://eparlib.nic.in/bitstream/123456789/761237/1/Presidents_Rule_in_St_UT_Eng_9th_ed_2016.pdf
130 https://www.dnaindia.com/india/report-uttarakhand-the-curious-case-of-president-s-rule-2206032

Some instances of misuse of article 356:

- After the 1977 elections post emergency, the government at the Centre headed by the Janata Party, dismissed the Congress-led governments on the ground that they had lost the people's mandate.[127] The matter was challenged in the Supreme Court, in the State of Rajasthan v. Union of India[128] case. A seven-judge bench dismissed the petition due to its refusal to get into political questions. Some judges even held that presidential satisfaction in invoking Article 356 of the Constitution was not justiciable.

- In 1996 in Gujrat, CM Suresh Mehta of the BJP faced rebellion from Shankar Singh Vaghela and 40 other MLAs. Post-defection, Governor Krishna Pal Singh ordered Mehta to prove his majority in the Vidhan Sabha. The government succeeded in proving its majority, but Pal sent the report to the then PM H D Deve Gowda, recommending President's Rule in the state.[129]

- In 2016, in Uttarakhand,[130] during passing of the state Budget, 9 MLAs of the Harish Rawat led Congress government, rebelled against the party and joined hands with the opposition.[131] Consequently, the majority of the Rawat government was challenged and governor KK Paul invited CM Rawat to prove his majority on the floor of the house. However, before the floor test, much political turmoil ensued, and on March 27, 2016, on the advice of the Union cabinet, Article 356 was imposed by President Pranab Mukherjee citing the failure of constitutional machinery in the state.[132] When the President's rule was challenged before the Uttarakhand HC, the court quashed the President's rule and ordered a floor test.[133]

- In 2016, political instability arose in Arunachal Pradesh when 20 MLAs of the ruling congress joined hands with the BJP and rebelled against chief minister Nabam Tuki.[134] The MLAs communicated their wish to form a government in the state before the governor, who, without informing the chief minister, advanced the assembly session and listed the removal of the speaker of the legislative assembly. Subsequently, the speaker disqualified the 20 MLAs on grounds of defection. However, the governor sent a report to the President citing failure of Constitutional machinery. The President on the basis of the governor's report imposed article 356 and dismissed the Congress-led government. Later, the SC quashed the governor's order calling it illegal and re-instated the Congress government.

Source: https://qph.cf2.quoracdn.net/main-qimg-c30754d017c11e5f092b2e4c3b04ed4b.webp

131 *https://indianexpress.com/article/india/india-news-india/uttarakhand-vijay-bahuguna-nine-rebel-cong-mlas-join-bjp/*
132 *https://www.hindustantimes.com/india/centre-imposes-prez-s-rule-in-uttarakhand-a-day-before-floor-test/story-WL3F0BcoVpIjs4sRbx6JbI.html.*
133 *Harish Chandra Singh Rawat v. Union of India, 2016 AIR CC 2455.*
134 *https://www.thehindu.com/news/national/other-states/Arunachal-political-crisis-A-timeline/article14983750.ece.*

6.1 Sarkaria Commission's Stand on Article 356

The Sarkaria Commission Report recommended an extremely rare use of Art.356. The Commission stood by the intention of the Framers of the Constitution who wanted Art.356 to be an exception to the rule, and decided that it should be used sparingly, as a last measure, when all available alternatives had failed.[135] The Report also observed "…each and every breach of a constitutional provision, irrespective of its significance, extent and effect, cannot be treated as constituting a failure of the constitutional machinery." [136]

In a situation of political breakdown, the Commission recommended the Governor should explore all possibilities of having a Government prove majority support in the Assembly. The report further required that every Proclamation of Emergency should be presented before each House of Parliament at the earliest, in any case before the expiry of the two-month period.[137] The State Legislative Assembly should not be dissolved either by the Governor or the President before such a Proclamation has been laid before the Parliament.

