

CAN INDIA HAVE ‘SANCTUARY’ STATES?¹

Abstract

Certain states have refused to implement the National Register of Citizens for citizens of India and expressed their dissent against the Citizenship Amendment Act 2019. This dissent has brought forth the debate of federalist structure of Indian governance back on the table. In the United States of America, the federal structure of the States has been definitely defined. States have also exercised their independent existence in the federal structure in several cases by refusing to implement federal law. Most recently, certain cities in different States of America were giving sanctuary to the immigrants on humanitarian grounds despite the strict anti-immigration law of the Trump government. The Trump government challenged this defiance of the individual States.

But unlike the United States, the Indian federalist structure does not have clear segregation of powers and in any case, the balance of power weighs heavier for the Centre. With such clear ideas of federalism, this paper tries to explore two questions: 1) What kind of federalist structure is India heading towards and how does sovereignty fit into this? 2) Can Indian states defy the Central law like the United States and should they have that right?

Introduction

The Citizenship (Amendment) Act, 2019 (“CAA”) received the assent of the President on the 12th December 2019. It expedites the procedure for procuring citizenship for all religious minorities from Afghanistan, Pakistan, and Bangladesh who had to flee their nation due to persecution. These minorities are all religions except Islam. Although there is no legislation for the National Register of Citizens (“NRC”), the Citizenship Rules, 2003 defined National Population Register (“NPR”) which was in force only in the State of Assam. After the enforcement of the CAA, the Union Cabinet approved funds for updating the NPR which was the foundation of NRC.²

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² HT Correspondent, *All you need to know about National Population Register and the NRC link*, HINDUSTAN TIMES, December 24, 2019, <https://www.hindustantimes.com/india-news/all-you-need-to-know-about-npr-and-the-link-to-nrc/story-U7iq7h5Ug4SCNdFicM1GdN.html> (last visited May 23, 2020).

Nineteen states led by the State of Kerala and Punjab expressed their dissent against CAA. These states refused to carry out work towards updating of the NPR. Few of the States even passed resolutions to that effect.³ States argued that CAA was against the secular fabric of the Constitution and, the States were merely asserting their federal rights by opposing the implementation of the Act in their respective State.

In 2018, the American Secretary of Homeland Security, Nielsen sought to prosecute sanctuary cities⁴ with anti-harboring laws⁵ for refusing to co-operate with federal deportation efforts, by allegedly trying to nullify federal immigration law unconstitutionally.⁶ Some cities chose to keep their resources and funds to primarily resolve local issues and not to use their resources to help the federal agents identify and deport immigrants by refusing to gather immigration-related data or detain undocumented people at the federal government's request.⁷ President of United States, Donald Trump, enforced specific federal provisions⁸ by threatening to withdraw federal funds by way of an executive order in 2017⁹ and orally threatened during the COVID-19 pandemic.¹⁰

States of the USA had defied directions passed in the judgement of the *Brown v. Board of Education*¹¹ which could not be imposed by the federal government.¹² Presently, the cities and the states are perfectly entitled to set themselves up as sanctuaries for undocumented migrants, and the federal government cannot go against the basic tenets of federalism. The judgment of *Printz v. the United States*¹³ supported this principle. Technically, immigration is an arena in

³ Aman Hasan Kumar, *Delhi Joins 19 State Governments Opposed to CAA/NPR/NRC*, THE CITIZEN (2020), <https://www.thecitizen.in/index.php/en/NewsDetail/index/9/18455/Delhi-Joins-19-State-Governments-Opposed-to-CAANPRNRC> (last visited May 18, 2020).

⁴ Justin Yang, *Do Sanctuary Cities Violate the Law?*, PENN UNDERGRADUATE LAW JOURNAL (2018), <http://www.pulj.org/4/post/2018/02/do-sanctuary-cities-violate-the-law.html> (last visited May 20, 2020).

⁵ Section 1324 of the Title 8 of the US Code.

⁶ Dara Lind, *Sanctuary cities, explained*, VOX (2018), <https://www.vox.com/policy-and-politics/2018/3/8/17091984/sanctuary-cities-city-state-illegal-immigration-sessions> (last visited May 21, 2020).

⁷ Naomi Tsu, *What Is a Sanctuary City Anyway?*, <https://www.tolerance.org/classroom-resources/texts/what-is-a-sanctuary-city-anyway> (last visited May 20, 2020).

