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# **AN ANALYSIS OF THE GOVERNMENT OF INDIA ACT, 1935 IN THE LIGHT OF FEDERALISM**

**AUTHORED BY - SUCHANA SEN**

## **ABSTRACT**

Most of the studies on federalism revolves around the legislative, financial and administrative relations between the Centre and the States. The Constitution of India, in nowhere, expressly mentions that “India is a Federation” unlike the Government of India Act, 1935 from which the Indian Constitution has derived many of its essential provisions as far as the drafting of the Indian Constitution is concerned. The Constituent Assembly of India functioned closely within the mental framework of the Government of India Act, 1935 with its strong unitary bias. Federalism is a permanent process in India with a strong centralized tendency by its constitution itself. If one goes by the origin of certain provisions depicted in The Constitution of India, he may clearly point out the similarity between the Constitution and Government of India Act, 1935 in some provisions. The researcher carried out her research and found one leading key aspect of the Government of India Act, 1935 which works as an aid in order to understand the federal aspect.

This paper broadly discusses about certain powers which Governor General possesses under section- 45 of the Government of India Act, 1935 which later on kept an impact upon the introduction of Article 352 and 356 in the Constitution of India. Articles 352 and 356 majorly talks about the power of the president to issue certain proclamation. The paper further discusses a little bit about the provisions of Article 356 and how it is exercised by the President of India in order to administrate the Country during the failure of Constitutional Machinery. Finally, the paper tries to bridge the gap between the Historical Aspect and the Current Day Scenario as far as Federalism is concerned.

**Key words:** Government, Federalism, Constitution, Proclamation.

## INTRODUCTION TO FEDERALISM

*“Federalism is more a functional arrangement for cooperative action, than a static institutional concept. Constitution provides a tool by the liberal use of which co-operative federalism can be substantially realized in the working of the system. A more generous use of this tool should be made than has hitherto been done, for progressive decentralization of powers to the governments of the states.”<sup>1</sup>*

The word "federation" is a derivation from the Latin term "foedus" meaning treaties or agreement.<sup>2</sup> Federalism constitutes a complex governmental mechanism for governance of a country.<sup>3</sup> It is a basic feature of the constitution and is a form of government in which the sovereign authority of political powers are distributed to various units. In a federal system, there is one common government for the whole country which is variously called as Central Government. There are local governments for the different regions in which the country is divided. These are called the State Governments.<sup>4</sup> Hence, we can see, at one level, there exists the central government having jurisdiction over the entire country, and reaching down to the person and property of every individual therein. On the other hand, there exist regional governments, each of which exercises, jurisdiction in one of the administrative units into which the country is divided under the constitution.<sup>5</sup> Prof. K.C. observes that the concept of federalism means the process of division of powers whereby both the federal as well as the regional governments are co-ordinate and independent within their domain without any one being subordinate to the other. Thus, federal principle can be said to be the system which is characterised by the presence of co-ordinate and co-equal authorities which are not subordinate to each other.<sup>6</sup>

Federalism in the modern age is a principle of reconciliation between two divergent tendencies, the widening range of common interests and the need for local autonomy. It seeks to draw a balance between the forces working in favour of concentration of power in the centre and those urging a dispersal of it in a number of units. It thus seeks to reconcile unity with multiplicity, centralisation with decentralisation and nationalism with localism.<sup>7</sup> Salient features of federalism include—

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<sup>1</sup> Sarkaria Commission on Centre State Relations, India, 1983.

<sup>2</sup> M. Asad Malik, Changing Dimension of Federalism in India: An Appraisal, 2 ILI Law Review, 85, 87(2019)

<sup>3</sup> NUZHAT PARVEEN KHAN, COMPARATIVE CONSTITUTIONAL LAW 439 (1<sup>st</sup> ed., 2015).

<sup>4</sup> UDAI RAJ RAI, CONSTITUTIONAL LAW-1 366 (1<sup>st</sup> ed., 2016).

