Federalism

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NAGALAND

- Nagas are agitated over what they perceive as the Centre's "threat" to override the exceptional status they enjoy under Article 371A of the Constitution.
- Earlier, Veerappa Moily, the Union Minister of Petroleum and Natural Gas, asked the Nagaland Legislative Assembly (NLA) to withdraw the Nagaland Petroleum and Natural Gas Regulation, 2012 (NPNGR) that it framed within the ambit of Article 371A.
- Taking a serious note of Mr. Moily's request, the Nagaland government held a consultative meeting with various sections of civil society. The meeting resolved to not only reject Mr. Moily's request but also demand that the GoI implement the unfulfilled clauses of the Sixteen Point Agreement, 1960, and place Nagaland under the Ministry of External Affairs. This may set up a new confrontation with the Central government.
- Mr. Moily's request and the earlier stand taken by Minister of State for Home Affairs, in a response to an unstarred question in the Lok Sabha— that "any resolution" passed by the NLA "seeking to revoke/remove the applicability of a law, the enactment of which lies within the sole domain of Parliament, is *ultra vires*" — was seen by many in Nagaland as a move to betray a negotiated agreement which entrenched Naga exceptionalism in India's federal polity.

BACKGROUND

- The 1960 Agreement laid the basis for the creation of Nagaland in December 1963. Article 371A, which was incorporated as a partial fulfilment of this agreement, facilitated negotiated sovereignty of the Nagas on matters pertaining to their religious and social practices, customary laws and procedure, administration of civil and criminal justice, ownership and transfer of land and resources, as the NLA can make any law of Parliament inapplicable by passing a resolution.
- After obtaining the opinion of legal luminaries, all of whom concurred that "land and its resources" as used in Article 371 A(1)(a)(iv) includes mines and minerals, the NLA passed a resolution in 2010 to the effect that laws made by Parliament on petroleum and natural gas would be inapplicable in Nagaland with retrospective effect.
- Drawing upon its special status, and after extensive legal consultation and advice, the NLA bypassed Entry 53 of List I of the Seventh Schedule and the Mines and Minerals (Regulation and Development) Act, 1957 (MMRDA), which exclusively invests mines and minerals as the "occupied field" of the Union, while framing NPNGR in December 2012.
- It has since suspended all oil operations in the State. Subsequently, it invited "Expressions of Interest" (EoI) from companies to explore and exploit the 11 oil and gas fields it identified across 11 districts of the State early this year.

- What is interesting is the timing of Mr. Moily's request and Mr. Ramachandran's stand which came only after the Ministerial Group, the apex decision making body headed by the Nagaland Chief Minister, reportedly shortlisted seven of the 23 companies which expressed their interest. This is seen by some as an indirect outcome of pressure mounted on GoI by disgruntled oil lobbies which are losing out in the bidding process.

PROCEDURAL ISSUES

- Yet, NPNGR raises a host of procedural issues which need immediate attention. Among the many, four may be identified.
- Firstly, NPNGR and the NLA's July 2010 resolution did not expressly state their intent to take away the rights vested in oil companies while suspending their operations in the State.
- Secondly, by requiring that only prospective companies "which have faith in the Naga customs and culture" could be granted land lease, a procedural complexity is embedded into the system because Naga customs and culture are not always neatly defined, and differ widely across tribes.
- Thirdly, by simultaneously recognising that land and its resources belong to three types of Naga landholders in perpetuity, viz., individuals, village bodies and the State, it may set apace a complicated lease negotiation process.
- Lastly, even though the State wields *de jure* power to make law and regulate "ownership and transfer of land and its resources," the emerging political process shows that *de facto* power is wielded by a melange of tribal bodies and Naga civil society. The inclusion of the presidents of Naga *hoho* and ENPO (Eastern Naga People's Organisation) as permanent invitees in the apex decision-making body clearly indicates this. Even as the State gives in to societal pressure, its "infrastructural power" would considerably get compromised.

WAY FORWARD

- These procedural problems are not insurmountable and need not subvert the substantive rights that the Nagas enjoy under Article 371A. However, given that the Article stems from a Centralist federal framework, there is a pertinent fear that the Central government may erode these rights in ways it did to the autonomy of Jammu and Kashmir.
- Although the creation of Nagaland was considered "outlandish" and spawned the creation of perpetually dependent homeland States in the northeast in the 1970s and 1980s, large-scale discovery of petroleum and natural gas would fundamentally redefine the politics of redistribution between the Union and Nagaland, on the one hand, and individuals and tribal groups in the State, on the other.
- This would also offset the preferential funding regime that Nagaland currently enjoys. Given the sensitivity of the Naga issue, political prudence demands that future engagement need not always be driven by legal correctness as the Sarkaria Commission report had already noted in a different context.
- A political willingness to accommodate and entrench this Naga exceptionalism not as an anomaly but as a model of accommodating deep differences would hold the future key. This would inevitably take Article 371A to new constitutional waters.

Federalism and Innovation

1. Culturally, India was always one country through all of history. Politically however, we were, more often than not, divided. And that political division was our competitive strength, for it encouraged innovation.
2. Our political divisions allowed our innovators and free thinkers to have options. If the Palas didn't like your ideas, you could go to the Cholas. If the Tuluvas of Vijaynagar didn't like your thoughts, you could go to the Bahmani Sultans. Since we were culturally one country, travel was easy.
3. So can we argue the opposite? Does centralisation harm innovation? More often than not, yes, it does. A Chinese emperor, who ruled all of China with an iron hand, banned maritime activities. Nobody in China dared to rebel against the anti-innovation decision of the emperor. The long-term impact was that it wasn't Chinese ships that colonised the world, but European ones. Rejection of the Gutenberg press by Emperor Akbar is another example.
4. But decentralization brings about wars and chaos. Thankfully due to our democratic model today, we have learnt to manage it. Hence decentralization is the direction we should move in.

Cooperative Federalism in India

Different Concepts of Federalism

1. Unilateral Federalism: Federal government, by and large directs provincial policy, usually through conditional funding. Thus, the model's major weakness is that it infringes upon jurisdictional autonomy. On the other hand, the model is considered the most effective for national programs, better coordination, minimum overlap between policies, and advantages of economies of scale.
2. Collaborative Federalism: Here the federal and provincial governments work collaboratively to attain policy goals, and there is no coercion on part of the federal government.
3. Cooperative Federalism: It describes a system of federalism where there needs to be cooperation between levels of government to get things done in the system. The Federal Government does not deliver health services but does provide the regulatory framework within which the regional governments provide health care.

Concept

1. It is "the practice of administrative co-operation between general and regional governments, the partial dependence of regional governments upon payments from the general governments, and the fact that general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions." It is characterized by increasing interdependence of federal and regional governments, a development that does not destroy the federal principle.
2. Center state balance: Article 3 of the Constitution, the exclusive power to form federal units. However, any legislative proposal in this regard cannot be introduced without obtaining prior Presidential (i.e., Central Government) sanction, which, in turn, must ascertain the views of the affected States before approving the introduction of such a bill in the Parliament. In practice it is rarely possible for the Parliament to ignore the views of the States.

Constitutional Provisions

1. Intergovernmental delegation of powers (Articles 258, 258A).
2. Directives given by the Centre to the States (Articles 256, 257).
3. All India Services (Article 312).
4. Inter-State Council (Article 263

Evolution in India

1. It was expected that, over a period, cooperative federalism will take roots in India given our constitutional machinery setup. However, political developments, particularly in the post-1967 period somewhat belied these expectations. States allege that systematic maneuvers were being put to practice by the Union Government for centralization, which caused political distortions and federal tensions.
2. With the Congress obtaining near two-thirds majority in the 1972 Parliamentary Elections, reaping on the success of the Bangladesh liberation war, the federal government started arguing the case for a 'strong centre' not only to serve the interests of balanced development but also to safeguard the unity and integrity of the country. The Central government adopted increasingly interventionist practices in the States. Office of the Governor and Emergency provisions provided in the Constitution, particularly those of Article 356, were used to keep and maintain Union's pre-eminence.
3. The imposition of emergency and the passage of 42nd Amendment only added to the demand by the States for greater devolution of powers. There were, therefore, concerted efforts during this period by non Congress parties to demand for State autonomy vigorously.

Present Situation

1. Security
    1. There is a clear need to further strengthen the Union when it comes to the security question including internal.
    2. However the tilt in favor of the Union has increasingly accentuated over the years even outside the security needs and it is felt in legislative, administrative and financial matters.