On the issue of the governor's report, the commission recommended appropriately amending Art.356 to include material facts and grounds under which Art.356 is invoked to make the judicial review more meaningful.[138] As per the Commission, the Governor's Report should be a 'speaking document, containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself or otherwise of the emergency situation contemplated in Art.356'.[139]

The Sarkaria Commission's recommendations on article 356 are extensive and define its applicability in detail. However, it is unfortunate that the recommendations given by the commission are regularly disregarded in the present day scenario, and there have been many recent instances of invoking article 356 that are prima facie against the letter and spirit of the Constitution of India.

[135] *The Sarkaria Commission Report (1987), para 6.8.01*
[136] *Ibid, para 6.3.23.*
[137] *Ibid, at para 6.8.05.*
[138] *Ibid, at para 6.8.08.*
[139] *Ibid*

7 Article 370 and 35A: The Case of Jammu and Kashmir

Article 370 of the Indian Constitution, similar to the "compact"[140] in the US, was an essential feature of federalism in India. It was included in the Indian Constitution in October, 1949.[141] The Article governed the Union's relationship with Jammu & Kashmir.[135] Through this article, the constitution gave special status to J&K, exempting it from the Indian Constitution and permitting it to draft its own constitution. The article further restricted Parliament's legislative powers in respect to the region. To extend certain central laws to J&K, on subjects which were part of the Instrument of Accession (IoA), consultation with the state government was mandated; however, on matters which were outside of the IoA, concurrence of the state government was mandatory.[142]

Article 370 was included in Part XXI of the Constitution, which included "Temporary, Transitional and Special Provisions'. Also, the Article itself states that it is a temporary provision.[143] Therefore, an important issue concerning Article 370 has been with respect to the interpretation of its temporary nature. One view has been that due to the above reasons, it is an entirely temporary provision,[144] whereas, another interpretation of it being temporary has been in the sense that the Constituent Assembly of Jammu & Kashmir had been given the right to modify, delete or retain it. At the time of dissolution of the Constituent Assembly, the assembly had decided to retain it, therefore it had become permanent.[145]

Another contentious issue regarding 370 is with respect to clause 3 of the Article. As per clause 3, the President of India has been given the right to delete Article 370; however, it could only be done on the recommendation of the Constituent Assembly of the State.[146] Since the Constituent Assembly of J&K was dissolved in 1957,[147] therefore, the possibility of it being deleted thereafter, even if it is considered temporary, is in question. On this issue, one view is that, since the constituent assembly no longer exists, article 370(3) is no longer valid i.e. Article 370 can no longer be deleted by a presidential order. In order to delete 370, one has to take the normal route of article 368 to amend the constitution.[148] However, another perspective is that post the dissolution of the Constituent Assembly; recommendations of the State Legislature can be taken.[149]

There are 2 important Supreme Court judgments which are often considered in regard to these questions.

In the Prem Nath Kaul (1959),[150] a five-judge bench of the Supreme Court observed on Article 370(2): "This clause shows that the constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final approval of the Constituent Assembly of Kashmir." Thus, this judgment gave the Constituent Assembly of Kashmir the final call to decide on the matter. As mentioned above, since the Constituent Assembly of Kashmir decided to retain Article 370, an interpretation of this judgment is that 370 is a permanent provision.

In Sampat Prakash (1968),[151] the apex court had decided that Article 370 could still be invoked even after the dissolution of Jammu and Kashmir's Constituent Assembly. A five-judge Bench said "Article 370 never ceased to be operative and there could be no challenge on this ground to the validity of the orders passed by the president in exercise of the powers conferred by it." Thus, this judgment can be interpreted as allowing clause 3 of the Article to be invoked even after the dissolution of the Constituent Assembly.