⁸ Section 1373 (a) of the Title 8 of the US Code states local governments cannot ban officials from sending or receiving information regarding immigration or citizenship

⁹ Yang, *supra* note 3.

¹⁰ Priscilla Alvarez, *Trump renews threats to withhold federal funds from sanctuary cities amid pandemic*, CNN (2020), <https://www.cnn.com/2020/04/30/politics/trump-sanctuary-city-coronavirus/index.html> (last visited May 24, 2020).

¹¹ *Brown v. Board of Education of Topeka*, U.S. 483 (1954). The US SC declared segregating in public schools as unconstitutional.

¹² Shubhankar Dam, *Contours of the federal showdown over the CAA and NRC*, THE CARAVAN (2020), <https://caravanmagazine.in/politics/contours-federal-showdown-cao-nrc> (last visited May 18, 2020).

¹³ U.S. 898 (1997) SC. The court upheld the principle of dual sovereignty dividing authority between federal and states concluding that each federal state held within itself fragments of sovereignty.

which the federal government has a say. However, that does not mean that the federal government will commandeer power upon the States.

While the United States model of federalism is clearly defined and demarcated, Indian federalism has consciously chosen to adopt from the US model and modify it to unify the nation. Article 1 states that India shall be a Union of States and Article 246 read with Part XI of the Constitution sets out the division of legislative, administrative, and executive powers amongst the Union government and States of India in an asymmetric manner. With this changed federal model, this article seeks to explore, if Indian states can act like ‘sanctuary cities’ by refusing to implement a Central law.

A showdown between federalism and sovereignty

Federalism happens to be dual sovereignty. Be it America or India, States have the power that does not vest with the Central government to protect citizens from concentrations of power.¹⁴ The current dispute over the structure of constitutional power is a battle about State sovereignty and not federalism. The difference between the two terms is about the ultimate control over policy.¹⁵

Federalism in USA and India is rigid and flexible federalism respectively. Rigid federalism is presumptively quasi-permanent with the distribution of power between national and local governments. Each level of government is responsible and therefore, sovereign. In the USA, the federal government precludes from commandeering the states to carry out federal regulatory and statutory programs. States and people are treated equivalently by the 10th amendment.¹⁶

Flexible federalism has an allocation of power between national and local governments. With the political pragmatism and Central government being the only true sovereign, the authority between the two tiers of government is also always evolving.¹⁷ Indian federalism is a flexible federal structure with a conversion of a unitary system into a federal system. Even the Indian Supreme Court recognised¹⁸ that sovereignty of the Indian nation vests with citizens of India.

¹⁴ ROBERT A. LEVY, *Rights, Powers, Dual Sovereignty, and Federalism* (2011), <https://www.cato.org/policy-report/septemberoctober-2011/rights-powers-dual-sovereignty-federalism> (last visited Apr 3, 2020).

¹⁵ Steven G Gey, *The Myth of State Sovereignty* (2002).

¹⁶ LEVY, *supra* note 13.

¹⁷ Gey, *supra* note 14.

¹⁸ *State of West Bengal v Union of India*, AIR 1963 SC 1241

Further, political power is divided asymmetrically between the Centre and the States with the superiority of the Centre.¹⁹

Federalism could not be employed in India until after 1967 because the nation was ruled by a single party till then and was bound to have the same ideology.²⁰ The concept of federalism changed after a single-party government changed to a multi-party government leading to an increase of conflict between Centre and states. The fact is that different parties in different states are to be acknowledged. There was a rise in difficulty to pass legislations²¹, implement policy/ programmes; and maintaining law and order between Centre and states proved antithetical to the constitutional goal of co-operative or collaborative federalism.

The Citizenship Bill was introduced in Parliament when the ruling party members were in the majority, and the Bill could pass effortlessly. Moreover, with the Centre's imperial grip on the nation through powers to invoke the emergency provisions with internal dissent²² and withholding funds to States, the Centre can arm-twist into getting the NPR regime restarted.²³

The prominence to the Centre government is under Article 246 of the Constitution of India. Notwithstanding, the Central Government in India must not risk losing its sovereignty rights by ignoring the will and interests of all its citizens, including the minorities.²⁴

India's myth of federalism

K. C. Wheare, eminent scholar, gave a test to find out if a Constitution is federal or not – “*Does a system of Government embody predominantly a division of power between general and regional authorities, each of which in its own sphere, is coordinate with the other and*

¹⁹ C. Raj Kumar, *State Sovereignty and Regional Autonomy in India: Human Rights and Governance Perspectives*, 102 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 118–122 (2008).