2. Administrative
    1. A large number of regulatory bodies (UGC, AICTE, NCERT, ICSSR, ICAR etc.) have in effect restricted state governments' powers on education. They are often justified by the need for co-ordinated and planned development of education, but this claim can apply to practically every field of governance.
    2. In NREGA, the Parliament has prescribed the role to be played by the PRIs and not left it open to the State Governments to determine the nature and scope of that role.
3. Financial
    1. The problem today is significant transfers are taking place through mechanisms not envisaged by the Constitution. Allegations of political considerations have vitiated Centre-State relations.
    2. The available scheme of fiscal transfers, though asymmetric, does provide a just and equitable framework for fiscal federalism. The problem is when distortions occur in fiscal arrangements due to politics in devolution, particularly through non-Constitutional channels. The challenge of placing fiscal transfers in a transparent and rule-based framework is indeed of great priority.
    3. Perhaps there is a case to make the Finance Commission to be a permanent body with a regular Secretariat and allow State participation in its Constitution and in formulation of terms of reference.

Legislative Supremacy of Union

1. Power of Parliament to legislate in national interest under a Resolution of the Upper House (Article 249).
2. Power of Parliament to legislate during operation of Emergency (Article 250).
3. Parliament's power to legislate with the consent of States (Article 252).
4. Legislation for giving effect to international treaties and agreements (Article 253).
5. Power to legislate in case of failure of Constitutional machinery in States(Article 356).
6. Power of Governor to reserve any Bill passed by the State Assembly for consideration of the President, sometimes for an indefinite period!

Executive Supremacy of the Union

1. Article 257(1) says that the executive power of the State shall be so exercised as not to impede the executive power of the Union. The Centre is empowered to give directions to States in this regard. If directions are not complied, emergency provisions may be invoked by the Centre.

Federal Conflict Management Bodies

1. Art 263: The Inter-State Council is supposed to be a body for intergovernmental consultation and co-operation. But it has not been given the powers to inquire and advise on disputes between States. It can only discuss subjects of common interest and make recommendations. It meets rarely and has not been able to work to its full potential.
2. Art 262: It provides for the resolution of inter-state water disputes which also failed to contain many disputes which reached it despite repeated hearings and decisions.

Coalition Politics - Is it a Problem?

1. Coalition politics has emerged as the product of conscious electoral choices made by the people. It would be incorrect to assert that such conscious democratic choices have been entirely without logic or reason.
2. It indicates that the existing political parties must have been perceived to have failed in addressing the unique problems of several regions of the country. These electoral choices actually go some way towards making the Central and State Governments more accountable.
3. Very often these regional parties have been resorting to sectarian identities and appeals as the means of mobilization. This development may appear to be a threat.
    1. But unity in diversity actually calls for the preservation and celebration of diverse identities.
    2. As long as all political parties express full faith in the Constitution of India, the danger of the unity of the nation being called into question does not really exist.
    3. True, at times it may appear that some political parties or forces are stretching the political fabric a bit too much. This is an inevitable part of the political growth process. The solution to the problems ultimately lies in

the political realm, rather than legal or constitutional systems.

Sarkaria Commission

Recommendations

1. Constitution of Inter- State Council (Art 263).
2. Strengthening of the Local-self Governing Bodies.
3. Governor
    1. It laid down guiding principles for the Governors in choosing Chief Ministers.
    2. The Commission recommended that in order to ensure effective consultation with the State Chief Minister in selection of a person to be appointed as Governor, the procedure of consultation should be prescribed in the Constitution itself by suitably amending Article 155. The government has not agreed to it and merely said it can be adopted as a convention.
4. Prior consultation with the States, individually and collectively, in respect of overlapping and concurrent jurisdictions, should be adhered to, except in rare and exceptional cases.
5. Ordinarily, the Union should occupy only that much field of a concurrent subject on which uniformity of policy and action is essential in the larger interest of the Nation, leaving the rest and the details for action by the States within the broader framework of the policy laid down in the Union law.
6. Article 356 should be used very sparingly, in extreme cases and only as a matter of last resort.
7. Net proceeds of corporation tax may be made shareable with the States.

Puncchi Commission

Needs to Review Central - State Relations Since Sarkaria Commission

1. Coalition governments at centre.
2. Economic reforms have changed centre - state relations.
3. Internal security challenges.
4. PRIs.
5. Sarkaria Commission did not consider the issue of international treaties in detail as treaties played a minimal role in law making at that time. Subsequently, however, with the advent of the World Trade Organization, and Indo-US Nuclear Deal, questions arise as to whether the power to enter into treaties and create international law should vest entirely with the Union without any necessary approval from either Parliament or the States.

Inter State Council (Art 263)

Composition

1. It consists of 6 union ministers (PM + HM + law + roadways + railways + agriculture + finance) and CMs of all states/UTs.

Important Recommendations of the Council

1. Transfer of 'residuary powers' from the Union to the Concurrent List (Not Accepted).
2. Prior consultation with States, except in cases of urgency, for legislations under List-III. (Accepted

in principle).

3. Enactment of a central legislation to allow urban local bodies to tax Union Government properties. (Under consideration).
4. Articles 200 and 201 of the Constitution should be amended laying down time limits of 1 month for Governor and 4 months for the President respectively for assenting to Bills, failing which the Bill would be deemed to have been passed. (Not accepted).
5. Obligatory consultations with State Chief Ministers before appointing Governors. (Not accepted).
6. Governors not returning to active politics except seeking election as President or Vice President. (Not accepted).
7. While choosing a Chief Minister, the leader of the party having an absolute majority in the Assembly should automatically be asked to become the Chief Minister and if there is no such party, the Governor must select a Chief Minister from among the parties or groups in the following order of preference:
    1. An alliance of parties that was formed prior to the elections.
    2. The largest single party staking its claim with the support of others, including "independents".
    3. A post-electoral coalition of parties, with the partners joining government.
    4. A post-electoral alliance of parties with some of the alliance-parties joining the government and the remaining parties including "independents" supporting the government from outside. (Accepted).
8. 80th Amendment Act, 2000.
9. Early revision of the royalty rates on coal. (Implemented).

Issues

1. The Council is supposed to be a body for intergovernmental consultation and co-operation. But it has not been given the powers to inquire and advise on disputes between States. It can only discuss subjects of common interest and make recommendations.
2. It meets rarely and has not been able to work to its full potential. It was created in 1988 but met for the first time in 1996.

Recommendations

1. Centre - state relations
    1. All major non-financial issues involving Centre-State relations must be placed before it.
    2. It should also be given the power to inquire and advise upon the disputes between States.
2. Concurrent / overlapping jurisdictions
    1. It should be given a continuing auditing role in such matters.
    2. Comments of the Inter-State Council should accompany a concurrent list Bill when it is introduced in Parliament.
    3. Any matters of transferring subjects out of List 2 into List 3 should be referred to the Council for its recommendations.
3. Functioning
    1. The Council may use a mechanism like a Committee of State Ministers to thrash out contentious issues.
    2. Meetings must be convened at least twice a year. The agenda of the meetings should be specific instead of general addresses by CMs. The agenda of the meeting should be prepared in consultation with the States and circulated well in advance. Pre-meeting exchange of notes should also take place.
    3. The Secretariat of the council should have better representation from the States.
    4. The Council should have expert advisory bodies and quasi - judicial support.

Importance of Council - Primary Education Issue

1. The conferences of Chief Ministers and Education Ministers were found to be an inadequate mechanism. Even the NDC couldn't work out a cohesive policy acceptable to all states. The strategy of an Empowered Committee of States Ministers was not invoked in this case.
2. The issue was not merely sharing of financial burden, though that was an important one. The main issue was that though the principal actors are to be the state governments, the way the process is perceived gives the impression that it is the Union's baby. This reduces the ownership and willingness of the states.
3. It is in such issues that the Inter-State Council can play a very important role and can lead to make or break of vital national programmes.

Should the decisions of the Inter-State Council be made legally binding?

1. It is not in consonance with the constitutional scheme of the separation of powers. Whatever powers are within the respective domains of the Centre and State Governments are - constitutionally speaking - theirs to exercise as they deem fit.
2. Furthermore, both the Central Government as well as State Governments are elected democratically, and are ultimately responsible for their decisions through the electoral process.
3. Utility of the council
    1. The Council is an extremely useful mechanism for consensus-building and voluntary settlement of disputes. Co-operative federalism is easily endorsed but difficult to practice without adequate means of consultation at all levels of government.

The Zonal Councils

1. They were established after 1956 to look into:
    1. Any matter of common interest in the field of planning.
    2. Any matter concerning border disputes, linguistic minorities or inter-State transport.
    3. Any matter connected with, or arising out of, the re-organisation of States.
2. These Councils consist of a Union Minister nominated by the President who acts as the Chairman and the Chief Ministers of States in the region along with two Ministers each from the member-States, nominated by the Governor as members.
3. The Council is aided by a number of ‘Advisers’ i.e Chief Secretary and one Officer of each of the member-States and an official nominated by the Planning Commission.
4. In the years immediately following the States’ reorganisation, the Zonal Councils were very active and helped resolve many issues. Over time however, the Zonal Councils met only occasionally. The Secretariats have ceased to be operational.
5. They should be abolished now as they have served the purpose.