Some legal experts have argued that these two judgments are in conflict with each other. Since both these judgments were decided by a five-judge bench, therefore, they argue, there needs to be a larger bench to decide on this matter.[152]

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140 http://www2.gcc.edu/orgs/GCLawJournal/articles/2018/GCC_Law_Journal_Spring_2018.pdf

141 https://www.hindustantimes.com/india-news/october-17-1949-special-status-is-born/story-7jBc91VIBSW6icN7kTBG4L.html

141 *Article 370(1) of the Indian Constitution.*

143 https://indiankanoon.org/doc/666119/

144 https://www.thehindubusinessline.com/news/national/article-370-is-a-temporary-provision-in-constitution-government-tells-rajya-sabha/article28349533.ece

145 https://www.thehindu.com/news/national/article-370-became-otiose-after-1957-dissolution-argues-senior-advocate-dinesh-dwivedi/article30618253.ece

7.1 Origin of Article 370

Before independence, there were two kinds of territories in India. One was under the direct administrative control of the British and the other comprised the princely states that had signed alliance treaties with the British. When the independence Act 1947 was enacted, the princely states that had alliances with the British[153] had their sovereignty fully restored to them and were given three options: to remain as independent countries, or to join the Dominion of India or the Dominion of Pakistan.[154] Section 6(a) of the 1947 Act said that this act of joining one of the two countries was to be through an Instrument of Accession. The Instrument of Accession was supposed to regulate and govern the distribution of powers between the central government and the concerned princely state.[155]

At the time, Maharaja Hari Singh, the ruler of Kashmir, had decided to remain independent. However, in October 1947 there was an armed infiltration by tribesmen from Pakistan in J&K. The maharaja realized that he needs help from India, thus, reached out to Prime Minister Jawaharlal Nehru and Patel, who agreed to send troops under the condition that Kashmir acceded to India.[156] Thus, Hari Singh signed the Instrument of Accession on October 26, 1947 and Governor General Lord Mountbatten accepted it on October 27, 1947.[157]

During that time it was India's policy that wherever there was a dispute on accession, it should be settled in accordance with the wishes of the. Lord Mountbatten had stated that "it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil is cleared of the invader, the question of the State's accession be settled by a reference to the people".[158] Further, Government of India's White Paper on J&K in 1948, made it clear that India regarded the accession of Kashmir as purely temporary and provisional.[159] In a letter to J&K Prime Minister Sheikh Abdullah dated May 17, 1949, Prime Minister Jawaharlal Nehru wrote: "It has been the settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the Constitution of Jammu and Kashmir is a matter for determination by the people of the state represented in a Constituent Assembly convened for the purpose." [160]

Source: https://thedispatch.blob.core.windows.net/thedispatchimages/2021/12/362841-article-370.jpg

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146 *Article 370(3) of the Indian Constitution.*

147 https://www.constitutionofindia.net/blogs/the_jammu___kashmir_constituent_assembly

148 https://www.newslaundry.com/2019/08/06/article-370-supreme-court-sampath-prakash-jammu-kashmir-special-status#~:text=Gonsalves%20said%3A%20%E2%80%9CIn%20October%201968,Assembly%20had%20ceased%20to%20exist.

149 https://www.thehindu.com/news/national/other-states/explained-how-the-status-of-jammu-and-kashmir-is-being-changed/article28822866.ece

150 *1959 AIR 749, 1959 SCR Supl. (2) 270*

151 *1970 AIR 1118, 1970 SCR (2) 365*

152 https://www.scobserver.in/reports/manohar-lal-sharma-union-of-india-article-370-reference-judgment-summary/

153 https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/archives-unbound/primary-sources_archives-unbound_india-from-crown-rule-to-republic-1945-1949_records-of-the-u.s.-state-department.pdf

Thereafter, in May 1949, Article 306A (now 370) was passed in the Constituent Assembly. Moving the motion, Gopalaswami Ayyangar had said that though the accession was complete, India had offered to have a plebiscite in J&K when the conditions were created.[161] He further stated, if accession was not ratified, "we shall not stand in the way of Kashmir separating herself away from India".[162] On October 17, 1949, when Article 370 was finally included in the Constitution by India's Constituent Assembly, Ayyangar reiterated India's commitment to plebiscite and drafting of a separate constitution by J&K's Constituent Assembly.[163]

