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A Comparative Analysis of Cooperative Federalism in the United States of America, Germany, and India in light of COVID-19 Pandemic

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ABSTRACT

The Covid-19 pandemic has exposed the strengths and weaknesses of the various federal governments. The model of cooperative federalism has proved beneficial in several countries, especially in the initial stages of the pandemic. The German model of administrative cooperative federalism has been immensely successful in the battle against the pandemic. However, the Indian cooperative federalism has failed miserably even though it looked promising during the first wave of the pandemic. This paper examines the federal provisions of the Constitutions of the USA, Germany and India and draws a comparative analysis of the implementation of such provisions and legislations as to how the various models of cooperative federalism fared against the unprecedented Covid-19 Pandemic.

I. INTRODUCTION

The various forms of government have their own unique advantages and disadvantages in different fields. In the midst of the unprecedented Coronavirus (Covid-19) pandemic, the political and administrative structure and the strengths and weaknesses of the various forms of government including the authoritative and democratic, unitary and federal as well as the combinations and variations of the various models of governance has been exposed to the world.

The Covid-19 pandemic provides a unique case study into the responsiveness and effectiveness of the various forms of governments. A centralized government such as the can effectively deal with such a crisis by implementing uniform laws and regulations, as seen in the case of China. Although being inherently disadvantageous, various countries like the USA, Belgium, Germany, and Australia have used their federal structure to their advantage in dealing with the pandemic.

The primary idea behind federalism is that there is no single decision-making authority for the

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state, but it is the collaboration between the centre and the state to implement the various policies that were heavily relied on to combat the pandemic. Although it has several flaws, the cooperative federal structure came to the forefront during the several waves of the pandemic. This research paper compares the structure provisions and constitutional mechanisms of cooperative federalism of the USA and Germany with India and offers suggestions regarding the shortcomings of the Indian model of cooperative federalism.

The model of cooperative federalism has been relied on by various countries including India, albeit the various waves of the Covid-19 pandemic required separate responses. However, considering that India has been one of the worst affected countries, several questions arise in regards to the management of the pandemic by following the model of cooperative federalism. In that regard, it is asserted that the existing legal framework regarding response to a pandemic in India is inadequate. It is further contended that the states were not given the required autonomy necessitated by the local and regional problems that are required in a federal structure based on coordination and cooperation. It is also asserted that the existing legislation that deals with such crisis situations need to be overhauled.

II. COOPERATIVE FEDERALISM

The term 'cooperative federalism' was a term first coined by A.H Birch in order to aptly

describe a system in which the administrative roles are discharged and fulfilled in cooperation between the Centre and the States as well as local institutions, instead of relying solely on one organ or the other.² This form of power distribution symbolizes a unified system instead of a specific authority. During the Covid-19 pandemic, several federations utilized their own models to their fullest capacity to combat the crisis. Among them, the cooperative scheme was widely used in various countries but the results were varied.

According to Nancy J. Knauer (2020), in the USA, the Tenth Amendment was the ultimate failsafe in dealing with such a crisis as the state and local authorities held the reins to police powers and public health.³ The present policy included a cross-institutional response in the USA with participation from all levels of government as well as private bodies. In the same vein, in the battle against the pandemic, the US structure evolved in order to assimilate various models like the nationalist cooperative federalism, non-centralized cooperative federalism and ultimately to dual federalism, according to Kincaid and Leckron (2020).⁴ While the party fissures had caused the cooperative model to fail in the USA after the initial stages, the same worked positively in Germany. The administrative cooperative federalism prevented Germany to experience substantial divergence in the policy through a set of "coordinative

² A.H. Birch, *Federalism, Finance and Social Legislation in Canada, Australia, and the United States* 305 (1955).

³ Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?* 23 N. Y. U. J. Legis. &

Pub. Pol'y 1, 43 (2020).