NDC and Planning Commission

1. Frequent meetings of NDC should be held (at least two meetings in a year).
2. These bodies have functioned almost as an extension of the Union Government or its agencies. They are created through an executive or administrative order of the Union Government and therefore perceive themselves as Union appointees.
3. At present the Members and Experts of the Planning Commission are all nominated by the Union Government. Representation needs to be given to states in the Planning Commission.

Legislative Issues in Centre - State Relations

Transfer More Subjects to State List

1. The case for centralization which existed at the time of framing the Constitution does not exist anymore and what is needed now is a conscious policy for strengthening the States by enriching the State List and following the principle of "Subsidiarity".
2. Sarkaria Commission recommended
    1. In matters of concurrent or overlapping jurisdiction, a process of mutual consultation should be followed. It must be evolved as a convention.
    2. Ordinarily, the Union should occupy only that much field of a concurrent subject on which uniformity of policy and action is essential in the larger interest of the nation leaving the rest for State action within the broad framework of the policy laid down by the Union Law.
    3. Whenever the Union proposes to legislate on a matter in the Concurrent List, there should be prior consultation. A summary of the views of the State Governments and the comments of the Inter-State Council should accompany the Bill when it is introduced in Parliament.
    4. Residuary powers excepting matters relating to taxation, should be placed in the Concurrent List.

Transfer of Subjects from States List to Concurrent List

1. Once a subject has been transferred so, there should be a joint institutional mechanism to review its administration under the Central law to see whether it has achieved its objectives and whether it is desirable to continue the arrangement.
2. If the findings are not positive it should be restored to its original position in State List.

Equal Representation of States in the Rajya Sabha

1. Yes
    1. Since the Lok Sabha is directly linked to the population, delinking the relation between population and number of seats in the Rajya Sabha would only create a balance of power between states.
    2. A Resolution under Article 249 which lacks the support of almost two-thirds of the total number of states can possibly get passed with the support of nominated members if it is pushed by the larger states. This seems more so in the case of growing regional parties and coalition politics. A coalition of parties ruling the major states can dominate RS.
2. No
    1. The Sarkaria Commission was not in favor as:
        1. The Rajya Sabha doesn't exclusively represent the federal principle except when exercising the special powers under Articles 249 and 312.
        2. The purpose of having nominated members also made it clear that the Rajya Sabha was not envisaged to function like a federal chamber only.
        3. It also has legislative function to prevent hasty legislation.
        4. It also has the function to bring elders who would not be interested in active politics. The object of RS as envisaged was to hold dignified debates and to share the experience of seasoned persons.
    2. The greatest opponents of such a change would be those states that enjoy larger number of representatives in the Rajya Sabha. This would defeat the amendment bill.
    3. States of the Indian Union were not independent entities having pre-existing rights or powers anterior to or apart from the Constitution like in US.
    4. The 2/3rd majority argument seems weak in practice because members in RS vote along party lines. Second Chambers are increasingly becoming 'national' institutions rather than representing states. However, this is weakened by the growing regional parties and coalition politics.

Domicile Requirement in Rajya Sabha

1. The law as it stood before The Representation of People (Amendment) Act, 2003, had prescribed that one of the

qualifications to become the representative of a particular state in the Rajya Sabha was being an elector of a Parliamentary constituency in that State.
2. However, the court observed that the Upper House already includes nominated members who have no state linkages.
3. The object of RS as envisaged was to hold dignified debates and to share the experience of seasoned persons. From this premise the Court concluded that residence was never a constitutional requirement.

Bills Reserved for President's Consideration (Art 200, Art 201)

1. The Governor is supposed to act as soon as possible after a bill is presented to him. In case he refers it to the president, however, the president is under no compulsion to "act as soon as possible after presentation". This means that a state bill can be blocked indefinitely.
2. Allowing the democratic will of the State Legislature to be thwarted by Executive fiat is questionable in the context of 'basic features' of the Constitution. Therefore the President should be given 6 months to decide and Art 201 needs to be amended.
3. If the President, for any reason, is unable to give his assent, it may be desirable for the President to make a reference to the Supreme Court under Article 143 for an opinion before finally making up his mind on the issue.

Treaty Making Power of the Union

Should Parliament's Ratification be Made Mandatory?

1. Constitutional position
    1. Art 73 allows the executive to enter into international treaties.
    2. Art 253 provides that notwithstanding any distribution of legislative power, the Parliament has the power to enact legislations to give effect to treaties and international agreements.
    3. Though the Parliament is vested with the power to enact laws in relation to the entering into and negotiation of treaties, no law in this regard has been enacted till date. Therefore, Parliamentary approval for every treaty is not the norm.
2. Court judgments
    1. The power to enter into treaties and implement them is comprehensive and unqualified, but courts can impose restrictions on this power. A treaty, for instance, cannot make provisions which would, in effect, amend the basic features of the Constitution, for it could not have been intended that a power conferred by the Constitution would, without an amendment to the Constitution, destroy the Constitution.
    2. Supreme Court declared in Vishakha that citizens can seek relief in courts on the basis of international treaties if the country has ratified them and they are not inconsistent with the law and constitutional provisions.
3. No, not needed
    1. Where parliamentary approval is required, it has led to certain complications. e.g. US Senate and Treaty of Versailles. In Indian case, treaties between India and Nepal on harnessing water resources of Mahakali and other rivers and the other with Bangladesh on sharing of the Ganga waters would not have been possible had these agreements been submitted to Parliament for ratification - particularly the treaty with Bangladesh as it would have been extremely difficult to obtain such ratification. One of the reasons for the success of European Union and ASEAN is that the decision makers were by and large free to take decisions.
    2. At the same time, the Parliament should not be kept in dark or that the authority of the Parliament should be denied. Thus any WTO Agreements, signed and ratified by the GoI can be implemented only by Parliament by making a law.
    3. In view of the fact that treaties may relate to all types of issues within or outside the States' concern, there cannot be a uniform procedure for exercise of the power. Furthermore, since treaty making involves complex, prolonged, multi-level negotiations wherein adjustments, compromises and give and take arrangements, it is

not possible to bind down the negotiating team with all the details.

4. Under our system of parliamentary government, executive has to render continuous accountability to Parliament anyways.

4. Yes, needed
    1. It is well within the competence of parliament to regulate treaty making power of GoI.
    2. In a democracy like ours, there is no room for non-accountability.
    3. Fundamentals of democracy
        1. Article 73 states that,'---the executive power of the Union shall extend to the matters with respect to which Parliament has powers to make laws.
        2. It also means that the Union Government cannot exercise its executive powers beyond the legislative powers of the Union.
        3. Under this Art, there is an underlying assumption that, before the Union Government exercises its executive power, there is a law enacted by Parliament on the subject concerned.
        4. Some argue that the provisions of Article 73 give power to the Executive to act on subjects within the jurisdiction of Parliament, even if Parliament does not make a law on those subjects.
        5. But this is a distortion of Parliament's supreme control over the Executive. If this interpretation is accepted then the Union Executive can act on all subjects on which Parliament has to make law, without there being any law made by Parliament. You can thus do away with Parliament and Parliament's duties to make laws. We will then have an autocratic government.
        6. Democracy presumes there should be a rule of law and all Executive actions will be supported by law and that there shall be no arbitrary action by any authority, including the Union Executive.
5. Recommendations
    1. Parliament should make a law to regulate the treaty-making power of the GoI.
        1. The law must clearly delineate the exercise of this power. In particular, it must provide for clear and meaningful involvement of Parliament in treaty-making.
        2. There can be a committee of parliament which must decide within 4 weeks whether the treaty should be allowed to be signed by the Executive without referring the matter for consideration to Parliament or whether it should be referred to Parliament for consideration.
        3. It should categorize the treaties into: (a) those that the executive can negotiate and conclude on its own and then place before Parliament by way of information. In this category may be included simple bilateral treaties and agreements which do not affect the economy or the rights of the citizens. (b) those treaties which the executive can negotiate and sign but shall not ratify until they are approved by the Parliament. (c) important, multi-lateral treaties concerning trade, services, investment, etc. (e.g. WTO, Indo-US nuclear deal), where the Parliament must be involved even at the stage of negotiation.
        4. If necessary, a time frame could be prescribed for Parliament to take a decision on the treaties, failing which it would be deemed to have been ratified.

Should States be Consulted in Treaties Which Affect Them?