<sup>5</sup> M P JAIN, INDIAN CONSTITUTIONAL LAW 529 (8<sup>th</sup> ed., 2018)

<sup>6</sup> J. N. PANDEY, CONSTITUTIONAL LAW OF INDIA 17 (52<sup>nd</sup> ed., 2015)

<sup>7</sup> See *supra* note 5

1. Dual Polity
2. Distribution of Powers
3. Written Constitution
4. Supremacy of Constitution
5. Federal Court and Judicial Review
6. Rigid Constitution

## **FEDERALISM IN INDIA**

In a country like India Federalism plays one of the pivotal roles when it comes to cope up with its diversity of cultural and lingual barriers. As people from different background and culture live together, neither it would be possible for a single Government to make uniform law for the whole country nor it is desirable for the interest of the people with separate cultures, languages and diverse backgrounds. Hence, the Central Government may make laws for the whole or any part of the territory of India. The respective State Governments may make and implement laws according to the social, economic and political status of the residents of different areas. Federalism offers and enables the Central Government to focus on primary public obligations and leaving countless 'secondary affairs' to the State Governments. Federalism in India is progressing in a very impressive pace over the years to form a predominantly parliamentary system. To sum up, In India, a federal system of government has been adopted because it is more effective as compared to a unitary one when the size of the territory of the country is as large as India & when diverse groups of the population of the country reside in a discrete territorial concentration as in India. Though according to some of the political scientists, Indian Constitution is quasi-federal in nature and having more unitary than the federal feature,<sup>8</sup> but the other group opine that it is a federal constitution with a special and new characteristics enabling itself to cope with emergent situation in national interest.<sup>9</sup>

The present federal system of India has its background in the Government of India Act, 1919 and the Government of India Act, 1935. The Government of India Act, 1919 made provisions for the first time for the separation of Central and Provincial Powers making a major shift in the unitary system of Government prevailing at that point of time.<sup>10</sup> The Government of India Act, 1935

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Dr. Mukesh Kumar, Nature of Indian Federalism: An analysis of Historical Basis and Problems, 7(1) IJHSSI, 42, 43(2018)

provided that the Indian Federal State was to consist of British India Provinces and the princely states and it was to be a centralised federation with considerable amount of autonomy for the provinces.<sup>11</sup> The historical legacy, the diversified character and continental size of India, the partial operation of federalism in the British Indian Provinces under the Act of 1935, and the growing popularity of federalism in the 20th century as a suitable political model for plural societies, did influence the Founding Fathers of the Indian Constitution to adopt a federal pattern for India. Pertaining to the matter, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Indian Constitution, made a comment, *"I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces (States) nonetheless, it is a Federal Constitution"*<sup>12</sup> He preferred 'Centralised Federalism' for India. Hence, federalism envisaged under the Indian Constitution is greatly tilted towards the Centre. The Centre's position and power vis-a-vis the States are so dominant and overriding that the latter have been reduced to the level of 'peripheral and mendicant status.' Moreover, the existence of states and survival of their popular governments are depending upon the sweet will of the 'Federal Leviathan.' Therefore, Indian Federalism may be characterised as 'prefectorial and permissive federalism'

## **GOVERNMENT OF INDIA ACT, 1935 IN THE LIGHT OF FEDERALISM**

Elements of federalism were first introduced into modern India by the Government of India Act, 1919 which separated powers between the centre and the provincial legislatures. Later on, it was further much more specified and elaborated in the Government of India Act, 1935<sup>13</sup> as far as the concept of 'Federalism' in India is concerned. The Government of India Act, 1935 made a provision for the establishment of an All India Federation consisting of the British India Provinces & such Indian State who would desire to come into the Federation. Under all the previous Government of India Acts, the Government of India was unitary, but the Government of India Act, 1935 envisaged a Federation taking the Provinces & the Indian States as one unit. However, the accession of the States to the Federation was optional. It could not be created until the States had provided their consent to join the Federation. At the time of joining it, each ruler of the State was required to sign an Instrument of Accession stating therein the extent to which it assented to surrender its authority to the Federal Government. It abolished Dyarchy at the Provincial level &