⁴ John Kincaid & J. Wesley Leckrone, *Partisan Fractures in US Federalism's COVID-19 Policy Responses*, 52 St. & Loc. Gov't. Rev. 298, 300 (2020).

mechanisms” according to Davide Vampa (2021).⁵ During the initial stages, cooperative administrative federalism focused on a “uniform approach.”⁶ As highlighted by Germany, the policy response to the pandemic followed the “bottom-up” logic of decentralized governance that led to coordination.⁷

As for India, according to Banerjee and Banerjee, even though the Indian legal structure presented idealistic cooperative federalism during such crisis, the correlation between the Centre and State was not robust enough to sustain the cooperation following the first wave of Covid-19.⁸

Likewise, according to Datta and Grover (2021), the unitary actions taken by the Centre in India highlighted how the cooperative federal structure was eroded as the states were denied sufficient autonomy.⁹ As it stands the success of the cooperative model of federalism in combating the Covid-19 pandemic depended largely on the relationship between the Centre and State as well as the legal enactments that embodied the spirit of cooperation and coordination.

⁵ Davide Vampa, *COVID-19 and Territorial Policy Dynamics in Western Europe: Comparing France, Spain, Italy, Germany, and the United Kingdom*, 51 *Publius: J. Fed'm* 601, 615 (2021).

⁶ Johannes Saurer, *Patterns of cooperative administrative federalism in the German response to COVID-19*, 1960 *Admin. L. Rev.* 139, 144 (2021).

⁷ Sabine Kuhlmann, Mikael Hellstrom, Ulf Ramberg & Renate Reiter, *Tracing divergence in crisis governance: Responses to the COVID-19 pandemic in France, Germany and Sweden compared*, *Int'l. Rev. Admin. Sci.* 1, 7 (2021).

III. COOPERATIVE FEDERALISM IN THE USA

The federal system in the USA was established by the ratification of the Constitution in 1788. The USA can be considered as a congressional-presidential federation. The Federalist Papers written by Alexander Hamilton and James Madison can be considered as the cornerstone that created the federal structure in the USA. As for the Constitutional provisions, the specific powers that belong to the federal government are described in the US Constitution.¹⁰ The power to adjudicate matters between the states and the federal government are vested in the federal courts.¹¹ The Supremacy Clause is contained in Article VI, which ensures that federal laws would supersede the state law in case of conflict. The Commerce Clause grants Congress the authority to legislate on matters concerning interstate commerce.¹²

The most important clause that is the backbone of cooperative federalism is the Tenth Amendment which provides a multitude of powers to the states, as long as they are not delegated to the Federal government. Among these powers, the primary responsibility for public health is vested in the states as they also

⁸ Pradip Banerjee & Pritam Banerjee, *Application of Cooperative Federalism in India During Covid-19 Pandemic*, *Intl. J. L. Mgmt. & Human.* 1485, 1490 (2021).

⁹ Ushashi Datta & Adwiteya Grover, *Sparring Centre-States: How Centripetal Governance During a Pandemic Has Eroded Co-Operative-Federalism in India*, *Rule L. J.* 2, 8 (2021).

¹⁰ U.S. Const. art I, § 8.

¹¹ U.S. Const. art III.

¹² U.S. Const. art I, § 8, cl. 3.

have the police power that enables the states to make laws in the field of health and safety.¹³

In times of the pandemic, the national response policy is based on cooperative federalism that is “federally supported, state-managed, and locally executed.”¹⁴ In *Smith v. Turner*, 48 U.S. 283, 408 (1849), the court has affirmed that the governors of the state have the power to utilize the police powers which are reserved to the state.

Even though the USA is considered a federal state, there exist various historical interpretations of federalism. Dual federalism had divided the responsibility and power into various categories during the 1950s, which has been referred to as the “layer-cake” model of federalism.¹⁵ Following this model, there began the period of cooperative federalism as there existed cooperation between the states and the federal governments based on the application of the Tenth Amendment. This period can be described as the “marble-cake” model of federalism.¹⁶ Following this, the states began retaking their powers as there was an emergence of new federalism. At present, there has been the polarization of powers as the states have used the federal powers to reject the conflicting federal policies and implement their own.¹⁷ Significantly, the model of federalism in the

USA evolved with the various stages of the pandemic.