1. Present mechanisms
    1. The States can consult through the Inter-State Council on all issues including treaties as it has a mandate which includes investigating and discussing subjects in which some or all of the States or the Union and one or more of the States, have a common interest.
    2. With regard to WTO negotiations, presently the Department of Commerce does have periodic meetings with state governments both to sensitize them on the progress of the negotiations and the issues under consideration as also to take on board their suggestions. These meetings have to be made more explicit and formal.
2. Issues
    1. The area of legislative competence of States is being eroded indirectly by the centre entering into treaties with other countries. Hence effective consultation with states is needed before adopting an international convention in respect of matters in the State List.
    2. If a treaty entered into by the Union Government casts obligations on the State Government,

then under such circumstances, the Union Government should provide the necessary funds and other assistance to implement the treaty.

3. Recommendations
    1. Treaties which affect the rights and obligations of citizens as well as affect subjects in State List should be negotiated with greater involvement of States. This can assume a twofold procedure. Firstly, a note on the subject of the proposed treaty and the national interests involved may be prepared by the concerned Union Ministry and circulated to States for their views and suggestions to brief the negotiating team. Secondly, an "Empowered Committee" of concerned Ministers of States and the Centre be asked to study the provisions of the agreement and recommend to Government to ratify the treaty in whole or conditionally with reservations on certain provisions.
    2. There may be treaties or agreements which, when implemented, put obligations on particular States affecting its financial and administrative capacities. In such situations, the Centre should compensate the states. Financial implications on State finances arising out of treaties should be a permanent term of reference to the Finance Commissions.

Governor and Centre - State Relations

Governor's Immunity

1. Article 361 states that neither the President nor the Governor can be sued for executive actions. Even where the Governor's bonafide is in question while exercising his discretionary powers, he cannot be called to enter upon defense. This should be done away with in discretionary cases.

Politicization of Governors - Appointment and Removal

1. The Union Government's stand however is that if a party came to power with a social and economic agenda and if it was found that the Governor was not in sync with it but would rather be antithetical to its policies, then the Governor could be removed. This is the basis of the 'pleasure doctrine'.
2. The Sarkaria Commission recommended that a person to be appointed as a Governor should satisfy the following criteria:-
    1. He should be eminent in some walk of life.
    2. He should be a person from outside the State.
    3. He should be a person who has not taken too great a part in politics generally and particularly in the recent past
3. The words and phrases like "eminent", "detached figure", "not taken active part in politics" are susceptible to varying interpretations and parties in power at the Centre seem to have given scant attention to such criteria. The result has been politicization of Governorship and sometimes people unworthy of holding such high Constitutional positions are getting appointed.
4. The Centre should adopt strict guidelines as recommended in the Sarkaria report and follow its mandate in letter and spirit. Appointment of the Governor should be entrusted to a committee.
5. The Governor, on demitting his office, should not be eligible for any other appointment except for a second term as Governor, or Vice-President or President. Such a convention should also require that after quitting or laying down his office, the Governor shall not return to active partisan politics.

Should Governor be Impeached like Judges?

1. No. Because the Governor's role has a heavy political content and discretion and it is not possible to lay down a set of concrete standards and norms with reference to which a specific charge against a Governor may be examined.
2. Governors should be given a fixed tenure of 5 years and their removal should not be at the sweet will of the centre. Only in exceptional circumstances, he may be removed after being given a reasonable opportunity.

3. In case of such termination or resignation, the Government should lay before Parliament a statement explaining the circumstances leading to the removal.

Discretionary Powers of the Governor - Consideration of a Bill

1. Prescribe a time-limit - say a period of 3 months - within which the Governor should take a decision whether to grant assent or to reserve it for the consideration of the President.
2. Delete the words "or that he withholds assent therefrom". In other words, the power to withhold assent, conferred upon the Governor, by Article 200 should be done away with.
3. If the Bill is reserved for the consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under Article 143.
4. When the State Legislature reconsiders and passes the Bill (with or without amendments) after it is returned by the Governor pursuant to the direction of the President, the President should be bound to grant his assent.
5. To provide that a "Money Bill" cannot be reserved by the Governor for the consideration of the President.
6. It may be more advisable to delete altogether the words in Article 200 empowering the Governor to reserve a Bill for the consideration of the President except in the case where the Constitution requires him to do so.

Coalition Government and Defections of Parties

1. A pre-election coalition should be treated as one political party for the purpose of the Tenth Schedule to the Constitution of India (law relating to defections).

Sanction of the Governor for Prosecution of Ministers

1. The question which arises is whether a Governor can act in his discretion and against the advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act.
2. In such situation there bias is inherent in the advice of the Council of Ministers. If the Governor doesn't act in his own discretion there would be a complete breakdown of the rule of law.

Ad Hoc Reports from the Governor to the President

1. Fortnightly report
    1. Each Governor sends to the President every fortnight a report on important developments that have taken place in the administration of the State.
    2. The practice generally followed is to send a copy of this report to the Chief Minister. These reports should create mutual trust between the Governor and the Chief Minister. It should therefore be made obligatory for the Governor to make a copy of the fortnightly report available to the Chief Minister.
2. Ad Hoc Reports
    1. The Governor may be obliged to report to the President some important developments together with his own assessment of them.
    2. He may consider it inadvisable to endorse a copy of such a report to the Chief Minister. For the same reason above, while sending these ah-hoc or fortnightly reports the Governor should normally take his Chief Minister into confidence, unless there are over-riding reasons to the contrary.

Emergency Provisions and Centre - State Relations

Art 355

1. Article 355 imposes an obligation upon the Union "to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution".
2. The Constitution does not further elaborate on how this duty of the Union is to be discharged. This is left to the discretion and judgment of the Union. Thus Article 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are essentially and reasonably necessary for the effective performance of that duty.
3. However, it may be noted that the Constitution does not, under Article 355, permit suspension of fundamental rights or change in the scheme of distribution of mutually exclusive powers with respect to matters in List I and List II. Except to the extent of the use of the forces of the Union in a situation of violent upheaval or disturbance in a State, the other constitutional provisions governing Union-State relationships continue as before.
4. Unless a National Emergency is proclaimed under Article 352, or powers of the State Government are suspended under Article 356, the Union Government cannot assume sole responsibility for quelling such an internal disturbance in a State to the exclusion of the State authorities charged with the maintenance of public order.

Local Emergency

1. It can be imposed within the territory of a state in cases of widespread violence, or a large scale natural disaster and which, in the opinion of the Union, a) is beyond the means of the State to control and/or; b) the State is unwilling to control or react to.
2. Needed
    1. State Government can continue to function and the Legislative Assembly would not have to be dissolved.
    2. Response of the Central Government would be issue specific and the Central Government would have to exit the moment the situation is back under control. Examples are Gujarat riots, Kosi floods.
    3. It would also reduce the temptation of the Centre to misuse the emergency provisions in Article 352 and Article 356.
    4. Art 355 casts specific duty on the Union. This will simply be codifying how the duty can be discharged. Given the strict parameters now set for invoking the emergency provisions under Articles 352 and 356, exercise of duty under Article 355 should be codified.
3. Not needed
    1. There are other existing provisions like the Disturbed Areas Act.
    2. It will lead to undermining of federal system.

Framework Lawfor Exercise of Power Under Article 355

1. Parameters which constitute 'internal disturbance' should be objectively defined.
2. Paramount Responsibility with the State: It must entrust the first and paramount responsibility of tackling any such situation to the State Government.
3. Situations in which the Union can Intervene: The Union can intervene only when the crisis is occurring to an extent that the State is incapable of or unwilling to tackle the situation. Parliamentary approval must be sought.
4. Other usual safeguards should apply.

Power of Union to give Direction to States

Constitutional Provisions

1. Art 256: The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and the executive power of the Union shall extend to the giving of such directions to a State as necessary for that purpose.
2. Art 257(1): The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as necessary for that purpose.

Issues

1. It is axiomatic that the power to enact legislation would be entirely meaningless without the power to enforce such valid law, and that is the mandate of Article 256. As such, it is difficult to accept the argument of states that Article 256 is destructive of the principles of federalism.

Judiciary and Centre - State Relations

Do we need an All-India Judicial Service?

1. India has a unified judiciary. Central and State laws are enforced and interpreted by the same set of Courts. This makes the constitution of an All India Judicial Service, as envisaged under Article 312 itself, a very natural phenomenon.
2. The judicial responsibilities that would be performed by a Judge in one State would be substantially the same as in any other State. There would, evidently, be laws enacted in a given State that do not exist in other States, and it is possible that certain types of legal disputes tend to arise more in one State than another for historical, geographical or cultural reasons. Nevertheless, the bulk of the civil and criminal litigation that would be adjudicated would be very similar in any part of the country.
3. Creation of such an All India judicial service, if accompanied by at least reasonably good remuneration being offered to recruits, would go at least some way towards attracting the best legal talent in the country to the Judiciary, at a young age.

