

INDIAN FEDERALISM PERSPECTIVES

The Centre for Multilevel Federalism (CMF) was founded in 2010 to bring together scholars from different disciplines including political science, economics and sociology, public policy experts, lawyers, and journalists interested in the working of federalism in India. One of our strengths lies in the territorial spread of our network. Today we have over 60 members, working in different universities and research institutions in India as well as in other parts of the globe.

With its distinguished international advisory board, the Centre has moved from strength to strength. As a member of the International Association of Centres for Federal Studies (IACFS), it had the honour of hosting the 2017 annual conference. The CMF has two underlying aims. First, to provide an intellectually stimulating environment for more effective collaboration, discussion, and research on federalism in India. Second, to bring about more informed public opinion on issues of federalism and also contribute, through our international partners and networks, to placing India more firmly in the development of comparative federalism. The Centre aims to position itself as a primary resource for issues relating to the sharing of powers and responsibilities between different levels of government in India's federal system. It has sought to develop and propagate an interdisciplinary study of Indian federalism in a comparative perspective. Through this series titled "Indian Federalism Perspectives", the CMF aims to share research, teaching, and policy insights on how India's multilevel federal system has engaged with a crisis that has multiple dimensions. The COVID 19 pandemic continues to impact our lives and throw up unusual demands and challenges. At the same time, it also provides us an opportunity to improve and fix dysfunctional elements in our federation.

On 6th October the CMF conducted a webinar "The State of Indian Democracy and Federalism" to celebrate its Tenth Anniversary. Dr S.Y. Quereshi, the former Chief Election Commissioner delivered the keynote address.

In this issue, Prof MP Singh examines how different levels of government have tackled the COVID 19 pandemic. He underlines the extensive use of executive federalism for policymaking implementation and monitoring. We thank you for your comments and observations on our previous issue. Please do write to us at cemufed.india@gmail.com to join our mailing list and also do share this link with your colleagues and collaborators interested in federalism.

Federal Handling of COVID-19 Pandemic in India

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Indian federal system has relied on the existing framework of laws and institutions in handling the COVID-19 pandemic. The relevant laws invoked are the Epidemic Diseases Act, 1897; National Disaster Management Act, 2005; and Criminal Procedure Code, 1973-1974. The political institutions involved are the conferences of the top executive and administrative heads of the Union and state governments in the first rush of the pandemic and subsequently the National Disaster Management Authority under the 2005 Act mentioned above, which is representative of the multilevel governmental structures. These institutions have taken the decisions pertaining to the nationwide lockdowns followed by selective unlocks depending on the specific state, city/ neighbourhood, or district/subdistrict contexts. The local district-level administration has been responsible for implementation of the decisions. There has arguably been a partial and mixed success in restricting the incidence of infection and mortality and enhancing recovery, despite the overwhelmed health infrastructure and immeasurable suffering for all, especially the poor and migrant manual workers.

In early 2020 Indian federalism was confronted with two great crises of unprecedented proportions in public health and economy. COVID-19 and economic downturn turned into a collapse aggravated by it. The new coronavirus originating from the Wuhan city in China in December 2019 soon spread like a prairie fire and engulfed the whole world and brought unprecedented harm to public health and economy globally. The new virus for which no vaccine is yet available despite frantic research has produced a pandemic and an economic impact nationally and globally at a scale which humanity has not probably had the experience to deal with in history.

In what follows, I analyse how the Indian federal system has attempted to tackle this pandemic. The Union and state governments were called upon to deal with challenges to both life and livelihood. They preferred to give priority to saving life over livelihood, to begin with, as is evident from the slew of policies followed. In the absence of known medicines and vaccine, the policies essentially focused on measures to prevent the spread of the infection, testing for presence or absence of the infection in the population, and provision of whatever medical care could be provided to infected patients.

In handling COVID-19, the Indian federal political system has mainly acted through what in comparative federal theory has been called 'executive federalism' (Watts 1999: 58). It is a mechanism of joint deliberation by executive or/ or administrative heads of the two orders of governments in a federal political system for common policymaking, implementation, and monitoring. The Parliament and state Legislatures have been paratically missing in action in the case study of India presented here. Notably, the Lok Sabha session ended twelve days before the schedule as coronavirus put India under its wings. The government adjourned the Parliament session in the midst of growing demands from opposition parties for extending it. As the virus spread further to critical proportions, unlike the UK where the opposition united to demand recall of Parliament, there was no such move in India either from the opposition or the government for its recall to session. Some chairpersons of parliamentary committees proposed videoconference meetings of their panels, but the move was generally ignored. Indeed, MPs demanded postponement of convening of the budget session over coronavirus. Later, in September 2020 when the monsoon session of the Parliament came to be planned, it was truncated to September 14-October 1 in view of the pandemic and question hour was removed and zero hour restricted in both houses, to the chagrin of the opposition.