Nationalist Cooperative Federalism- This model embodies the nationalistic approach to cooperative federalism as the states followed the federal directives.¹⁸ There existed uniformity in the federal orders and regulations, but it was flexible enough to allow the states to implement those rules according to their requirements.¹⁹

Non-Centralized Cooperative Federalism- This model emphasizes the non-centralized structure in which there exists cooperation in the federal-state-local partnerships. The relief bills passed by Congress exemplify this model. However, this structure was short-lived as there began massive bipartisan response between the Democrats and the Republicans. The polarized parties could not transcend their differences which meant that cooperative federalism fizzled out after an initial burst of coordination.

Dual Federalism- Following the inefficiency of federal directives, the model of dual federalism became prevalent. In accordance with the Tenth Amendment, the governors exercised their powers in curbing the effects of the pandemic. This model suited the structure of the USA as there began party polarization. In *Gibbons v. Ogden*, 22 U.S. 1, 203, 1824, the Court held that the quarantine and health laws fall under the

¹³ U.S. Const. amend. X.

¹⁴ U.S. Dep’t of Homeland Sec., *The National Response Framework* 7 (4th ed. 2019)

¹⁵ Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950)

¹⁶ Morton Grodzins, *The American system: A new view of government in the United States* 152 (1966).

¹⁷ John C. Blakeman & Christopher P. Banks, *The U.S. Supreme Court, New Federalism, and Public Policy*, *Cont. Am. Fed’m & Pub. Pol’y* 1, 11(2018).

¹⁸ Heather K. Gerken, *Federalism as the new nationalism: An overview.* 123 *Yale L. J.* 1889, 1893 (2013).

¹⁹ Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 *Whittier L. Rev.* 161, 168 (2014).

ambit of “state sovereignty and outside the federal interstate commerce powers”.

In the initial stages of the pandemic, the model of cooperative federalism was utilized in which there was vigorous cooperation among the federal government and the states. However, due to the party polarization, federalism in the USA moved away from cooperative federalism to dual federalism as the policy response became increasingly non-centralized. This active form of federalism is characterized by state and federal governments working separately in different fields in order to utilize their respective strengths. The biggest advantage that the USA had was the fact that the governments were open to the idea of interchange of power dynamics and the federal structure had evolved based on their requirements is the most effective and robust system used to address the crisis.²⁰

IV. COOPERATIVE FEDERALISM IN GERMANY

The German federal system consists of 16 states, which are also known as Länder and the Centre, which is also known as Bund. The Constitution of Germany, also known as the “Grundgesetz”, provides for the competence of the federation to make laws (under Articles 70-82) and implement them (under Article 83-91e).²¹ Articles 70-74 provide the manner in which the legislative power is divided between the federal and state government and the exclusive subjects that the

federal government is competent to legislate upon. In this regard, the primary provision relating to concurrent federal legislative competence title is Article 74, Section 1 (19) which deals with the laws relating to human and animal diseases that pose a danger to the public.

In regards to executive rulemaking, article 80 is the primary provider.²² It applies to the entirety of federal legislation. As for the implementation of these legislations, the Constitution provides for express federal competencies.²³ In order to deal with the Covid-19 pandemic, based on Article 74, Section 1(19), the Federal Infectious Disease Control Act, 2000 (IfSG) was enacted and subsequently amended in light of the Covid-19 pandemic.

The federal system of Germany follows the notion of “cooperative administrative federalism” which is a mixture of administrative and cooperative federalism.²⁴ Administrative federalism fulfils the essential role of state administration in the German federation.

The notion of “cooperative administrative federalism” combines two traditional features of German federalism: administrative federalism and cooperative federalism. This is exemplified in the predominance of the state actors in implementing the federal legislation. In the German context, cooperative federalism refers to the strong connection between the federal and state governments. This is exemplified in the interconnected roles played by the upper house

²⁰ Smith & Breenblatt, *supra*, at 95.