Subordinate Courts

1. In 1976, the subject of subordinate courts was brought into the Concurrent List. But practically, nothing has been done by the Union Government by way of financial support to the Subordinate Courts.
2. Art 247 provides that Parliament may by law, provide for the establishment of any additional courts. The parliament has not made any law so far on it.
3. Art 73 states that the Executive power of the Union will not extend to a subject in the Concurrent List unless such executive power is conferred by the Constitution or by law made by the Parliament. And the parliament has not made any law on the matter so far.
4. So the States blame the Centre for not providing adequate funds and the Centre seem to think it is not part of its responsibility to support the subordinate courts.
    1. The Central Government has not established sufficient number of courts for administering Central Laws and the entire burden of administering the central laws has been thrown upon the courts established by the State Governments.
    2. The present practice on the part of Union Ministries while presenting any Bills is to say that the expenditure on the Courts will be borne by the State Governments.
5. If the scheme of division of powers is analyzed, it becomes obvious that the expenditure on the Subordinate Courts where Parliament legislates on subjects in List I should be borne by the Union Government, whereas for laws made by the State Legislature on subjects in List II, such expenditure should be borne by the State Government. On legislation in respect of subjects in List III is concerned the natural conclusion would be that if the legislation is brought in by the Parliament such expenditure must be borne by the Union Government and where such legislation is brought in by the State legislature, such expenditure must be borne by the State Governments.
6. As a general principle, it is argued, that under the doctrine of separation of powers, it is not open to any one of the three branches to underestimate the legitimate needs of the other branches so as to make it difficult for those

branches to discharge their Constitutional obligations satisfactorily.

Financial Issues and Centre - State Relations

Constitutional Provisions

1. All the taxes in the Union List for a part of the sharable pool with the exception of:
    1. Those referred to in Articles 268 and 269. Article 268 refers to duties levied by the Union but collected and appropriated by the States. Under Article 269, taxes on the sale of goods and taxes on the consignment of goods shall be collected by the Government of India but shall be assigned to States.
    2. Surcharges referred to in Article 271.
    3. Any cesses levied for specific purposes.
2. Article 275 (1) provides for grants-in-aid as Parliament may determine. These grants can be dispense only on the recommendations of the FC.
3. Under Article 282, the Union can make any grants. Unlike the grants under Article 275 which need FC recommendation, grants under Article 282 can be made with no such restriction.
4. Clause (2) of Article 293 imposes the condition that a State may not raise any loan if any part of the loan extended by the Government of India remains outstanding. In such cases, the permission of the Government of India is required for a State to raise a loan.

Sarkaria Commission / NCRWC / Puncchi Commission Recommendations

1. Revenues
    1. Art 268 and Art 269 should be periodically revised jointly by centre and states.
    2. The monetary limit on tax on professions should be revised. Parliament may be vested with powers to do so instead of amending the constitution each time.
    3. Surcharges and cesses should not be levied by the Union Government except for a specific purpose and for a strictly limited period.
    4. The review of royalty rates on major minerals, petroleum and natural gas should be done every two years.
    5. ‘Interstate Trade and Commerce Commission’ under Article 307 should be established to ensure removal of barriers to inter-State trade and commerce;
2. Expenditure Reforms
    1. Central and State governments should take into account the high opportunity cost of populist measures.
    2. It is necessary that an annual paper on subsidies is prepared by the PC.
3. Planning
    1. State Planning Boards should be strengthened.
    2. Close and full involvement of the States at all stages of plan formulation is very essential.
    3. The practice of States submitting inflated plan proposals should be firmly discouraged.
    4. Besides the general reviews contained in the States' Annual Plan and the mid-term appraisal, a quinquennial review should be done which should help in the next Five-Year Plan.
    5. Consultation with District Planning Boards should be made obligatory for formulating plans at higher levels.
4. CSS
    1. The number of CSS should be kept to the minimum.
    2. The need for the Union Government initiating pilot projects even in regard to subjects in the States’ sphere carrying high national priority is recognized. But these should be formulated in prior consultation with the States. Once a programme has passed the pilot stage and has been accepted as desirable for implementation on a larger scale, it should appropriately form part of the State Plan.

3. State Governments should be fully involved in determining the contents and coverage of the CSS so that local variations are taken care of.

5. State Borrowings
    1. The Union Government should give its consent freely to States for borrowing for periods less than one year.
    2. The system of tax-free municipal bonds should be introduced in the country.

Issues in Centre - State Financial Relations in Past 2 Decades

1. Changes due to economic reforms
    1. States have a greater role now in economic development. They can now differentiate themselves by creating necessary enabling conditions.
    2. Increasing inequalities and imbalances across States.
        - The strategy consisting of area specific programmes and the area specific tax exemptions have so far failed. So there should be higher central transfers to backward States.
        - Poor governance in such backward states acts as deterrents to private investments. So there should be greater focus on the issues of governance in such states and additional grants should be made conditional on administrative reforms.
    3. Large scale migration from poorer States to richer States and a faster pace of urban growth stretching the already inadequate civic amenities in urban areas.
2. Changes due to 73rd and 74th Constitutional Amendments
    1. States now have to allocate resources to PRIs.
3. Changes due to Tax Reforms
    1. 80th Amendment. Growing importance of Service tax after 80th Amendment which has been placed under Art 268.
    2. Need to revise the ceiling of Rs. 2500 on profession tax and assign it to local bodies.
    3. Growing importance of cesses and surcharges. The share of cesses and surcharges witnessed a sharp increase from 4.9% of the gross tax revenue of the Centre in FC-8 to 11.34% in the award period of FC-12. In the years 2008-09 and 2009-10, the share of cesses and surcharges increased further to over 13 per cent of the gross tax revenue.
    4. The proposal to include aviation turbine fuel in the list of declared goods.
    5. GST.
4. Changes due to FRBMA
    1. 12th FC recommended a Debt Consolidation and Relief Facility with debt write-offs linked to the enactment of state FRBMAs, elimination of revenue deficit and containment of fiscal deficit. West Bengal and Sikkim are yet to enact the legislation.
    2. One of the methods of circumventing the FRBM targets is through off-budget liabilities. The Government of India has been issuing bonds to oil marketing and fertilizer companies which are off-budget and do not add to the fiscal deficit. But these are nevertheless liabilities of the Central Government. It is therefore necessary to bring all the off-budget liabilities of both the Central and State Governments into fiscal accounting.
    3. Some of the State fiscal responsibility legislations provide for an independent evaluation of adherence to the legislation. In most cases this has not been operationalised. The Central Legislation does not provide for an independent evaluation.
5. Changes in central lending to states
    1. Prior to 2005-06, the Centre was dispensing normal plan assistance in the grant-loan ratio of 30:70 in the case of General Category States and in the ratio of 90:10 in the case of Special Category States.
    2. 12th FC recommended termination of direct central lending to States on account Central Plan assistance. States are now allocated additional market borrowings in lieu of loan component of normal Central assistance.
    3. This has cast a burden on the States in terms shorter duration and higher costs of the market borrowings. The Central loans had a repayment period spread over 25 years with a moratorium of five years in repayment. In contrast, the market loans have a repayment period of 10 years with a bullet repayment at the end of the tenth

year.

