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A 'UNIT' FROM FEDERALISM*Emergence of A Unitary Response from A Cooperative Federation During the
Pandemic*

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ABSTRACT

The fateful year of 2020 bore witness to the emergence of a global crisis triggered by the onset of the Corona Virus, giving rise to the unprecedented COVID-19 pandemic. This pivotal event laid bare inherent vulnerabilities within healthcare systems and the broader domains of governance and constitutional frameworks. This academic exposition critically examines India's multifaceted response to this pandemic, employing a comparative lens to juxtapose the unitary and federalist approaches operationalised during the initial and subsequent waves of the crisis. In its nascent stage, the unitary response exhibited a discernible efficacy in curtailing viral transmission. However, the subsequent resurgence of the contagion during the second wave cast a glaring spotlight on the inadequacies embedded within India's collaborative federal structure. A meticulous dissection of the constitutional provisions makes it evident that India's foundational framework inclines toward a greater degree of unitariness, particularly during periods of exigency. Drawing upon a comparative examination with the United States, a nation renowned for its robust federal structure that facilitated localised interventions, the discourse accentuates the shortcomings of India's cooperative federalism in the face of such an unprecedented crisis. This essay finds that, within the Indian context, a unitary-oriented response demonstrated a heightened efficacy in effectively navigating the intricacies of pandemic management. Furthermore, the study serves as a poignant reminder of the intricate challenges inherent in harmonising federal systems with exigent circumstances, shedding light on the complex interplay between centralisation and decentralisation within the governance paradigm and further addressing whether the

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Indian Constitution provides and intends for a structure to answer such a crisis in a federal format.

Introduction

2020 was a time of crisis, not only for the country but for the world at large. The human race was pitted against a brutal force of nature, the SARS-COVID-19 virus. Not only in the form of the millions of lives it took but also in unveiling the inadequate and corrupt systems around us. The virus clarified the areas we lacked in healthcare, justice, and, most notably, the constitutional structures we had built to support us. The management of the virus by India was phenomenal. The virus indirectly launched an attack on the fundamentals of the Indian constitution. India's overall response to COVID can be divided into two. A Unitary and centralised response was warranted and met from the first wave, which helped contain the virus. Subsequently, the second wave was where states were given more priority and expected to handle tasks resulting in a more federalist methodology. This is where the boundaries of federalism and the constitutional mechanisms in place to combat a crisis of this magnitude were pushed to their extremes. This paper will attempt to examine exactly this; to show the unitary response as more efficient than the federal response mechanism as seen in the first and second waves. Further, this paper will also go into depth to analyse whether the Constitution provides and intends a structure to answer a crisis in a federal format. Finally, it will provide a comparative analysis of the handling of the pandemic by a strictly federal government in the USA and a cooperative federal one in India.

Operative Unitariness as an answer to the pandemic

Historically, we have seen that the most efficient way to handle emergency disaster management revolves around a robust command and control approach². We saw this statement resonate internationally, where political analysts in the US were pleading to their government to forsake the federal system. In most federal states, as in the US, health is in the exclusive domain of the states and the local governments³. The political analysts in the US viewed the Wuhan response to COVID in the form of a centralised approach as the model response to the pandemic. India's clever response to the pandemic was too in this centralised approach, at least for the first wave, where it saw success in combatting the virus.

² David Alexander, "Disaster and emergency planning for preparedness, response, and recovery". In Oxford research encyclopedia of natural hazard science, Oxford: Oxford University Press, 2015

³Sahoo, N. and Ghosh, A.K., 2021. The COVID-19 Challenge to Indian Federalism. *ORF Occasional Paper*, 322

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1) First Wave

As soon as the first case was reported, the central government began taking precautionary measures and banned mass congregations. Several states also imposed lockdowns; however, on 24th March 2020, the union government imposed a nationwide lockdown, marking the first tilt towards a unitary system over the federal system. By September, India had become one of the most affected countries in the world. These lockdowns ensued until October.