7.2 Abrogation of Article 370

In August 2019, Amit Shah, the Union Home Minister, read out a resolution in the Rajya Sabha abolishing Article 370 of the Indian Constitution, thereby stripping Jammu and Kashmir of its special status.[164] Jammu, Kashmir and Ladakh were now going to be three separate segregated units. Ladakh was further separated and was accorded a separate Legislature, whilst Jammu and Kashmir valley were to have a State Assembly.[165] Thus, the debate on Article 370 was back on centre-stage.

The main controversy was that the abrogation happened by invoking 370(3). As discussed above, 370(3) gave the President power to delete Article 370 on recommendation of the Constituent Assembly. This meant that the Union government was of the position that 370(3) was valid even after the dissolution of the Constituent Assembly of J&K, and the recommendation needed to be taken from the State Government. However, at the time there was no state government in J&K, therefore, the Governor was taken to mean the state government.[166]

The opposition questioning the constitutional validity of the abrogation criticized the decision on three grounds. Firstly, some argued that post the dissolution of the Constituent Assembly of J&K, Article 370 was a permanent provision and could not be abrogated.[167] Secondly, some argued that the use of 370(3) after the dissolution of the Constituent Assembly of J&K was invalid. In order to abolish Article 370, the normal route of Constitutional amendments through article 368 needed to be taken.[168] The third argument was that the State Legislature's assent cannot be derived from the Governor, who is the representative of the central government. "Government" cannot be equated as such with "Governor", especially in matters involving the restructuring of States.[169]

The 2019 Presidential order also resulted in nullifying Article 35A.[170] Article 35A stems from Article 370, having been introduced through a Presidential Order in 1954. It gives Jammu and Kashmir the right to decide who are its permanent residents are and give them special rights in government jobs, on buying property in the state, scholarships and other schemes.[171] Jammu and Kashmir defines its permanent residents as "persons born or settled within the state before 1911 or after having lawfully acquired immovable property and are resident in the state for not less than 10 years before that date." The law[172] bans non-permanent residents from settling permanently in the state, buying land, from taking government jobs and scholarships.

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154 *Ibid*
155 https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india/amp/
156 https://www.sundayguardianlive.com/legally-speaking/story-jks-accession-india
157 *Ibid*
158 https://www.mtholyoke.edu/acad/intrel/kasmount.htm
159 https://www.orfonline.org/research/the-kashmir-that-india-lost/
160 https://thewire.in/law/article-370-amendment-reorganisation-jammu-kashmir-unconstitutional-violate-fundamental-rights-petition-supreme-court
161 https://www.legalserviceindia.com/legal/article-1106-article-370-the-only-bridge-which-connects-the-people-of-j-k-to-the-people-of-india.html
162 *Ibid*
163 *Ibid*
164 https://pib.gov.in/newsite/PrintRelease.aspx?relid=192505
165 *Ibid*
166 https://thewire.in/law/article-370-jammu-kashmir-constituent-assembly
167 https://thewire.in/law/jammu-and-kashmir-decoding-article-35a-and-article-370
168 https://www.newslaundry.com/2019/08/06/article-370-supreme-court-sampath-prakash-jammu-kashmir-special-status#~:text=Gonsalves%20said%3A%20%E2%80%9CIn%20October%201968,Assembly%20had%20ceased%20to%20exist.
169 https://thewire.in/law/article-370-jammu-kashmir-constituent-assembly
170 https://frontline.thehindu.com/cover-story/article29048647.ece

Article 35A was nullified on the claims that it was unconstitutional, which was based on two arguments. Firstly, it was argued that Article 35A was introduced by a Presidential order than by following the ordinary procedure of amendment under Article 368 of the constitution.[173] Secondly, it was argued that Article 35A violated the equal protection clause under Article 14 of the Constitution.[174]