²¹ GRUNDGESETZ [GG] [BASIC LAW], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

²² Uwe Kischel, *Delegation of Legislative Power to*

Agencies: A Comparative Analysis of United States and German Law, 46 Admin. L. Rev. 213, 232 (1994)

²³ See GRUNDGESETZ [GG], art. 80-91e.

²⁴ Saurer, *supra*, at 146.

(Bundesrat) and lower house (Bundestag) of the German Parliament, which is also known as the “joint-decision trap”.²⁵

In the fight against the Covid-19 pandemic, the key factor in Germany’s approach has been the cooperation between the federal and state governments. Following the initial phase, cooperative administrative federalism focused on a uniform approach in limiting the effects of the pandemic. The conceptual structure of the Infectious Disease Control Act (IfSG) supported the German cooperative administrative federalism model. The Act enabled the state governments to issue regulations which were then implemented by the state administrators.

The federal government dealt with the overall general regulations while the specific requirements and policies were regulated by the state governments. Additionally, there exists a cooperative and positive attitude in Germany towards all actors in the federal system working together, as opposed to competition between the Bund and the Länder.²⁶ The cooperative administrative federalism was successful in managing the covid-19 pandemic along with the regional and local application of rules wherever necessary. The decentralized action was utilized to its fullest extent in the German model of cooperative administrative federalism.

²⁵ Fritz W. Scharpf, *The Joint Decision Trap: Lessons from German Federalism and European Integration*, 66 Pub. Admin. 239, 239 (1988).

²⁶ Thieß Petersen et al., *Public Attitudes Towards German Federalism: A Point of Departure for a Reform of German (Fiscal) Federalism? Differences*

V. COOPERATIVE FEDERALISM IN INDIA

India follows a unique “dual, cooperative-collaborative, and organic-interdependent federalism.”²⁷ The distribution of power, however, has a strong tilt towards the centre. The traditional centre-state structure is not followed in India, however, the structure is federal in spirit and unitary in nature.

From a federal perspective, the Constitution provides the Parliament with the power to make laws for the whole or any part of the country.²⁸ This power has been limited by the Seventh Schedule which distributes the power in three lists: Union, State and Concurrent List. Article 246 distributes the powers between the Centre and the State. Under Article 248 and Entry 97 of the Union list, the residue powers are vested on the Parliament to make laws on matters that are not present in the Concurrent or State list. Under Articles 73 and 162, the executive powers of the Union and states are coextensive with the legislative powers. The amending provision under Article 368 ensures that both the houses of the Parliament participate in the amending process. Article 256 and 257 ensures that there is coordination and cooperation between the Centre and the states. However, there are several provisions that ensure that the structure of government does not become entirely federal in nature, which includes the emergency provisions

Between Public Opinion and Political Debate, 17 GER. POL. 559, 573 (2008).

²⁷ Ajay Kumar Singh, *Union Model of Indian Federalism* 45 (2009).

²⁸ India Const. art 245.

under Part XVIII of the Constitution as well as provisions such as Articles 249, 250 and 253 which allow the Parliament to legislate on measures that belong in the state field. However, cooperative federalism can be observed in Article 261 which deals with the full faith and credit clause. The constitution of NITI Aayog exemplifies the spirit of cooperative federalism in India.

In regards to tackling the Covid-19 pandemic, Entry 81 of the Union List empowers the Parliament to legislate on “inter-state migration; inter-state quarantine”, while Entries 1, 2, and 6 of the State List give the states the law-making power for “public order,” “police” and significantly “public health and sanitation; hospitals and dispensaries”. On the other hand, Entries 23 and 29 empowers both the Centre and the states to legislate on “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”.²⁹ Evidently, in pursuance of cooperative federalism, the states have been given a wide array of powers to deal with healthcare while the Centre deals with the overarching national planning and regulations.