To understand this unitary tilt, we need to know where the Union Government derived its power to enforce its will even though India accounts for a federal outlook regarding the distribution of powers as per the 7th schedule⁴. Therein, the states held control over the Centre on matters concerning health as entries 1⁵, 2⁶, and 6⁷ of the State List covered “public order,” “police”, and notably “public health and sanitation; hospitals and dispensaries”. In response to this, the Centre gained its power from Entry 81⁸ of the Union List, which enshrined the Centre’s legislative competence on matters governing “inter-state migration; inter-state quarantine,” and Entry 23⁹ and Entry 29¹⁰ of the Concurrent List, where the Centre held precedence over the state on the grounds of “social security and social insurance; employment and unemployment” and “prevention of the extension from one state to another of infectious or contagious diseases or pests affecting men, animals or plants”. The Centre was further empowered through Article 73,¹¹ read with Article 162,¹² which held that its executive powers were coextensive with its legislative powers. This “federal” constitutional scheme ironically maintained a unitary application where the Centre was charged with taking the lead and paving the way through a crisis while facilitating coordination among states, supervising the pandemic, and providing critical financial and healthcare-related support to the states¹³. All the while, it was the duty of the states to manage healthcare and enforce law and order.

⁴The Constitution of India, 1950, Schedule VII

⁵ The Constitution of India, 1950, Schedule VII, List II, state List, Item 1

⁶ The Constitution of India, 1950, Schedule VII, List II, state List, Item 2

⁷ The Constitution of India, 1950, Schedule VII, List II, state List, Item 6

⁸The Constitution of India, 1950, Schedule VII, List I, Union List, Item 81

⁹ The Constitution of India, 1950, Schedule VII, List III, Concurrent List, Item 23

¹⁰ The Constitution of India, 1950, Schedule VII, List III, Concurrent List, Item 29

¹¹The Constitution of India, 1950, Art. 73

¹²The Constitution of India, 1950, Art. 162

¹³Hartley, K., Bales, S. and Bali, A.S., 2021. COVID-19 response in a unitary state: emerging lessons from Vietnam. *Policy Design and Practice*, 4(1), pp.152-168

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Although the fiery core of legislative power that fuelled the Centre was the National Disaster Management Act 2005¹⁴, under which the Centre proclaimed the pandemic to be a “notified disaster”. Here, even though the 7th schedule did not explicitly state the term “disaster”, the Centre utilised its residuary powers and, in that capacity, issued a lockdown and directives to states which caused the breakdown of the federalist structure¹⁵.

The inadequacy of the federal structure was quickly proven when the states used the Colonial Epidemic Diseases Act of 1897¹⁶. This enshrined the state with blunt teeth to deal with the pandemic and numerous conditions under these issued regulations. Further, for punitive actions, various sections of the Indian Penal Code 1860¹⁸ were used¹⁹. The lack of an adequate, up-to-date structure that was not built on the back of the colonial-era act, which never could have envisioned a Pan-India severe pandemic, is just one of the main reasons the unitary approach of the Centre was the ideal approach to take.

Additionally, India’s successful overcoming of the pandemic was the unitary method. Here the Centre took up the mast, became the country’s leader, and managed the virus during the lockdown. As a result, there was a firm hand on the wheel that was providing precise policy directions and conducting the supply of essential materials and technical support, taking over responsibilities that would have generally fallen in the domain of the state— however, the unexpected situation called for the federal structures to be temporarily sidelined. The Centre had taken the burden of coordinating the entire vaccination process; here, the Centre compared to the states with the more significant resources, technical

¹⁴National Disaster Management Act, 2005

¹⁵Sahoo, N. and Ghosh, A.K., 2021. The COVID-19 Challenge to Indian Federalism. *ORF Occasional Paper*, 322

¹⁶ The Epidemic Diseases Act, 1897

¹⁷ Manish Tewari, “India’s Fight against Health emergencies: In search of a legal architecture”, ORF Issue Brief, March, 2020, <https://www.orfonline.org/research/indias-fight-against-health-emergencies-in-search-of-a-legal-architecture-63884/>