However, critics have argued that Article 370 vests in the President the power to extend the provisions of the constitution. The Supreme Court endorsed this view in Sampat Prakash v State of Jammu and Kashmir.[175] The Court observed: "Article 370 is a special provision for amending the Constitution in its application to the state of Jammu and Kashmir…..Article 368 does not curtail the power of the President under Article 370." Further, critics argue that article 14 has not been violated due to the provision of intelligible differentia as observed by SC,[176] which in this case is to preserve the autonomy of the state. Many other north-eastern states also enjoy similar protection.

Since the abrogation of 370, around two dozen petitions filed by various political parties and individuals have challenged the validity of the nullification in the Supreme Court.[177] However, the petitions remain pending before the court for over two years. On 2 March 2020, the 5-judge bench while hearing the petitions rejected the request to refer these petitions to a larger bench.[178] The request for a larger bench was made by the petitioners by referring to the Sampat Prakash and the Prem Nath Kaul case.[179] As mentioned earlier, the petitioners had argued that both these judgments were in conflict with each other and both judgments had a five-judge bench, therefore, the matter could only be resolved by a larger bench.

The court while denying the request for a larger bench held that there was no conflict.[180] It primarily gave two reasons for its decision. One, it observed that the circumstances in which these cases were decided were different. And two, the issues involved in them were completely different.

Article 370 is an important part of the federalism in India. It had been introduced considering the unique history of Jammu and Kashmir joining the Indian Union. Tomorrow, even if the Supreme Court upholds the constitutional validity of the abrogation of 370 and 35A, there is no doubt that this has undermined the federal structure of the nation.

Source: https://images.thequint.com/thequint%2F2019-08%2Ffc6d0517-119e-40fd-a4e9-ef35e3571df5%2Fpun370.jpg

171 https://economictimes.indiatimes.com/news/politics-and-nation/what-is-article-35a-and-why-is-everyone-in-india-talking-about-it-now/articleshow/70507788.cms
172 https://timesofindia.indiatimes.com/india/why-theres-turmoil-over-article-35a-in-kashmir/articleshow/70526833.cms
173 https://thewire.in/law/why-article-35a-matters
174 *Ibid*
175 *1970 AIR 1118, 1970 SCR (2) 365*
176 *Chiranjit Lal Chowdhury v Union Of India and Others, 1951 AIR SC 41*
177 https://www.tribuneindia.com/news/nation/abrogation-of-article-370-around-two-dozen-petitions-hang-fire-in-supreme-court-273416

8 Some Special Provisions: Article 371, Schedule 5 and Schedule 6

8.1 Article 371

Article 371 of the Indian Constitution is connected to granting some special provisions to certain states. It appears in Part XXI of the Constitution, titled 'Temporary, Transitional and Special Provisions'.[181] Article 371 deals with special provisions for the states of Gujrat and Maharashtra. Articles 371A, 371B, 371C, 371D, 371E, 371F, 371G, 371H, and 371J define special provisions with regard to the states of Nagaland, Assam, Manipur, Andhra Pradesh, Sikkim, Mizoram, Arunachal Pradesh, Goa and Karnataka. The main objectives behind Article 371 are to meet the unique needs of the backward regions of these states, protect their economic and cultural interests, combat local challenges and protect the customary laws in these regions.[182] Article 371 was part of the Constitution at the time of its commencement in 1950, whereas Articles 371A through 371J were incorporated subsequently.[183]

- **Article 371, Provisions for Gujarat and Maharashtra:**[184]

This article provides special powers to the governors of Gujarat and Maharashtra to create independent development boards for Vidarbha, Marathwada and the rest of Maharashtra and Saurashtra, Kutch and the rest of Gujarat. The purpose is to ensure that there is equitable allocation of funds for developmental expenditure over these areas. It further gives room to provide more facilities for employment opportunities, vocational and technical education in the state.