6. Changes in loans against small savings
    1. Till 1998-99, small saving collections were being credited to the CFI and the Centre was extending loans to a State against small saving collections in that State.
    2. In April 1999, the National Small Savings Fund (NSSF) was created with Central guarantee.
    3. The collections under NSSF are invested in state government securities (100% till 2007 and 80% since then).
    4. States' borrowings against net small saving collections are no more treated as loans from the Centre following the setting up of NSSF.
    5. So FC has been excluding small saving loans from the purview of DCRF. Besides, loans from the NSSF carry a high interest rate of 9.5% per annum.
7. Changing Pattern of Plan Assistance to States
    1. First change is the reduced central budgetary support to the State Plan. Centre's GBS to the Central Plan and the State Plans used to be 1:2 earlier. Now it has become more than 2:1.
    2. Second is the significant change in the pattern of plan assistance. The share of normal plan assistance in the total budgetary support to the State Plan has come down drastically and that of CSS and special plan assistance has gone up considerably.
8. Vertical Imbalance
    1. The share of Central transfers in the aggregate revenue receipts of States has remained stable at around 40% of their own revenue receipts. For the high-income States, it varies from 16 - 25% of their revenue receipts. In respect of the middle-income States, it varies from 25 - 33%. The dependence of low income States is much higher and that of SCS is almost 90%.
    2. The states are anyways not compensated for the compliance and enforcement costs of many central legislations like EPA, FCA.
9. Changes due to Inclusive Growth
    1. As most areas contributing to inclusive growth like agriculture, education, skill development, provision of health services, welfare of weaker sections, etc., are in the realm of States, there is a clear need to realign the resources in favor of States.
10. Mining and environment protection
    1. Extraction of minerals involves huge costs in terms of environmental protection and rehabilitation of people. At present these costs are borne mainly by the States and only partly by the leaseholders. As the extraction of mineral wealth serves national interests, states should be compensated by the Union. Centre also derives substantial revenue from export duties on minerals.
    2. The power to fix royalty on major minerals is vested with the Central Government. Under the provisions of the MMRDA, royalty can't be revised more than once in 3 years. One of the main grievances of the States is that there are undue delays even beyond 3 years. Another issue is the conversion of specific rates of royalties into ad valorem rates based on mineral prices.
    3. Currently proceeds from off shore oil and gas production and sale of spectrum don't form a part of the sharable pool.
11. Non-Plan and Plan Conundrum
    1. Finance Commissions have been criticised often for restricting their assessment to the non-plan accounts only. In the Constitution, there is no distinction between the plan and non-plan accounts.
    2. There are a number of linkages between the plan and non-plan expenditure.
        1. Firstly, the expenditure on completed plan schemes becomes committed expenditure on the non-plan account.
        2. Secondly, borrowings for financing the plan give rise to debt servicing burden which adds to the non-plan expenditure.
        3. Thirdly, personnel employed for the implementation of plan schemes are transferred to non-plan.

CSS (Art 282) Issues and Recommendations

1. Both the central government and the state governments share the responsibility towards fulfillment of DPSP. But the capacities of central government are vastly more than those of state

governments. So the Central Government cannot disown its responsibility to provide funds for healthcare (a DPSP) on the pretext that "healthcare" falls within the domain of the States. The enactment of legislation and the implementation of the same might primarily fall within the domain of the States, but the constitutional responsibility of all levels of government remains joint and several.

2. With the introduction of new CSS, central transfers to states under CSS have gone up considerably while those under normal central assistance have fallen. Growing discretionary transfers from the Centre have severely constrained the States in drawing and implementing schemes according to their priorities.
3. The resources for CSS are acquired through taxes which should be a part of the common pool and not left to the sole discretion and use by the Centre.
4. The compliance and implementation cost of these CSS are also borne by the States. The RTE model should be followed there i.e. the additional cost imposed on states due to such schemes and central legislations should be made a part of the FC ToRs.
5. The centre also increases the states' share arbitrarily without consulting them as in the case of SSA.
6. Over the years, a number of district level agencies have been created for the implementation of CSS. The Central Ministries are directly transferring substantial amounts of money to these implementing agencies bypassing the State Governments.
    1. This system put in place to address the problem of delays in releasing funds.
    2. But it has eroded accountability. Implementing agencies are part of the State Government but are not accountable to it.
    3. Large sums are reportedly lying unspent in the bank accounts maintained by the implementing agencies.
    4. There is no proper accounting of these funds.
    5. It should be ensured that the State Governments pay interest in case of delays in the transfer of funds beyond 15 days of their receipt from the Central Ministries.
7. One size fit all approach.
8. Growth of parastatals.
9. The conditionalities frequently encroach upon the legislative autonomy of the States. A case in point is the JNNURM, which requires the State to reduce Stamp Duty rates to at most 5%, a rate which can only be prescribed by the Legislative Assembly.

Bypassing States in Transfer of Funds to Local Bodies

1. Many of the areas in respect of which funds are allocated are actually the domain of States.
2. Additionally, it may so happen that the Central Government allocates funds for a certain period of time, but it afterwards unable or unwilling to continue disbursing funds. In such a situation, unless State Governments and the Central Government are in close coordination, certain welfare programmes could languish altogether, with grave consequences for general public interest.
3. Such funds are invariably carved out of the sharable pool which was going to states.

Finance Commission Issues and Recommendations

1. Attempts must be made to synchronize the periods of FC and FYP, CFC and SFCs.
2. <u>Strengthening FC</u>
    1. One of the criticisms against the working of the FC is that the transfers recommended by them are based on past indicators and not on forward indicators. Undoubtedly, forward indicators are preferable.
    2. Permanent FC division should be setup. It will ensure proper monitoring of the recommendations of the Commissions and even pave the way for the adoption of forward looking indicators.
3. <u>Strengthening ToRs</u>
    1. Liability of states arising out on account of DA and Pay commission recommendations should be a part of its ToR.
    2. Additional liabilities of states arising out of compliance and enforcement of central laws, their share in CSS, compensation for mining and environment protection should be a part of FC ToRs.

4. Reports of FC
    1. Information gathered by the FC as well as the detailed methodology followed should be published within six months of the publication of the Report.
    2. It will be a healthy practice if the observations and suggestions made by the FC on matters other than the ToR are also considered by the Government and a statement placed in Parliament.
5. Tax devolution vs Grants
    1. States have been seeking predominance of tax devolution because of its inherent buoyancy as compared with the grants which are fixed in nature.
    2. Another issue is the conditionalities attached to grants.
    3. Compared with tax devolution, grants have a greater redistributive role.
    4. The proportion of grants in total Finance Commission increased from 9% in the award period of FC-X to 19% in the period of FC-12. This is a welcome development.
    5. Recent FCs have recommended grants to address special problems and to bridge the gap in the provision of services like education and health. This is a welcome development.
    6. Performance - linked incentive grants are should be more effective in addressing the problems of backward States and hence adopted by FC.

Planning Commission Issues and Recommendations

1. PC micromanagement
    1. PC insists on Central Ministries seeking its approval for any changes in the approved projects. This needs to be dispensed with so long as sectoral allocations are adhered to. That will achieve the desired macro coordination goals of PC instead of micro managing.
    2. Planning commission has encroached upon the autonomy of the states as it can accept, modify or reject the states' proposals for development programmes, for which central assistance is sought and which can be granted only on the acceptance of PC. Such detailed exercise of approving States' annual plans may not be necessary. The States should be given freedom to plan according to their own needs and priorities within the framework of nationally accepted priorities.
    3. Over the years, the share of Gadgil formula normal plan assistance has fallen to just 19% of the total PC assistance while those through CSS and special plans have increased. An issue with the adgil formula is that it gives higher weightage to population and hence is not as progressive as FC transfers.
2. Issues in states' annual plans
    1. Annual Plans are decided several months after the presentation of the State Budget. This reduces the efficacy and sincerity in the planning effort.
    2. The mismatch between the Annual Plans and the Five-Year Plans remains a problem. A case for multi-year budgeting with a firm budget for the first year and provisional for the second and third years assumes importance in this context.
    3. There is a tendency on the part of States to seek higher plan outlays and the PC approving them based on unrealisable estimates of own resources. When the estimated resources do not materialise, non-plan expenditure takes the cut. Thus, the very purpose of a higher plan outlay is not served.
    4. The share of State Plan outlays in total Plan outlays has witnessed a steep decline from 60% in 1st FYP to 40% now. This was mainly due to the reduced budgetary support to the State Plan.

Table 4.10: Components of Gadgil Formula

Criteria	Weightage in Percent
1. Population (1971)	60.0
2. Per capita income	25.0
Of which	
i) Deviation method covering only States with per capita income below the national average	20.0
ii) Distance method covering all the general category States	5.00
3. Performance	7.5
Of which	
i) Tax effort	2.5
ii) Fiscal management	2.5
iii) National objectives	2.5
4. Special problems	7.5
Total	**100.0**

Unified and Integrated Market

Part 13 of © (Art 301 - 307) - Inter-state (+ Intra-state) Trade and Commerce

1. Art 301: Subject to other provisions in this part, trade throughout the territory of India shall be free.
2. Art 302: Non discriminatory restrictions may be imposed by the parliament in public interest. ESMA, 1955 was enacted according to this exception.
3. Art 303: (a) Art 303(1): Neither the parliament nor any state legislature may make any law giving preference to any state over any other in trade and commerce within India (e.g. states can't resort to domestic treatment). (b) Art 303(2): But in times of scarcity in any part of India, parliament may make discriminatory provisions.
4. Art 304: (a) Art 304(a): Non-discriminatory taxes may be imposed by states on goods imported from other states. This means a state can only impose those taxes on goods coming from other states as it imposes on goods produced within the state. (b) Art 304(b): However in "public interest", a state may impose reasonable restrictions.