¹⁸ Indian Penal Code, 1860

¹⁹ Nolan Pinto, “Karnataka govt invokes sections of Epidemic Diseases Act in form of Covid-19 rules, 2020”, India Today, March 11, 2020, <https://www.indiatoday.in/india/story/karnataka-govt-invokes-sections-of-epidemic-diseasesact-in-form-of-covid-19-rules-2020-1654567-2020-03-11> See Government of Meghalaya Notification, No. Health 68/ 2020/ 56, Dated Shillong 28 May 2020, <https://meghealth.gov.in/covid/Notification%20-%204th%20Amendment%20of%20MED%20COVID%20Regulations%202020.pdf> See ” Jharkhand state Epidemic Diseases (COVID-19) Regulations, 2020”, Avantis, May 1. 2020, <https://www.avantis.co.in/legalupdates/article/8749/jharkhand-state-epidemic-diseasescovid-19-regulations-2020/>

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knowledge, and strategic mind to ensure state cooperation with manufacturers to conduct trials and procure the vaccines²⁰.

These were key features of why the unitary ideology trumped the federal structure. India's success in the first wave was due to the centralisation and unitary tilt, which allowed the country to leverage more resources and expertise, thus ensuring quick decision-making. Here the crisis was tackled with a strong command and control that mitigated the pandemic more effectively and efficiently, like surveillance, isolation of at-risk or positive cases, restriction of movement, etc²¹. Hence, this proved the efficacy of the unitary structure approach to COVID-19.

2) *Second wave*

The story here takes a significant shift in the second wave. India changed its approach from a centralised structure in the first wave to a decentralised system in the second wave. It raised many questions about India's federal capacity to encounter the pandemic that required a Unitary response over a federal one. This wave of the pandemic stripped down the fluff and exposed the inadequacies of the current constitutional, administrative and legal structures required to fight such a crisis. India's model of cooperative federalism fumbled the handling of the second wave. This fumbling can be hugely attributed to the missing central leadership and the lack of trust and cooperation between the states. Listed scholars state that managing the first wave by ramping up healthcare and using a solid centralised administration minimised the casualties²².

The disadvantages of using a federal system were highlighted in this wave, where India saw weak central control and coordination that led to catastrophic levels of infection and fatality.²³ Moreover, the national system could have been more efficient in handling the pandemic as this form of governance was costly as more people were elected at both Centre and state levels. With the increase in elected representatives, the probability of corruption

²⁰ Rao, K.S. (2021) Helping states combat covid-19 is Centre's fundamental duty, The Indian Express. Available at: <https://indianexpress.com/article/opinion/columns/second-wave-coronavirus-vaccine-serum-institute-7290331/> (Accessed: October 26, 2022)

²¹ COVID-19 Response In A Unitary state: Emerging Lessons From Vietnam Kris Hartleya , Sarah Balesb And Azad Singh Balic

²² Sahoo, N. and Ghosh, A.K., 2021. The COVID-19 Challenge to Indian Federalism. *ORF Occasional Paper*, 322

²³ Rocco, P., Béland, D. and Waddan, A., 2020. Stuck in neutral? Federalism, policy instruments, and counter-cyclical responses to COVID-19 in the United states. *Policy and Society*, 39(3), pp.458-477

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increases exponentially. This makes decision-making quite onerous and leads to regional inequalities in the distribution of resources.

Harmonious cooperation between states builds the bedrock for a healthy functioning federation²⁴. However, this is different in India during the second wave. When the chance was given to them, it resulted in state governments openly fighting each other over medicines and even blocking supplies. In their failure, they would then create friction with the Centre and play the blame game on whose fault their state came near collapse.

The benefits of a unitary structure become more prominent when we learn that federalism finds its footing in the cooperation of states in a country. Let us take an example, a relatively very simple one. State A has a surplus of oxygen, while State B desperately needs it. State B must plead with State A to share its supplies in a federalist country. State A, however, let's assume for some reason, malicious or not, or even because it simply did not want to, the state refuses this request. Being a federalist state, the centre cannot and should not interfere with states' disputes. Consequently, state B hangs by a thread and state A flourishes in exclusivity.