- **Article 371A (13th Amendment Act, 1962), Nagaland:** [185]

This provision was inserted after a 16-point agreement between the Centre and the Naga People's Convention in 1960, which led to the creation of Nagaland in 1963. As per this article, the Parliament cannot legislate in matters of Naga religion or social practices, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, and ownership and transfer of land without concurrence of the state Assembly.

- **Article 371B (22nd Amendment Act, 1969), Assam**[186]

This article empowers the President to constitute a committee of the elected tribal representatives of the Assam Legislative Assembly and also provide for its functions.

- **Article 371C (27th Amendment Act, 1971), Manipur** [187]

This article empowers the President to create a committee with the elected members from the hilly regions of the state. It also entrusts the governor to secure the powers of this committee to ensure its proper functioning.

- **Article 371D (32nd Amendment Act, 1973; substituted by The Andhra Pradesh Reorganisation Act, 2014), Andhra Pradesh and Telangana:** [188]

As per this article, the President must provide equal opportunities and facilities for the local population in public education and employment. The President can ask the state to create an administrative tribunal to solve all the disputes with regard to appointments and promotions to civil posts in the state. The President also has similar powers for admissions in educational institutions.

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178 https://www.scobserver.in/reports/manohar-lal-sharma-union-of-india-article-370-reference-judgment-summary/
179 *Ibid*
180 *Ibid*
181 https://www.mea.gov.in/Images/pdf1/Part21.pdf
182 https://timesofindia.indiatimes.com/india/what-is-article-371-and-how-is-it-different-from-article-370/articleshow/83946915.cms
183 https://thewire.in/government/jammu-kashmir-constitution-special-powers-10-states
184 https://indiankanoon.org/doc/89891/
185 https://indiankanoon.org/doc/371998/
186 https://indiankanoon.org/doc/825999/

- **Article 371E:**[189]

This has allowed for the establishment of a central university in Andhra Pradesh by a law of the Parliament.

- **Article 371F (36th Amendment Act, 1975), Sikkim:**[190]

This empowers the members of the Legislative Assembly of Sikkim to elect the representative of Sikkim in the House of the People. Further, to protect the rights and interests of various sections of the population of Sikkim, the Parliament may provide for a number of seats in the Assembly to be filled only by candidates from those sections.

- **Article 371G (53rd Amendment Act, 1986), Mizoram:**[191]

This article states that without the consent of the State Legislative Assembly, the Parliament cannot decide on matters of religious and social practices of the Mizos, Mizo customary law and procedure, civil and criminal law of the land, and the transfer of land ownership.

- **Article 371H (55th Amendment Act, 1986), Arunachal Pradesh:**[192]

This article gives special powers to the Governor of Arunachal Pradesh, on the directions from the President with regard to the law and order in the state. Although the Governor needs to consult the Council of Ministers, the governor's decision will be final. This special power of the Governor can cease only on the direction of the President.

- **Article 371I (56th Amendment Act, 1987), Goa:**[193]

As per this article, the State Legislative Assembly of Goa will consist of not less than 30 members.

- **Article 371J (98th Amendment Act, 2012), Karnataka:** [194]

This Article provides for some special provisions for the Hyderabad-Karnataka region. The President shall give special responsibility to the Governor of Karnataka to create a separate board for the development of the Hyderabad-Karnataka region. Every year, a report regarding the working of this board needs to be presented before the State Legislative Assembly. Equitable funds need to be allotted for developing this region. Further, a proportion of seats in educational institutions and state government jobs in Hyderabad-Karnataka need to be reserved for individuals from this region.