Current Situation

1. Essential Commodities Act (ECA), 1955 imposes a number of restrictions on storage, movement and pricing of goods.
2. APMC Acts enacted by States empower State governments to notify commodities and designate markets and market areas where the regulated trade should take place. They do not allow direct buying of agricultural produce by processing industries or exporters thus preventing the farmers from realizing better prices for their produce which was the main purpose of such legislation.
3. Major tax impediments
    1. CST: The CST is levied on inter state movement of goods. It is an origin based tax and this allows states of origin to shift the tax burden to the residents of other States. CST also denies input credit on inter-State sales creating distortions.
    2. The system of VAT is segmented between CENVAT, State VAT, Central Service Tax and a number of levies by the States and local bodies and the Central sales tax.
    3. Octroi/entry tax. While inter-State sales tax is on the export of goods, Octroi is similar to import duty. These

lead to inordinate delays and harassment at the numerous check posts.

Recent Reforms

1. ECA
    1. The number of commodities coming under the purview of ECA has been substantially brought down.
    2. But most of the agricultural commodities still continue to remain under the purview of the Act.
    3. ECA should be amended to provide for restrictions only during exceptional situations.
2. APMC
    1. The Central Government brought out a model APMC Act in 2003 allowing private agents to set up a market or buy products directly from the market.
    2. But the adoption of the Act by the States is voluntary.
    3. Only a few states, and none of the major states, have amended their APMC Acts allowing direct marketing, contract farming and markets in private and cooperative sectors.
    4. Even among these, many are yet to notify the relevant rules to make the amendments fully operational.
3. Inter-State Trade and Commerce Commission under Article 307
    1. This Commission should be vested with both advisory and executive roles with decision making powers. As a Constitutional body, the decisions of the Commission should be final and binding on all States as well as the Union of India. Any party aggrieved with the decision of the Commission may prefer an appeal to the Supreme Court.

Inter-State Water Conflicts

Constitutional and Legal Framework

1. 7th Schedule, state list has water in it. But the Union List has regulation and development of inter-state rivers valleys in it. But this has to be regulated by a law made by the parliament.
2. The Constitution contains a specific Article - Article 262 – which deals with adjudication of disputes relating to inter-state river valleys. It reads:
    1. Article 262(1): Parliament may make a law to provide for the adjudication on any dispute regarding any inter-state river valley.
    2. Art 262(2): Parliament in its law may provide that no court, including the SC, will have jurisdiction in respect of any such dispute.
3. The River Boards Act, 1956: It was enacted under the entry 56 of List 1 with the objective of enabling the Union Government to create, in consultation with the State Governments, boards to advise on the integrated development of inter-State basins. These Boards were supposed to prevent conflicts by preparing developmental schemes in consultation with states.
    1. No water board, however, has so far been notified under the Act.
4. The Inter-State Water Disputes Act, 1956: It was enacted under the Art 262 and provides for an aggrieved State to ask the Union Government to refer a dispute to a tribunal. A water disputes tribunal is appointed by the Chief Justice of India and consists of a sitting judge of the Supreme Court and two other judges chosen from the Supreme Court or High Courts. The tribunal, so appointed, can choose assessors and experts to advise it and the Award is beyond the jurisdiction of courts.

Sarkaria Commission Observations and Recommendations

1. Constituting the tribunals
    1. Centre used to take inordinate amount of time to constitute and notify the tribunal even if a

complaint was received from a state. So it recommended that once an application under the Inter-State River Water Disputes Act is received from a State, it should be mandatory on the Union Government to constitute a tribunal within a period of 1 year.
    2. Centre should also be empowered to appoint a tribunal, suo-moto, if necessary.
2. Support to the tribunals
    1. There should be a database and an information system at the national level.
    2. States used to refuse sharing data with the tribunals. They should be compelled by law to share all the data as needed by the tribunals.
    3. Adequate staff and machinery should be given to the tribunals.
3. Inordinate delays in working of the tribunals
    1. The commission recommended that the tribunal must pronounce its award and such an award should become effective within 5 years from the date of constitution of the Tribunal.
4. Binding nature of the award
    1. The government initially had the flexibility not to accept the award. A tribunal's award should have the same force and sanction behind it as an order or decree of the Supreme Court.

Inter-State Water Disputes (Amendment) Act, 2002

1. Accepting Sarkaria commission's recommendation, the centre would establish a Tribunal within one year on a request by a State Government.
2. The Tribunal would investigate the matters referred to it and give its report within 3 years (Government of India may extend the period by another two years).
3. The decision of the Tribunal, after their notification by the centre, shall have the same force as an order or decree of the Supreme Court.

Ravi Beas Case

1. The matter was referred to the Tribunal in 1986. A report was given in January 1987. Political differences led to further references being made to the Tribunal and the matter is still before it.
2. Meanwhile Punjab has through legislative enactment terminated all agreements. The legality of this action is the subject matter of a Presidential reference to the Supreme Court in 2005. The matter is still awaiting the Court's opinion.

Cauvery Dispute

1. In 1970 TN applied to the Central Government for constituting a Tribunal. No action was taken and only on the directions of the Supreme Court the Centre set up a Tribunal in June 1990.
2. Disputes were raised on whether the Tribunal was endowed with powers to give interim awards.
3. Orders of the Tribunal were nullified by Ordinances promulgated by Karnataka. Advisory opinion was sought by the Centre on the legality of the Karnataka Ordinance.
4. Riots broke out on the publication of the interim award and PILs on compensation issues were filed in the Supreme Court.
5. The final order of the Tribunal was given in 2007 but these have been referred back to the Tribunal through clarificatory petitions and challenged in the Supreme Court through Special Leave Petitions under Article 136.

Lessons from Tribunal Experience

1. Enforcement issues
    1. Increasingly, States are becoming resistant in complying in spite of express provisions in the Constitution regarding the finality of such awards. States have passed laws in their legislatures canceling water sharing agreements or nullifying tribunal orders. SC is still to rule on the legality of such legislations.
    2. Enforcing the award and ensuring compliance depends on centre's political will which is found to be lacking in most cases. Coalition politics, where regional parties have a major say in the Central Government makes such interventions by the Centre difficult.

3. Control over water is considered a right which has to be jealously guarded. Compromise is considered a weakness which can prove politically fatal. Although a scientific and dispassionate approach may lead to solutions which could be mutually beneficial, they are not attempted as it would mean giving up established rights.

2. Challenge in SC
    1. Although awards can't be challenged in the SC as per the Constitution, they are still taken to the court in the name of interpretation and implementation.
    2. Special leave petitions under Art 136 are filed by the parties before the court. Thus the 2002 amendment which explicitly states that the decision of a Tribunal shall have the same force as an order or decree of the Supreme Court has been found to be ineffective.
    3. Interim awards are taken to the court.
    4. Several points involving an interpretation of the Constitution are raised in the Supreme Court.
    5. Activists have raised the issues of environmental damage, rehabilitation and alternate livelihood in front of the court. These are matters which are outside the purview of Water Tribunals.
3. Weaknesses in law
    1. There is no time limit for the centre to notify the tribunal's award. Thus centre can practically veto it for an indefinite period.
    2. The decisions of the tribunal are questioned for errors and omissions.
    3. Parties seek explanation/guidance of the Tribunal on points referred, and even on points not originally referred.
    4. The 2002 Act provides for conclusion of proceedings in 3 years extendable for a further period not exceeding 2 years. However, there is a provision to extend indefinitely time for a clarificatory or supplementary order. This needs to be rectified and time limit for clarificatory / supplementary orders needs to be prescribed.
    5. River boards should be setup. This would encourage resolution of disputes within the Board and in the event the matter does go before a Tribunal then the Tribunal would have before it the records and deliberations before the Board.
4. Weaknesses in procedure
    1. Tribunals should focus mainly on technical issues. Technical and legal issues should be dealt with separately. Issues need to be spelt out on practical considerations and optimal solutions found.
    2. They should deviate from the strict procedures and format of judicial hearings. More participatory and conciliatory approach as adopted in board rooms rather than in court rooms should be followed. The success of the Krishna Water Disputes Tribunal (1969-1978) has been ascribed to adoption of participatory rather than adversarial procedures.
    3. Tribunals should include people from multiple disciplines from all relevant fields and presided over by a judge. This would also bring about the attitudinal change.

Inter State Water Disputes (Amendment) Bill, 2011

1. A National Water Tribunal to be setup merging all individual tribunals.
2. Each case to be decided by a bench of 2 judges.
3. Each dispute to be decided in maximum of 2 years extendable maximum for 1 year under extreme circumstances.
4. Its orders to have same force as SC orders.

Should Water be Shifted Under Concurrent List or Inter-State Rivers be Nationalised?

1. No need, since constitutional provisions already don't preclude central management.
2. Doing so will lead to similar demands in other subjects like say land.