Now this example may seem like it needs to be more complex. However, this was precisely the case in 2021, where Hospitals in Delhi were choking from the scarcity of oxygen when they made a plea to their neighbours Haryana for some oxygen. The home minister of Haryana, Anil Vij, pettily blocked the oxygen supply to Delhi. The reason behind such a block was minuscule and ironic. Rajasthan and Himachal blocked the oxygen supply to his state; hence, he secured the oxygen to Delhi in a twisted sense of unity with the other states²⁵.

What would then be the solution? The solution was and always will be the unitary methodology; the Centre, in this scenario, stepped in, defused and resolved the situation. This problem as a whole would not have occurred if the regulation of medical supplies towards the states were done on an as-needed basis by the centre as it was done during the first wave, like the PPE kits. The unitary system mitigates the chances of corruptive and selfish behaviour by

²⁴Jha, P.C., 2022. India's Cooperative Federalism during Covid-19 Pandemic. *Indian Journal of Public Administration*, p.00195561211072568

²⁵The Print (2021) Delhi hospitals gasp as Haryana refuses to share oxygen, then centre steps in to Resolve row, ThePrint. Available at: <https://theprint.in/health/delhi-hospitals-gasp-as-haryana-refuses-to-share-oxygen-then-centre-steps-in-to-resolve-row/643753/> (Accessed: October 26, 2022)

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removing humanity's most significant danger, ironically, other people's behaviour. Thus, saving lives and exposing the fatal flaw in the federalism process.

The veracity of the second wave in India from the state's perspective when it came to their turn to shoulder their responsibilities was the centre's fault and responsibility. However, when you take a mirroring view, it concludes that should the centre have continued to exercise its responsibility and control in the same unitary way that it handled the first wave, the second wave would have been much easier to work through with fewer casualties. The Centre fumbled and gave up the unilateral centralised decision-making process, making the country vulnerable to numerous corruptive practices and political agendas²⁶.

Thus, it becomes clear that the swift action of the Centre to adopt a unitary structure abandoned the principles of federalism²⁷. The success can be attributed to how the centre imposed the national lockdown while issuing alerts on the guidelines and protocols required to combat the virus through proactive leadership. This gave India sharp teeth in the fight and allowed us to acquire and produce PPE kits efficiently, creating emergency health infrastructure in record time²⁸.

Does the constitution provide a federal structure to combat Pan-Indian crises like COVID?

The functioning of a federal constitution is very different during peace and in an emergency²⁹. The Constitution alone does not provide a structure that could be used in a crisis. The second wave of the COVID pandemic showed the world that the cooperative federal system does not allow for a functional and efficient structure. The case of the *State of Rajasthan v. Union of India*³⁰ characterised the constitution as a "more unitary than federal" structure regardless of its quasi-federal status. The constitution merely held appearances of

²⁶Saxena, R., 2020. Federalism and the COVID-19 crisis: Centre-state opposite relations in pandemic federalism-India. *Revista "Cuadernos Manuel Giménez Abad"*, (19), pp.23-25

²⁷ Jha, R. (2021) *Impact of the COVID-19 pandemic on India's federalism*, ORF. Available at: <https://www.orfonline.org/expert-speak/impact-of-the-covid-19-pandemic-on-indias-federalism/> (Accessed: October 26, 2022)

²⁸Swweta Punj, "How India became a PPE Manufacturing hub", India Today, February 21, 2021, <https://www.indiatoday.in/india-today-insight/story/how-india-became-a-ppe-manufacturing-hub-1771584-2021-02-21>

²⁹ S.N. Jain, *Freedom of Trade and Commerce, and Restraints on the state Power to Tax Sale in the course of Inter-state Trade and Commerce*, 10 JILI, 547, 582, (1968)

³⁰ 84 Beg

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the federal system. These so-called federal provisions are watered down by the needs of the country's progress and development, especially in crises.