Source: https://i.ytimg.com/vi/WID4SkDu-_4/maxresdefault.jpg

187 https://indiankanoon.org/doc/424060/
188 https://indiankanoon.org/doc/1466428/
189 https://indiankanoon.org/doc/87434/
190 https://indiankanoon.org/doc/338476/
191 https://indiankanoon.org/doc/1184172/
192 https://indiankanoon.org/doc/181196/
193 https://indiankanoon.org/doc/1404922/

8.2 Schedule 5 and Schedule 6

The Government of India Act 1935 led to the creation of 'excluded' and 'partially excluded' areas with separate political representation for the tribes in India.[195] Under this act, while the elected governments administered the provinces, the 'excluded' areas were administered by the Governor who functioned as per his discretion. In 'partially excluded' areas, the Governor functioned on the advice of his ministry.[196] Since the north-eastern tribal regions were considered very backward, they were completely excluded from the scope of normal laws and the central or provincial legislature had no power to make laws with regard to these areas.[197] These provisions were continued even after independence by having them incorporated into the Constitution with some modifications.

The Constitution has defined the term 'Scheduled Areas' as "such areas as the President may by order declare to be Scheduled Areas after consultation with the Governor of the state."[198] The Fifth Schedule to the Constitution has prescribed the following criteria for scheduling, rescheduling and alteration of Scheduled Areas: a) preponderance of tribal population, b) compactness and reasonable size of the area, c) A viable administrative entity such as a district, block or taluk d) Economic backwardness of the area as compared to the neighbouring areas.[199]

These criteria are rooted in the principles followed in declaring 'Excluded' and 'Partially-Excluded Areas' under the Government of India Act, 1935.[200] While the wholly excluded areas have been incorporated into the Sixth Schedule, covering Assam, Meghalaya, Tripura and Mizoram in the North East, the Fifth Schedule has covered the tribal areas of the rest of the country.[201] Currently, the Fifth Schedule covers tribal areas in ten stales namely, Andhra Pradesh, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan, Telangana and Himachal Pradesh.[202] These two schedules provide for alternate or special governance mechanisms for scheduled areas, thereby further strengthening the federal character of the constitution

Important Provisions of the Fifth Schedule:

- The Governor of a state has been entrusted with special responsibilities in the administration of the Scheduled Areas in the state. He/she is required to prepare a special report annually or whenever required, and submit it to the President, regarding the administration of the Scheduled Areas.[203]

- The Union Government can issue appropriate directives to the State Governments as to the administration of the Scheduled Areas.[204]

- This Schedule also provides for the constitution of a Tribal Advisory Council with 20 members, 3/4th of whom should be scheduled tribe members of the state legislature,[205] to advice on such matters pertaining to the welfare and advancement of Schedule Tribes.[206]

- The Governor may make rules regarding the number of members of the Tribal Advisory Council, its conduct, meeting and other incidental matters.[207]

- The Governor may, by public notification, direct that a particular Act of the Parliament or of the State Legislature, shall not apply to a Scheduled Area or to its parts, with exceptions as may be directed.[208]

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194 https://www.latestlaws.com/bare-acts/central-acts-rules/article-371j-constitution-of-india-special-provisions-with-respect-to-state-of-karnataka
195 *Ibid*
196 *Ibid*
197 *Ibid*
198 https://tribal.nic.in/downloads/CLM/CLM_Reports/6.pdf
199 *Ibid*
200 *National Commission for Scheduled Tribes (2012). Special Report: Good Governance for Tribal Development and Administration. New Delhi, GoI.*
201 https://tribal.nic.in/downloads/CLM/CLM_Reports/6.pdf

- The Governor may make Regulations for peace and good governance in the Scheduled Areas by which she/he may, among other things, prohibit or restrict the transfer of land by members of the Schedule Tribes amongst themselves; regulate the allotment of land to members of the Scheduled Tribes in such areas; and regulate the business of moneylenders who lend money to members of the Schedule Tribes, etc..[209] While making such regulations the Governor may, in consultation with the Tribal Advisory Council, repeal or amend any Act of parliament or of the Legislature of the State, or any existing law which for the time being is applicable to the area in question.[210] The Governor shall submit all such regulations to the President, and these shall be effective only after the assent of the president. [211]