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<sup>11</sup> *Id.*

<sup>12</sup> Constituent Assembly Debate, Vol. 4, p. 133, Constituent Assembly Debate, Vol. 5, pp.33-36

<sup>13</sup> Royal assent was given on August 2, 1935.

introduced it at the Centre. The Executive Power of the Centre was vested in the Governor-General. The researcher has identified one key aspect of the Government of India Act, 1935 which undermines the concept of today's federalism in India and the power of the Governor General which lies within the scope of section- 45 of the Government of India Act, 1935.

## **PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY**

Section-45 of the Government of India Act, 1935 gives---

*“(1) If at any time the Governor-General is satisfied that a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of this Act, he may by Proclamation--*

*(a) declare that his functions shall to such extent as may be specified in the Proclamation be exercised by him in his discretion;*

*(b) assume to himself all or any of the powers vested in or exercisable by any Federal body or authority, and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority:*

*Provided that nothing in this subsection shall authorise the Governor-General to assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to the Federal Court.*

As one may observe, the referred section clarifies the powers available to the Governor General for practicing in case of any kind of emergency arisen. Later, we find similar provision under article 352 and 356 of The Constitution of India where president has been given right to issue certain proclamation if any grave emergency arises. Section 45 overall provides provision of in case of failure of constitutional machinery. When the Government of the Federation fails to carry out administration, the Governor General has absolute jurisdiction and authority to ask the Government of the Federation to move out and can issue his rule throughout the entire Federation as per his will. This function of his ruling should be specified in the formerly issued proclamation. Functions mentioned in the proclamation must be exercised by the Governor himself in his discretion. The Governor General has got a finite procedure in order to carry out administration by issuing certain proclamation. Section 45(1)(b) interprets how exactly the Governor General

may exercise the power he possesses under the proclamation. It is said that certain powers which are exercisable only by the Government of the Federation, can be exercised by the Governor General himself under such proclamation issued. For example, Governor General does not have control over Police but he may, during the period of failure of constitutional machinery can exercise his control over the Police. Just like the previously cited example, the Governor General, if feels that any such incidental and consequential provision is required for him to be necessary in order to administrate the Federation or it is essential *“for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority”*. Under no circumstances or provision the Governor General gets authorisation to practice any of the power available exclusively to the Federal Court. The Governor General can neither assume to himself any of the powers vested in or exercisable by the Federal Court nor suspend, the operation of any provision of the Government of India Act, 1935 as far as Federal Court is concerned.

*(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation*

The Governor General, if thinks that in the previously issued proclamation some sort of changes should be made or according to the situation and circumstances at that point of time, the former proclamation is not prompt, he can revoke the previous one or draft some changes in the same and issue the new proclamation through a subsequent declaration that a new proclamation is going to substitute the old one.

*(3) A Proclamation issued under this section-*

*(a) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament;*

*(b) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months:*

*Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this subsection it would otherwise have ceased to operate.*

The new proclamation issued by the Governor General under section- 45(3) must be expressly notified and properly communicated to the Secretary of the State. As India was following bi-cameral legislature at that point of time, it was compulsory for the Governor General to lay down such proclamation before every house of representatives. Once a proclamation is issued, it will

be active for six months from the date of issuing and will stop after the mentioned period of time provided that it is not a proclamation revoking another previous proclamation issued by the Governor General. It is interpreted that if the proposal of issuing proclamation is often placed before both the houses of parliaments and gets approved frequently then that declaration may continue to be in force for the next twelve months from the date of getting issued. (If not revoked)

- Point to be noted, in the proviso to clause 3(b), the period originally fixed was three months but in the House of Lords it was extended to twelve months as it was thought, in the words of Marquess of Zetland, “*unreasonable to trouble Parliament every six months to consider a case of this kind when the total period for which it might last was three years.*”<sup>14</sup>