The judiciary too has not been appreciably engaged with review of the government's handling with the current pandemic. A legal expert who has examined a series of cases decided by the constitutional courts in this context finds the Supreme Court highly deferential to the Central government either accepting the government's version or taking a hands-off approach in the 'policy matters' of the executive. If anything, some High Courts like Karnataka, Bombay, Tamil Nadu, Andhra Pradesh, and Gujarat have taken judicially more proactive approach than the Supreme Court and other High Courts (Desai 2020).

The main informal forums of executive federalism in India, in order of hierarchy and

power, are the Prime Minister/Chief Ministers conferences, ministerial conferences of concerned ministries of the Union and state governments, chief secretaries' conferences of the two levels of governments, and Union and state secretaries' conferences of the concerned ministries or departments of the two orders of governments. These are 'informal' in the sense of being neither instituted under the Constitution nor any parliamentary enactment. They owe their origins in precedent or convention. Since the time of the first Prime Minister Jawaharlal Nehru (Indian National Congress) there had been set up a National Development Council (NDC) by a Cabinet Resolution (August 6, 1952) consisting of the Prime Minister (Chair), some relevant Union Ministers, and Chief Ministers of states and Lt. Governors of Union territories for giving guidelines for and finally endorsing the Five-year Plans formulated by the Planning Commission, a body of some key Union ministers and economic experts and chaired by the Prime Minister himself and also set up by a Cabinet Resolution (March 15, 1950). But both these bodies were abolished by Prime Minister Narendra Modi (BJP/NDA) in 2014/2015, replacing them by the NITI Aayog and its Governing Council set up by a Cabinet Resolution (Swinden and Saxena 2017). Both these new bodies are much weaker and much less a regular wheel of the vehicle of the Centre-state decision-making than the Planning Commission and NDC were, and in reality this centralises financial and other powers in the finance ministry and other Union ministries despite the professed claims of promoting decentralisation and 'cooperative federalism' made by the Modi government.

The informal forums of executive federalism I have mentioned above are even more ad hoc than NDC and the Governing Council of the NITI Aayog. They are not set up by a Cabined resolution as ongoing bodies and occasionally convened by the Home Ministry. Incidentally, there is a formal institution of executive federalism contemplated in the Inter-State Council (ISC) in Article 263 of the Constitution. But it was not operationalised until 1990, and when it was actually set up by a Presidential Order that year by omitting clause (a)

of Article 263 (relating to its power of ‘inquiring into and advising upon disputes which may have arisen between States’), its first meeting was not called until 1996. All Prime Ministers have since convened its meetings very sparingly. This is despite the fact that all constitutional commissions on Centre-State Relations – chaired by Justice R.S. Sarkaria (Government of India 1988), Justice M.N. Venkatachaliah (Government of India 2002), and Justice M.M. Punchhi (Government of India 2010) – have strongly recommended its revival and greater use to reform the working of the Indian federal system towards greater federalisation (Singh and Saxena 2015). In dealing with COVID-19 pandemic, Prime Minister Modi primarily relied on the informal Prime Minister/Chief Ministers’ conferences mentioned above.

In all forums of executive federalism - formal or informal - there is no provision or convention for decision making by majority. Decision is by consensus as sensed by the chair. Moreover, there is also no provision or convention for reporting the decisions to the Parliament or state Legislatures and approval by them (Singh and Saxena 2015).

The virtual Chief Ministers’ conferences convened by Prime Minister Modi operated, by and large, with remarkable degree of sense of urgency and consensus, which was rather surprising in view of the highly conflictual state of inter-party and intergovernmental relations before the outbreak of the COVID-19 pandemic on a series of recent issues and legislations like the triple talaq abolition and its criminalisation; Citizenship Amendment Act (CAA) relaxing rules for grant of citizenship to persecuted minorities (Hindus, Sikhs, Jains, Buddhists, Christians, and Parsis) from Pakistan, Afghanistan, and Bangladesh; proposed renewal of the National Register of Citizens; abrogation of Articles 370 and 35A relating to Jammu & Kashmir; etc. All these had triggered widespread civil unrest by Muslim minority and others and protest from non-BJP state governments alleging government’s policies of Hindu majoritarianism and undermining of constitutional secularism. Eleven non-BJP state governments had taken a

‘No-CAA/No-NRC’ stance and passed Assembly resolutions on this issue. The pandemic has obviously set aside these widening conflicts and produced a sense of crisis, emergency, and the necessity of a united national response. Yet these PM/CMs conferences on COVID-19 pandemic were not without the airing of legitimate intergovernmental grievances and differences.