²⁰ M Asad Malik, *Changing dimensions of federalism in India: An appraisal*, 2 INDIAN LAW INSTITUTE LAW REVIEW 30 (2019).

²¹ For instance, statutes like the Prevention of Communal Violence Bill, 2014 and bill to form a National Counter Terrorism Council were opposed staunchly by the States of opposition parties.

²² Article 355 promulgates Union to ensure that government of every State is carried on in accordance with provisions of this constitution failing which the Union government can declare President's rules under Article 356. See, Aymen Mohammed & Malavika Prasad, *Towards cooperative federalism*, THE HINDU, February 4, 2020, <https://www.thehindu.com/opinion/lead/towards-cooperative-federalism/article30729075.ece> (last visited May 20, 2020).

²³ Justice Narendra Chapalgaonkar, *Federalism: Lend 'em Your Ears*, INDIA LEGAL - STORIES THAT COUNT (2020), <https://www.indialegallive.com/analysis/federalism-lend-em-your-ears-87734> (last visited May 19, 2020).

²⁴ Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND J TRANSNAT'L L 97 (2013).

*independent of them? If so, the government is federal.*²⁵ It essentially meant that there was division of powers between the Centre and State, and there was co-ordination between both governments for smooth functioning without any government being subordinate to the other.²⁶ Wheare studied the nations like the USA, Canada and Australia wherein there was ‘competitive federalism’²⁷ between the Central and provincial government. Although with increase in inter-nation wars, federalism became more co-operative within a nation State.²⁸ Wheare observed that in the 20th century, there was a rise in co-operative governments with a powerful centre, but the powerful centre in no ways implied a weak regional government.²⁹

P. K. Tripathi observed that the Indian Constitution was a phenomenon which did not fulfil the requisite requirement of federalism and yet Judges always tried to alter the nature of the Constitution from non-federal to a federal Constitution.³⁰ The Indian Supreme Court had been inconsistent in its opinion on federalism. They believed on the one hand that the powers of the Centre under the Constitution weighed heavier than the State Governments,³¹ yet in 1973³² they declared that federalism was a basic feature of the Constitution. Tripathi argued that the judges actually created a “mythical sense of federalism”.³³

Duchacek set out ten questions to ask to any national system to find out if the system is federal or not³⁴ When this was tested with the Indian national system, it showed that Indian Constitution fulfils a majority of those yardsticks showing co-operative federalism, few being, independent sphere of Central Authority, amending the Federal Constitution, indestructible identity and autonomy and clear division of power.³⁵

²⁵ Wheare, K.C., Federal Government, cited in Luke Jose, *Does India believe in a mythical notion of federalism?*, CONSTITUTIONAL LAW SOCIETY, NUJS (2019), <https://wbnujscls.wordpress.com/2019/12/18/does-india-believe-in-a-mythical-notion-of-federalism/> (last visited Jul 29, 2020).

²⁶ Amartya Bag, *Indian Federalism: Examining the Debate*, SSRN, 9 (2009), <https://ssrn.com/abstract=1500315> (last visited Jul 28, 2020).

²⁷ IVO D. DUCHACEK, *COMPARATIVE FEDERALISM* 192 (1970).

²⁸ Bag, *supra* note 25 at 3.

²⁹ *Id.* at 3.

³⁰ P. K. Tripathi, *Federalism: The Reality and the Myth*, JOURNAL OF THE BAR COUNCIL OF INDIA, 252–253 (1974); Bag, *supra* note 25 at 4–5.

³¹ *State of West Bengal*, *supra* note 17.

³² *Kesavananda Bharti v. State of Kerala*, AIR 1461 (1973).

³³ Tripathi, *supra* note 29 at 253.

³⁴ DUCHACEK, *supra* note 26.

³⁵ Yogesh Pratap Singh, *Comparative Federalism: Testing Indian Constitution on the yardsticks of Ivo D. Duchacek*, ROSTRUM’S LAW REVIEW (2014), <https://journal.rostrumlegal.com/comparative-federalism-testing-indian-constitution-on-the-yardsticks-of-ivo-d-duchacek/> (last visited Jul 28, 2020).