*(4) If at any time the government of the Federation has for a continuous period of three years been carried on under and by virtue of a Proclamation issued under this section, then, at the expiration of that period, the Proclamation shall cease to have effect and the government of the Federation shall be carried on in accordance with the other provisions of this Act, subject to any amendment thereof which Parliament may deem it necessary to make, but nothing in this subsection shall be construed as extending the power of Parliament to make amendments in this Act without affecting the accession of a State.*

There are provisions regarding the Government of Federation while getting controlled under the proclamation. It is stated and elaborated under section- 45 about such provisions where a Federal Government is turned down for three continuous years. In case, a Government of Federation has for a continuous period of three years been carried on under and by virtue of a Proclamation issued under section- 45, it has got rights under the act to restore itself after the completion of the said period of time. The certain proclamation, by which the Government of the Federation was turned down since the past three years will lose its validity as far as administrating and governing the Federation is concerned. After the three-year period is over, the Government of the Federation starts working as usual in the same manner how it used to before the proclamation forbade it to govern in order to control over the failure of constitutional machinery. After three years, the proclamation would stop to have any effect over the administrative system. the government of the Federation shall be carried on in accordance with the other provisions of the Government of India Act, 1935. It is clearly depicted that this is “*subject to any amendment thereof which Parliament may deem it necessary to make, but nothing in this subsection shall be construed as extending the power of Parliament to make amendments in this Act without affecting the*

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<sup>14</sup> PROF. C. L. ANAND, CONSTITUTIONAL LAW AND HISTORY OF GOVERNMENT OF INDIA 530 (8<sup>th</sup> ed., 2008)

*accession of a State.”*

- Point to be noted, Clauses 3(b) and (4) These were added by way of amendment to the Bill to ensure that Proclamations under this breakdown clause will in all cases come to Parliament for approval in order to enable Parliament to review the position from time to time. In the second place, it makes it clear that at the end of three years, the period beyond which the Proclamations cannot run, the personal rule of the Governor-General will cease to have effect and the formal provisions of the Constitution will be resumed subject to any amendment thereof which Parliament may deem it necessary to make. In the third place, it makes it clear that if amendments are made which alter in any way the conditions under which the Princes have acceded, the Instrument of Accession would become voidable. Explaining the position in relation to States, the Solicitor-General said, *“This is a matter on which the States made representations and very proper representations.”* They said, *“You are asking us to join a Federation in which we have a measure of control through the responsibility at the centre. We do not in the least complain of there being an emergency clause of this kind, but it would not be right that the Federation should be governed under emergency powers by the Governor-General year after year and that we should still be held to our instrument of accession.”*<sup>15</sup>

*(5) If the Governor-General, by a Proclamation under this section, assumes to himself any power of the Federal Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, reference in this Act to Federal Acts, Federal laws, or Acts or laws of the Federal Legislature shall be construed as including a reference to such a law.”*

The Governor General may assume certain powers which belong to him while issuing of a certain proclamation. During this period of time i.e. the period when the proclamation was issued, if, the Governor General assumes the power of the Federal Legislature, he can make laws using such power. According to the Government of India Act, 1935, laws made during this phase by the Governor General, are valid till two years from when the proclamation has become void in the eyes of law and the Government of the Federation has got back its power to administrate the Federation. If the laws made by the Governor General during his period of tenure under proclamation does not get repealed, re-enacted or replaced by the Houses of Parliament with a

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<sup>15</sup> See *supra* note 12

proper legislature, “any reference in this Act to Federal Acts, Federal laws, or Acts or laws of the Federal Legislature shall be construed as including a reference to such a law.” It was felt that such laws should not come to an end immediately, on the other hand it was also felt that such laws which in some cases, might be drastic should not continue indefinitely.

*(6) The functions of the Governor-General under this section shall be exercised by him in his discretion.*

The special power available to the Governor General under section- 45 of the Government of India Act, 1935 shall be exercised by him only and only during any grave emergency arising due to the failure of Constitutional Machinery. It is up to the discretion of the Governor General where he may deem, issuing the proclamation, fit and proper.