In tackling the COVID-19 pandemic in the rush of its outbreak, six virtual meetings by online videoconference mode of executive heads of the Union and state governments and key Union ministers and the health ministers of states took place chaired by Prime Minister Modi. These meetings were preceded by a meeting of chief secretaries of the states chaired by the Union cabinet secretary. These exercises in executive and administrative federalism are not new; these are rather regular features in general or specific policy areas of the two levels of governments in India as also in other Commonwealth parliamentary federations such as Canada and Australia. However, the frequency of these meetings as well as intensities of their deliberation and the spirit of cooperative federalism during the current pandemic in India seems to be admirably unprecedented. In the first meeting Prime Minister Modi’s appeal for concerted federal approach to the crisis and national lockdown was unanimously endorsed. As it happened, five successive phases of lockdowns were consensually agreed upon and announced by the Centre. The five successive phases were as follows: (i) 25 March-14 April; (ii) 15 April-3 May; (iii) 04-17 May; (iv) 18-31 May; (v) 1-30 June, in the contaminated or ‘contained’ zones only.

The Union Home Ministry issued on May 30, 2020, the ‘Unlock-1’ guidelines allowing a phased re-opening of most activities across the nation from June 1, and restricting the lockdown only to the containment zones until June 30, 2020. It also changed the night curfew hours from 7 pm to 7 am now to 9 pm to 5 am. International air travel, schools, gyms, cinema halls continued to be prohibited. The current phase of ‘unlock 1’ is focused on revival of economic activities. Activities prohibited earlier

were opened subject to the following of standards operating procedures (SOPs) to be prescribed by the Union Health Ministry. In phase I, beginning from June 8, religious places for public worship, hotels, restaurants, other hospitality services and shopping malls were permitted to open. In phase II Schools, colleges, educational/training/coaching institutions would be allowed to open after consultation with states and Union territories. Based on consultations by and feedback to state governments and Union territories with parents and other stakeholders, decision on the reopening of these institutions were taken in July. In phase III, dates for reopening of international air travel of passengers, metro rails, cinema halls and similar places, social /political/sports/entertainment/academia/cultural/religious functions and congregations were to be decided on the assessment of the situation. The containment zones, however, were to continue to be under lockdown. The Union Home Ministry also removed all restrictions on intra-state and inter-state movement of persons and goods. Night curfew was continued to be in force with revised schedules. Decision about containment zones were to be taken by the state and Union territory governments taking into considerations the Union Home Ministry guidelines.

With the announcement of ‘unlock-1’ phase commencing from June 1, 2020, works and services were resumed in a phased manner in selected sectors. Beginning with unlock-2 commencing from July 1(2020) the first ministers’ conferences stepped back in favour of decisions by the National Disaster Management Authority (NDMA). NDMA is chaired by the Union Home Minister, with some MPs, top members from the administrations of Union/ state/ union territory/local governments, corporate economic sector, civil society, media, etc. The unlock-2, announced by the Centre by the decision of the NDMA in consultation with the state governments, started from July 1. During this phase training institutes run by the Union and state governments were allowed to function from the middle of the month while schools and colleges remained closed until July 31. Apart from restrictions in containment zones, inter-state

and intra-state movement of persons and goods were made free. Demarcation of containment zones were now demarcated by state and union territory governments and notified on the websites of the respective district collectors and by the states and Union territories. Directives issued by the NDMA as to precautions against new coronavirus were to be followed, the Union Home Ministry announced. State governments now had greater autonomy of taking appropriate measures as per their specific contexts and needs. The Union Ministry of Home Affairs announced unlock-3 starting from August 1, which removed restrictions on the movement of individuals during nights and allowed yoga institutions and gymnasiums to open from August 5. However, lockdowns on containment zones have been extended till August 31. Schools, colleges, and coaching institutes will remain closed till August 31. The same for metro rails, cinema halls, entertainment parks, theatres, bars, auditoriums, assembly halls.