We see that the constitution provides for a robust Centre where the division of power is significantly tilted towards the Centre, moreover, acts like the NDMA 2005 allow the centre to traverse the principles of federalism and separation of powers. Furthermore, even the residual powers have been left with the Centre, with the parliament having an incredible authority even over the state list. Even with the limited powers that the states have, they do not enjoy exclusive control. With the approval of the Rajya Sabha, the parliament can legislate on matters in the state list in the furtherance of national interest. Most importantly, the parliament can do this even without an emergency³¹.

In the case of an emergency, the centre becomes the all-powerful agency, and all the states go under the centre's wing. It converts whatever little federal structure into a unitary one without any amendment, a significant deviation from federalism³². The intention of the constitution makers becomes apparent here that in the case of a crisis, the centre needs to be given the reins. Another example of their choice was envisaged in the processes before the 44th Amendment. It allowed Article 352³³ to be invoked with a simple majority in each house, allowing for an impromptu constitutional amendment, making it temporarily practically unitary.

This was also seen in the case of *Karnataka v. Union of India*³⁴, where the court took cognisance of the constitution's robust unitary features in emergencies. Justifying the unitary structure's presence, they are meant for temporary use only and must be invoked only when called upon. A federalist structured constitution is not feasible nor desirable in an emergency as it causes too much devolution of power among the states³⁵. This is because states have varying economic conditions across the nation. Regardless of the tax decision scheme, some states won't be able to raise enough resources for themselves and inevitably rely on the Centre, impairing its capacity especially during national calamities, where large-scale federal funding would be required, which the Centre can manage as states lack the administrative infrastructure. The second wave showed us something: a two-decade Jaya Gokul Educational

³¹Jain, M.P., 2000. The Constitution of India

³² For discussion on Supreme Court's jurisdiction under Art. 131, see, supra, Ch. IV, Sec. C(iii)(b)

³³ The Constitution of India, 1950, Art. 352

³⁴ 86 Beg

³⁵Jain, M.P., 2000. The Constitution of India

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Trust v. Commrcase. & Secy. to Govt. Higher Education Dept³⁶ held that states could not meet the demands of industry, trade, and commerce, which have national dimensions.

The second wave showed us that there needs to be more comprehensive legislation that allows for effective governance with pandemics and other national emergencies that India could face in the future. Here the state had to resort to ad-hoc measures like ordinances or expansive interpretations of colonial acts to do simple activities like enforcing physical distancing norms.

Thus, with the tools at hand, the efficient manner of handling crises like COVID-19 is the Unitary structure.

Comparative Analysis of the USA&India

The COVID-19 pandemic was unprecedented worldwide, with different countries tackling the issue to the best of their capabilities. Each country aimed to achieve a stable position during the pandemic, with minor damage to their economic activity, while handling an unexpected crisis to such an extent as efficiently as possible with their limited resources. As seen above, government structures and their design also played a significant role in determining how prosperous a nation would be in handling the pandemic for its citizens.

Such was the case for the United States of America, a country with one of the most federal governments worldwide, and whose handling of the pandemic can be seen as a prime example of the workings of a solid federal structure during unprecedented times.

Though not all efficient, handling the pandemic by the USA's national, state and local governments proved that localised responses could be much more efficient during emergencies than a central one when given adequate power under a federal scheme.

1) Structure of the USA's federal government

The federal government in the United States is a dualist structure, which means that state governments have clearly defined and differentiated powers from those of the central federal government. They are free to exercise these powers without any interference from the centre. This implies that state governments have much more freedom to decide on issues

³⁶AIR 2000 SC 1614

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affecting their states and the local people and can do so without prior approvals or permissions from the central government. This structure of the US federal government is also why the USA is one of the countries with a truly national government structure, amongst others, such as Germany and Brazil. Therefore, in the USA, states have their constitutions and can form their complete governments, which can be wholly independent of the one at the central level. Due to this independent functioning, the issues they can deal with completely on their own are also clearly defined, of which public health is one essential matter that falls under one of the reserved powers of the state under the 10th Amendment to the US Constitution³⁷.