## **CONCLUSION**

The way India today continues to practice federalism, has not grown overnight. It took decades and centuries in order to get a properly shaped framework. Undoubtedly. The Government of India Act, 1935 played a major role as far as giving shape to the Indian Federal Polity is concerned. If one examines thoroughly the provision in the Government of India Act, 1935 pertaining to the special powers available to the Governor General of issuing proclamation, he can easily point out that it is the source from where Indian Constitution has derived its major ideas of Article 352<sup>16</sup> and 356<sup>17</sup> pertaining to the power of President in order to control any emergency arisen out of the failure of constitutional machinery.

When a state's constitutional machinery fails, or a Constitutional Breakdown in a State or “otherwise” takes place and the government of a state cannot function in accordance with the Constitutional provisions, the President of India assumes to himself all or any function of the State government concerned by the virtue of article 356 and hence constitutionally it is called the “President's Rule.” In common parlance, it is known as ‘Central Rule’, ‘New Delhi Rule’, ‘Presidential Administration’, ‘Governor's Rule’, and ‘Governor's Administration’. As there is a constitutional limit for the operation of Presidential administration in any State,<sup>18</sup> it is being

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<sup>16</sup> Article 352, The Constitution of India, 1950

<sup>17</sup> Article 356, The Constitution of India, 1950

<sup>18</sup> Before the 44th Constitutional Amendment, the Presidential administration could continue, with a periodic approval of the Parliament for three years, but this amendment reduced the maximum limit to one year.

characterised as “caretaker arrangement,”<sup>19</sup> “temporary rule,”<sup>20</sup> and “an interim administration.” The Governor prepares a report and submits it to the President, who, with the assistance and advice of the Council of Ministers and Prime Minister, takes over the state government similar to that of the Governor General used to do by the virtue of section- 45 of the Government of India Act, 1935. An example of President’s rule in India will help to comprehend the whole idea of it. When there was no clear winner of the election in Maharashtra in 2019, the President's rule was applied, and the state's governor, Bhagat Singh Koshyari, assumed control of the government on behalf of the Union.<sup>21</sup>

Article 356 has been a controversial article from the Constituent Assembly itself. Some of the authors were adamantly opposed to this Article. They were concerned that it would attempt to revive an imperial tradition. But Dr. Ambedkar countered that “*No provision of any Constitution is immune from abuse as such and that the mere possibility of abuse cannot be a ground for not incorporating it.*”<sup>22</sup> A requirement for effective governance is the distribution of power among various organs and institutions ‘*a sine qua non*’ for good governance. Article 356's unusual and extraordinary powers cannot be used to advance the interests of a political party or to topple a legitimately elected administration or the Legislative Assembly.

The word ‘federation’ is nowhere mentioned in the Constitution of India, 1950 and the federation existing in India is not the result of any agreement between the States and the States have no right to secede from the Union. In India the federal structure changes into unitary structure to deal with national crisis and to curb separatist tendencies. But at the same time various efforts are also being made to increase cooperation between the Union and the States to make the federal structure function smoothly. Thus, it can be said that India is a cooperative or collaborative federation with a strong Centre to uphold the sovereignty, unity and integrity of the nation.

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<sup>19</sup> K.N. Katju, *Parliamentary Debates*, Part II, Vol. II, No. 4, March 12, 1953, Col. 1899, and Dawan S. S. *Asian Recorder*, April 30- May 6, 1970, p. 9518

<sup>20</sup> Shukla, V. C. Lok Sabha Debates, 4th Series, Vol. XVIII No. 4, July 25, 1968, Col. 1547

<sup>21</sup> Prateek Chandgothia, *Analysing the Scope of Article 356: Emergency on the Grounds of Breakdown of State Machinery*, 2 *Jus Corpus L.J.* 296 (2022).

<sup>22</sup> National Commission to Review the Working of the Constitution, 'A Consultation Paper on Article 356 of the Constitution' (The Hindu Centre, 2002)