A sixth round of video conference later on with the Chief Ministers of worst-affected 10 states – Andhra Pradesh, Karnataka, Tamil Nadu, West Bengal, Maharashtra, Punjab, Bihar, Gujarat, Telangana, and Uttar Pradesh - on August 11 (2020) Prime Minister Modi urged the imperative of testing and tracing all those who had come in contact with an infected individual within 72 hours with the target of bringing the fatality rate (ratio of deaths to positive cases expressed as percentage) in these states to under 1 per cent in view of the fact that India’s national case fatality ratio had promisingly now fallen to 1.99 per cent, the lowest since the beginning of national lockdown in March (2020)(*The Indian Express* 2020). The PM added that the recovery rate rising to 70 per cent of active cases reducing to 28 per cent and daily tests of almost 700,000 showed our efforts had been successful. Some CMs asked for a special financial grant from the Centre to combat COVID-19 and guidance for conducting sero-surveillance (*The Economic Times* 2020).

District-level administrations in some states also came in for enterprising and unique regional models of cluster containment measures

in hotspots that appeared to be more effective, viz., the Agra Model in Uttar Pradesh, the Bhilwara Model in Rajasthan, and the Pathanamthitta Model in Kerala. ‘These innovative “regional models” convey what Shashi Tharoor calls the “power of example” and could lead even nations with limited health infrastructure’ (Singh 2020). India’s civic culture of social service also helped, e.g. the Rashtriya Swayamsevak Sangh (RSS), the Hindu cultural organization, doing intense voluntary social work in more than half a dozen states in plasma donation for building immunity among the infected to conducting cremation and last rites of the dead (Yadav 2020), Delhi’s Gurdwara Bangla Sahib’s serving of 40,000 meals per day, among others (Singh 2020). The Agra Model sought to manage the hotspots through an active survey and containment plan. The area was identified within a radius of 3 kms from the epicentre while 5 km buffer zone was demarcated as the buffer zone. In the Bhilwara Model the city was completely isolated by imposing Section 144 CRPC. In the first phase essential services were permitted; in the second phase a total shutdown was imposed with city and district borders sealed with check posts at every point of entry and exit. The containment zone was demarcated around 3 kms and buffer zone around 7 kms. In the Pathanamthitta Model, along with sealing and contact tracing, every person who had entered the district was screened and record of places visited and persons contacted and likely to be contacted was maintained for reaching to them at short notice (Ghosh 2020).

The pandemic and its fiscal impacts on the Centre and states has significantly altered the federal balance of forces in favour of the Union government. This is illustrated by the recent conditional increase in borrowing limit for states and reforms in the agricultural sector, a patently state subject under the Constitution. The Union government increased the borrowing limit of state governments from 3 per cent to 5 per cent of the gross state domestic product. However, only the first 0.5 per cent of this enhancement is unconditional; a further 1 per cent will be allowed contingent on the borrowing being linked to specific reforms such as debt sustainability, job

creation, power sector reforms, and urban development. A final 0.5 per cent will be permissible on significant achievements in these areas. The pandemic has also caused Centre-state tension on the former’s failure to compensate the latter in full for five years during the transition to the GST regime introduced in 2017 the losses incurred by the states on account of this reform. Following the GST Council meeting in late August 2020, the Centre offered two options to the states for meeting this year’s shortfall of Rs. 2.35 lakh crore under the new indirect tax regime: (i) special window to the states coordinated by the Union Finance Ministry to borrow the projected shortfall of Rs. 97,000 crore only on account of GST implementation - and not the pandemic - to be fully repaid from compensation cess fund without counting it as states’ debt; or (ii) taking into account COVID-19 pandemic and borrowing the entire Rs. 2.35 lakh crore bearing the interest burden and the bulk of it being counted in the books of the states. While the states may prefer the first option yet the burden on them is obvious. Non-BJP states have decried the Centre’s solution as an attack on federalism by deepening the states’ debt burden and straining their finances. (*The Sunday Express*, August 30, 2020).

This case study of federal handling of the COVID-19 pandemic gives a rare glimpse of the working of the mechanism of executive federalism in India in a serious crisis in the policy domain of public health policy formulation, harmonisation, and monitoring. It shows an exceptional Union-State cooperation in face of a serious public health emergency under the existing laws like the Epidemic Diseases Act (1897 as subsequently amended), the Criminal Procedure Code 1973 and 1975), and the National Disaster Management Act (2005), extending the last one to public health emergency. The governments in India hurriedly set aside extremely contentious and conflictual issues that had been raging prior to the outbreak of the pandemic, sharply dividing the Union and State governments and the civil society. This visibly enhanced the political system’s capacity to a remarkably high level to deal with an emergent crisis of national and global dimensions.

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Preferred citation for this contribution: Singh, Mahendra Pratap. (2020). Federal Handling of COVID-19 Pandemic in India. *Indian Federalism Perspectives*, 1(3) October