There has been a conflict between the ‘competitive federalism’ and ‘co-operative federalism’ and India has shown features of co-operative federalism where the power of States does not compete with the Central government.³⁶ Hence it can be concluded that India has a unique model of federalism, incomparable with other models.

Can States oppose a Central Act?

The protests of the States against the law may sound futile when it comes to the CAA because citizenship falls under the Union list³⁷ and it is the Central government’s prerogative to decide who gets citizenship and who does not. But does the voice of the States and the citizens not matter at all? There is nothing to say that national law needs State consultation, but there is nothing expressly prohibiting the Centre for consulting the State. A strong central character does not necessarily mean that the provincial governments are primarily administrative agencies for central policies.³⁸

State governments take an oath to administer their governance constitutionally and abide by the principles of justice and fairness. Apart from approaching the apex court for challenging the CAA, the states are opposing the unconstitutional law by withholding their co-operation because they are an essential part of a federal scheme.³⁹ The States are obligated to follow disputes involving fundamental rights of the citizens of the State. The juxtaposition is that the State grants fundamental rights and if the State files for fundamental rights, there will be an imbalance in the constitutional scheme of India.⁴⁰

Collecting data for NRC is a laborious task, which will require much assistance from the State Governments.⁴¹ To elaborate further among the divided items of the schedule, the State has an exclusive charge for public order and police. The NPR-NRC exercise will presumably burden the State machinery as national governments will have neither the resources nor the political

³⁶ Bag, *supra* note 25 at 9.

³⁷ Article 246 of the Constitution of India, Seventh schedule, List – I: Union List, Item no. 17 – Citizenship, naturalization and aliens.

³⁸ Chapalgaonkar, *supra* note 22.

³⁹ Mohammed and Prasad, *supra* note 21.

⁴⁰ Satya Prakash, *CAA: Federalism is not a one-way street*, THE TRIBUNE - VOICE OF THE PEOPLE (2020), <https://www.tribuneindia.com/news/nation/caa-federalism-is-not-a-one-way-street-28704> (last visited May 18, 2020).

⁴¹ Assistance like building of detention centres, segregating staff to carry out the actual registration. See, Arpan Chaturvedi, *Can States Refuse To Implement NPR And NRC?*, BLOOMBERG | QUINT (2019), <https://www.bloombergquint.com/law-and-policy/can-states-refuse-to-implement-npr-and-nrc> (last visited May 20, 2020).

incentive to dictate policies of purely local impact.⁴² Scores of marginalised Indians will have to prove their citizenships by producing documents and subjecting themselves to an arbitrary procedure. State officials will have to verify numerous such documents leading to further strain on them. As a result, there will be challenges of law and order.

So to force a State to implement such a strenuous regime without prior consultation explains the deference of the State.⁴³ Hence, states are protesting and passing resolutions. If nothing else, it will lead to mobilisation of citizens, who have the sovereign power vested in them.

Final thoughts

Federalism needs a strong sense of unity, more than the machinery provided in the Constitution.⁴⁴ The Union Government must include States in the decision making of laws instead of imposing the same. Especially, those laws which require more participation from the State governments. The former CM of Karnataka stated that “*for robust federalism, the Union and the States must function on a mutually complementary and co-operative basis, and they ought to feel that they are equal partners in the national reconstruction.*”⁴⁵ Alternatively, the Union government may choose to exploit an archaic emergency provision to enforce its will, but that will not foster co-operation.⁴⁶

Constitutions throughout the world often fail to ensure that governments represent their people and not control them.⁴⁷ With the NRC, the Central Government was trying to bring a law to check who is the recipient of the benefits and government schemes. But the current exercise has moved the objective beyond ‘who are the beneficiaries?’ to ‘who should be the beneficiaries?’. It has created a bracket of people who should benefit and who must not? The States and the citizens are merely trying to point out this to the Central Government, but this is not the immediate concern. The immediate concern is that the Centre is choosing to ignore these protests and going against the federal fabric of the constitution.

⁴² Gey, *supra* note 14.

⁴³ Mohammed and Prasad, *supra* note 21.

⁴⁴ Justice (Retd.) B.N. Srikrishna, ‘Beyond Federalism’ (2011) 38 India International Centre Quarterly 386.

⁴⁵ Chapalgaonkar, *supra* note 22.

⁴⁶ Mohammed and Prasad, *supra* note 21.

⁴⁷ Ludsin, *supra* note 23.