Important provisions of the Sixth Schedule

- This schedule provides for two kinds of governing units in Tribal Areas: the Autonomous District Councils and the Autonomous Regions. A District Council has been provided for Each Autonomous District comprising not more than 30 members, and a Regional council has been provided for Autonomous Regions.[212]

- The Governor has the Power to include, exclude or diminish any of these areas or define their boundaries.[213]

- The powers of administration are vested in these Districts and Autonomous Councils.[214] The Governor is entitled to make rules for the constitution of the Councils, its Composition, term of office, appointment of officers and staff, and procedure and conduct of business.[215]

- The Elected members of the councils shall have a normal term of five years.[216]

- The District and the Regional Council have the power to make rules in respect to land other than Reserved Forest land, management of forest, other than reserved forest, use of canal or water courses for agriculture, Regulation of shifting cultivation, establishment of village or town committees, appointment or succession of chief or headmen, inheritance of property, marriage and divorce and social customs with the prior approval of the government.[217]

- The District and the Regional Councils are also empowered to constitute village councils for trials. They may also prescribe and lay down the procedures for trial and enforcement of the decisions. [218]

- The District Councils may establish and manage primary schools, agriculture, animal husbandry and other community projects.[219]

- The Councils have their own district and regional funds and may assess and collect land revenue and impose taxes, grant licenses and leases for minerals,[220] make regulations for control of money lending and trading by non-tribals,[221] regulate publications[222] etc.

- The Governor has the power to direct exclusion or modification of any Act of the State Legislature relating to the consumption of non-distilled alcoholic liquor.[223]

- The Governor also has the power to appoint Commissions to enquire into the affairs of any Council,[224] annul or suspend any office acts or resolutions,[225] and dissolve the Council and direct elections subject to the prior approval of the State Legislature.[226]

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202 *http://panchayatonline.gov.in/viewappswindow.htm?OWASP_CSRFTOKEN=1S7M-6TT4-6S31-LCW7-66P0-RFKJ-SNQFYMK&appname=indexPESA#~:text=In%20short%20form%20this%20is,%2C%20Odisha%2C%20Rajasthan%20and%20Telangana.*

203 *Section (3) of Schedule 5 of the Indian Constitution.*

204 *Ibid*

205 *Section 4(1), Ibid.*

206 *Section 4(2), Ibid.*

9 Conclusion

The above discussion has demonstrated that the framers of the Constitution always intended for India to have a federal structure with a relatively strong Union. At the time of framing of the Constitution, a need was felt to ensure that union government is empowered so as to maintain the integrity of the nation. Over the years, the Supreme Court of India has recognised this feature of Indian federalism. The decision of the Court in S.R. Bommai case has further strengthened federalism by recognizing it to be a part of the basic structure of the Constitution. However, it appears that over the years, the Parliament, which is a responsible constitutional organization, has used its power to regularly encroach upon the powers of other authorities. If this practice is not checked, then it may lay down dangerous precedents and enable a powerful Centre to change the very nature of federalism in India by making itself the sole repository of executive and legislative powers.

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[207] *Section 4(3), Ibid*
[208] *Section 5(1), Ibid.*
[209] *Section 5(2), Ibid*
[210] *Section 5(3), Ibid.*
[211] *Section 5(4), Ibid.*
[212] *Section 2 of Schedule 6 of the Indian Constitution*
[213] *Section 1(3), Ibid.*
[214] *Section 2(4), Ibid.*
[215] *Section 2(6), Ibid.*
[216] *Section 2(6A), Ibid.*
[217] *Section 3, Ibid.*
[218] *Section 4, Ibid.*
[219] *Section 6, Ibid.*
[220] *Section 9, Ibid*
[221] *Section 10, Ibid.*
[222] *Section 11, Ibid.*
[223] *Section 12, Ibid.*
[224] *Section 14, Ibid*
[225] *Section 15, Ibid.*
[226] *Section 16, Ibid.*

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