The Centre and the states ensured the safety and security of the citizens by turning to the model of cooperative federalism in which the Centre and the states coordinated the resources and the

regulations. However, by turning to the Disaster Management Act, 2005, the Centre rejected cooperative federalism during the first wave of the pandemic as it took a unilateral decision to impose national lockdown. This lockdown was imposed without following any “parallel, cohesive national plan to mitigate the fallout of the sweeping restrictions on movement.”³⁰ 30

Following this, there was a shift towards unilateral decentralization with the Centre imposing national lockdown, while the states ensured that there were localized rules and regulations. Through coordination with the states and proactive federal leadership, the healthcare institutes were able to procure medical equipment and PPE kits. This exemplified cooperative federalism in India. However, the deadlier variant of the Covid-19 had spread significantly more during this period and the government effort was lacking in regard to containing it. With mass scale gatherings of Kumbh Mela and the election rally, the structure of cooperative federalism had almost collapsed as the state governments had been overwhelmed by the huge increase in Covid-19 cases and struggled to form rules and regulations, especially in the field of oxygen procurement and vaccine distribution.

²⁹ Niranjan Sahoo & Ambar Kumar Ghosh, *The COVID-19 Challenge to Indian Federalism*, ORF Occasional Paper 322, 327 (2021).

³⁰ Sarthak Sethi, *Covid-19 and Indian Federalism: Through the Lens of the Disaster Management Act,*

2005 and Fiscal Federalism, Indian L. J. (Nov. 10, 2021, 9:36 PM), <https://www.indialawjournal.org/covid-19-and-indian-federalism.php>.

VI. INFERENCES AND POLICY SUGGESTIONS

Although during the initial stage there was a form of cooperative federalism in place in India, as the virus became more infectious, this model had completely failed in the Indian scenario. One of the reasons for this is that the Constitution does not provide a federal structure to deal with the pandemic situation. The federal structure of the USA had swiftly evolved with the change in pandemic from nationalist cooperative federalism to Non-Centralized Cooperative Federalism and ultimately to dual federalism in order to combat the pandemic. However, this was not the case in India as the shift from unilateralism to decentralization exposed the flaws of the cooperative federal structure in India.

In the same vein, the paradox that exists in the federal constitutional framework became evident as 'public health' is a state matter enumerated under the state list, however, in accordance with the Disaster Management Act, 2005 (DM Act), the Centre is empowered to make decisions regarding healthcare during pandemics. This is in stark contrast to the Federal Infectious Disease Control Act (IfSG) of Germany which takes into account the necessary legal requirements that enables cooperative federalism to foster during the crisis. Likewise, the DM Act was enacted to deal with short time disasters, however, the long battle with Covid-19 has certainly exposed its weaknesses. The vagueness of the DM Act, along with the colonial era Epidemic Diseases Act, 1897 has negatively affected the cooperative federalism as the Centre and the states have

relied on the respective legislations and its varied interpretations to negate the regulations. As such, the DM Act and the Epidemic Diseases Act, of 1897 needs to be amended or substituted in light of the deficiencies of the present legislature.

VII. CONCLUSION

The model of cooperative federalism was utilized during the covid-19 pandemic in various countries. While the USA initially followed the cooperative federal structure, following the partisan fissures, it shifted to dual federalism. Germany was extremely successful in dealing with the pandemic using cooperative federalism and partly due to the frequent amendments to the Federal Infectious Disease Control Act, 2000 (IfSG) that dealt with the Centre-state relationship during pandemics.

In India, the early stages of the pandemic showed positive signs for cooperative federalism, but the cracks in this structure were laid bare as the virus became more infectious. A mixture of complacency and triumphalism that resulted from managing the first wave in addition to the vague legislatures like Disaster Management Act, 2005 and Epidemic Diseases Act, 1897 led to the failure of cooperative federalism. A careful restructure of these laws are essential in order to respond to the crisis of such magnitude as the Covid-29 pandemic.