Public health decisions concerning the state rest entirely with the state government, and it was ultimately the state's responsibility to handle the pandemic within its jurisdictional areas. The federal government's duty in this regard only extends to the imposition of travel restrictions if necessary, such as the government blocking passengers from certain countries from travelling to the USA in the early leg of the pandemic or providing for mandatory quarantine periods to people coming from certain countries³⁸. Besides that, the centre only offers essential support to the state when required, such as fiscal compensation. All monetary matters thus rest with the central federal government, but the power to legislate on educational policies, childcare, policing etc., lies with the state government. The state government also has the authority to close and reopen schools and businesses falling within state borders. Apart from monetary matters, the central government possesses certain powers regarding emergencies in the country, though the Constitution does not provide any specific provisions. However, the President has certain special powers under different statutes, such as the Public Health Service Act of 1944³⁹. Therefore, states have police power in the USA to govern themselves efficiently and independently of any interference from the centre, which ultimately enabled better handling of the COVID-19 situation in the USA.

2) USA's handling of the COVID-19 pandemic

Although the USA was well prepared to handle a pandemic of such an unprecedented scale and nature compared to their counterparts, the President's initial hesitancy delayed their reaction to the situation, costing them more resources in the long run.

³⁷ Kincaid J and Leckrone JW, *Comparative Federalism and Covid-19: Combating the Pandemic* (NC Steytler ed Routledge 2022)

³⁸ *Ibid*

³⁹ *Ibid*

Furthermore, political party polarisation in the country also hampered their responsiveness to the pandemic, with the Democrat party supporting mask-wearing practices and the Republicans encouraging living with the virus to defend individual freedoms⁴⁰. However, even after a delayed central response by the Trump administration to the spread of the pandemic, the states acting independently of the Centre ensured that the USA could tackle the problem the way it did.

Governors and mayors of the states and local towns reacted by mid-march without prior legislative approvals, with states issuing shutting-down orders to schools and non-essential businesses and stay-at-home orders (SAHOs) to people. This prevented the spread of the virus to a great extent in these states, and only allowing essential travel enabled states to reduce the number of deaths in the initial wave of the pandemic while better managing the situation. Although the conditions were left to fend for their own regarding resources and medical equipment, they formed coalitions with other state governments. They could thus manage the situation at the grassroots level when the central government was majorly inactive. Even when adverse effects started showing on employment rates and economic groups in the states due to the SAHOs issued by them, the states were sufficient enough to handle the conditions by using their funds and using federal funds to only a limited extent to deal with some socio-economic consequences. However, even after the states took the situation as best as possible, the US faced the highest number of cases and deaths worldwide.

The above account shows that the USA's response to the pandemic was highly non-centralised and could take effect only because of how their federal structure was designed, with the states having complete autonomy over their affairs. Such a system and a federal handling of the pandemic situation would not work the same way in India because we follow a cooperative federalism structure that ensures that the centre and the states work together on most issues.

Compared to the US centre-state relations, this implies that states in India are not entirely independent to handle their own issues, which further causes delays in the implementation of policies. Thus, as India follows a quasi-federal government structure, with

⁴⁰*Ibid*

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our centre having considerably more powers than the states⁴¹, India's federal structure could not handle the pandemic like the USA.

Conclusion

From how the first two waves were handled, it becomes apparent that the unitary method was the aptestway to deal with the pandemic. The situation at hand called for the abandonment of federalist principles that made India a quasi-federal country into a unitary country so that it would have a strong command and control approach to contain the virus and the rampant distrust amongst the states. The primary reason behind the failure of the cooperative federalist system was in the name itself. In practicality, states are not willing to cooperate with other states in a harmonious fashion leading to necessary intervention from the centre. Moreover, it also becomes imperative to take note of the legislative intent and structure of the constitution to handle a crisis which revolves around transforming the quasi-federal structure into a temporary unitary structure. Furthermore, the Indian federal structure also does not provide states with enough autonomy to handle their affairs independently, without any central government interference. As seen above, the pandemic was handled somewhat efficiently in the United States due to the federal structure they possess, which differs from the Indian governmental system. Thus, a national system of government would have been disadvantageous in the pandemic.

⁴¹Alexandrowicz CH, "Is India a Federation?" (1954) 3 International and Company Law Quarterly 393
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