River Basin Management Bill, 2013

1. It seeks to set up a river basin authority each for the management of 12 major river basins in the country.

2. It seeks to amend the defunct Rivers Board Act of 1956, provides for integrated planning, and development and management of water resources.
3. It proposes a two-tier structure for a River Basin Authority comprising a political Governing Council and an official-level Executive Board.
4. The Council will not only make River Master Plans but will also enable basin states to come to an agreement for implementation of the Plans.
5. If a dispute cannot not be settled, then it will be referred to a tribunal under the Inter State Water Disputes Act, 1956 for adjudication.
6. It also mandates protection of "ecological integrity necessary to sustain ecosystems dependent on water", that may include restrictions on water usage to maintain minimum natural flow in rivers to meet the ecological needs and regulated groundwater use.

National Water Framework Bill, 2013

1. It provides for a minimum quantity of 25 litres per capita per day potable water, preservations of water quality in all rivers and a mechanism for principles for fixation of water prices.
2. It mandates that governments should specify the "quality standards" of water supply for various uses like drinking, livestock, irrigation and industries among others.
3. While noting that the government remains the trustee of water resources, it gives it the flexibility of roping in a "private agency" for "some of the functions of the state". In this context, it stipulates that "allocation and pricing" should be based "on economic principles to ensure its development costs.
4. For this purpose, an independent statutory water regulatory authority shall be established by every state for ensuring equitable access and its fair pricing. It would work on a "principle of differential pricing for water".

Environment and Centre - State Relations

Constitutional Framework

1. The original Constitution had no direct reference to the environment.
2. Art 47, however, commands the State to improve the standard of living and public health and this necessarily includes environment.
3. 42nd Amendment Act
    1. DPSP Article 48 A – 'The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country".
    2. Fundamental Duty: Article 51-A (g) – "It shall be the duty of every citizen of India to protect and improve the natural environment".
    3. Forests was moved out of state list to the concurrent list. Subjects such as protection of wildlife, population control and family planning were introduced in the concurrent list.
4. 73rd and 74th Amendment Acts
    1. 11th and 12th schedules provide for environmental protection and conservation, soil conservation, water management, social and form forestry, drinking water, fuel and fodder by the PRIs.
5. Article 21 has been repeatedly interpreted by the Court as 'right for clean environment'.
6. Individual subjects having direct impact on environment are scattered along all the 3 lists:
    1. Union list: Industries, oil, mines, inter state river valleys, fishing beyond territorial waters.
    2. State list: Public health and sanitation, agriculture, water, land, fishing, Industries (subject to

above), mining (subject to above).
3. Concurrent list: Forests, wildlife, planing, population control.

Development and Environment – Role of Centre, States and Local Bodies

1. Distribution of powers
    1. Issues relating to conservation; research; earmarking areas as biospheres; and protection of endangered species are best looked after by the Central Government. This is because:
        - Livelihood issues and commercial pressures are more keenly felt in the States and they would be prone to letting 'conservation' issues remain in the background.
        - Parliament can debate somewhat dispassionately keeping an All-India perspective and India's international responsibilities in mind.
    2. Livelihood and social justice concerns are best addressed by the involvement of PRIs. So far there has been this gap and the activist organizations have stepped in.
2. Stronger constitutional statement
    1. Constitutions of Ecuador and Columbia give fundamental rights to nature. Many other constitutions also make such strong statements. We too need to make a strong statement regarding environment in our constitution. This will enable a sharper focus on environmental issues while carrying out any planning.
    2. Scope of Entry 20 (Economic and Social Planning) in the Concurrent List can be extended to include "Environment and Ecological Planning" at all governmental levels.

Wildlife (Protection) Act, 1972

1. It used the term "habitat" which includes land, water or vegetation which is the natural home of any wild animal. This is why "land" under the Act also includes water bodies.
2. It also gave powers to the authorities to declare any area considered necessary as a Protected Area (PA).
3. It limits the right to live inside PAs. The initial Act did not provide for any settlement of the rights of PA inhabitants but this was rectified by a 1992 Amendment. A further amendment in 1993 however again put restriction on the exercise of the rights.

Forest (Conservation) Act, 1980

1. States can notify any land as a Reserved or Protected Forest or a Wild Life Sanctuary or a National Park. But the Act mandates they have to obtain the Centre's clearance before diverting any forest land for non-forestry use.
2. The FCA envisages equal amount of non–forest land to be mutated in favor of forest department in lieu of the forest area so diverted.
3. In the process, certain good forest area that was diverted was being denuded and the loss could not be compensated. So the SC in 2002 created the CAMPA Funds.
4. It is seen as a restrictive legislation. This has led to a conflict between conservation and some of the developmental programmes.

National Forest Policy, 1988

1. It emphasized that the existing "forest" and "forestland" should be fully protected.
2. The "forestland" or "land with tree" cover should not be treated merely as a resource readily available and therefore to be utilized for various projects but to be viewed as a national asset.
3. Diversion of "forestland" for any non-forest purpose should be subject to the most careful examinations by specialists from the standpoint of social and environmental costs and benefits.

Biological Diversity Act 2002

1. CBD has three goals which are conservation of the biodiversity; the sustainable use of its components and fair and equitable sharing.
2. Prior approval of the National Biodiversity Authority is mandatory for accessing the biological resources.
3. Provision of the Act shall be in addition to, and not in derogation of any law for the time being in force, relating to forests or wildlife.

Livelihood Issues and Legislative Framework

1. India wanted to increase 'forest area'. So vast amounts of land were declared as ‘forest’ without following a due process of law or even ecological rationale. Thus even lands earlier used for common purposes (fuel and fodder) were also declared as forests. Diverse categories of non-private land of ex-princely States were declared without proper survey as forests.
2. SC mandated that the FCA be extended to the dictionary definition of forest irrespective of ownership. Other orders of SC prohibiting removal of dead, diseased, dying or wind fallen trees, drift wood and grasses from the National Parks/Wild Life Sanctuaries has further tightened the Act.
3. The position in the Schedule V and VI Areas is the worst, since they hold most of the forests. The rights of the tribals were never recorded. All this has deprived the people. The issues with PESA and FRA are well known.
4. Legislations had ignored India’s tradition of community conservation. Local users and their institutions, who had the maximum stake in sustainable management of common lands were divested of the authority to manage them. JFMC was a step in right direction, but here too undue influence of the forest department limits its efficacy. Forest dwellers continue to be classed as ‘encroachers’.

Compensation for Eco-System Preservation

1. It should cater to:
    1. Price to be paid for maintenance of the eco-system.
    2. For foregoing the opportunities of infrastructure and economic development.
    3. For loss of revenues arising out of non-exploitation of forest resources.
    4. For investment in alternate, sustainable development models.
    5. For appropriate rehabilitation packages for the displaced.
2. Suggestions have been made to include per capita dense forest area in the modified Gadgil formula.
3. Uttarakhand Formula: Uttarakhand gave a valuation of the Eco-System Services (ESS) and compensated accordingly.
4. REDD: The quantity of carbon which is prevented from entering the earth’s atmosphere because they have been sequestered by the conserved forests is estimated. These savings are converted into carbon credits and then sold to developed countries. The revenue is then invested back into protecting the forest and improving life of communities.It can also be used internally to compensate States through Centre-State financial transfers.

Mineral Issues and Centre - State Relations

Case for Mining Compensation

1. Mining causes great environmental and livelihood damage.
2. Mining activities involve large machineries, not many jobs were created. Whatever little job opportunities are provided, they are extremely hazardous and low paying.
3. Urbanization cannot take place near mines.
4. Mining leads to displacement of people which has its costs.
5. Centre gains export tax. Minerals are national wealth.

The Constitutional Provisions

1. The constitution confers powers on the States to regulate mines and mineral development subject to the provisions of the Union list.
2. The Union list provides for regulation of mines and mineral development by the centre as per a law made by the parliament. The Parliament made the MMRDA, 1957 which:
    1. Introduces the concept of the major minerals and the minor minerals.
    2. Confers rule making power on the Central Government for the grant of reconnaissance permits, prospecting

licences and mining leases. It makes it mandatory for the State Government to obtain the approval of the Central Government before any reconnaissance permit, prospecting licence or mining lease is given in major minerals.

3. The centre can also specify and revise from time to time the royalty rates from the major minerals.
4. The State Government has the power to make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals.

3. Thus the entire field of minerals development has been occupied by the Central Government.
4. Royalty rate issue
    1. Even after Sarkaria recommendations, the minimum period for revising royalties has been brought down to three years and not two. This too is not followed and their are longer delays.
    2. States feel that this is a denial of their legitimate share of revenue.
    3. The responsibility of fixing royalties should be delegated to States after laying down the floor and ceiling limits and issuing guidelines.
    4. States would also prefer an ad valorem basis for royalty calculations.
    5. Central Government does not share with the States the export duty it receives from mineral exports. Similarly an excise duty is levied on extracted coal is not shared with the States.