

Democracy, Representation, and Self-Rule in the Indian Constitution

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A. Introduction

The democratic value of self-rule requires people to have control over their own affairs. Modern democracies seek to promote self-rule by adopting strategies such as federalism, decentralisation, minority rights, and arguably, bicameralism. These strategies, however, can engender tensions between self-rule and the principle of equal representation. While equal representation aims to ensure that the vote of each citizen is equally significant, self-rule may demand that sub-state national communities¹ be disproportionately represented in certain instances. This paper examines the failures and potential of federalism and bicameralism as strategies to promote self-rule in India and reconcile it with the ideal of equal representation.

Part B of the paper examines the Indian model of asymmetric federalism in the north-eastern parts of India and advances two arguments. First, it provides a brief outline of the nature of Indian federalism to argue that federalism in India seeks to promote the value of self-rule. Secondly, the asymmetric federalism model under the Constitution of India's sixth schedule fails to realize this objective. Particularly, it fails to alleviate separatist tendencies and integrate tribal² communities within India. It also creates institutions based on ethnic identities that disproportionately empower sub-state national communities, simultaneously disempowering other individuals and groups.

Part C then turns to Indian bicameralism. In its limited design, the Indian upper house does little to reduce the fissiparous tendencies of sub-state communities in India. However, if bicameralism reframed as an institutional mechanism to foster self-rule among sub-state communities in fractious countries, a restructured Indian upper house could increase the ability of sub-state communities to participate meaningfully in their own rule.

We provide below a brief background to the peculiar situation in some states in India that will repeatedly find mention in the paper.

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¹ Hereafter, 'sub-state communities'.

² We use the term 'tribal' identically to how the Constitution of India, 1950 uses it, to refer to communities to whom a particular model of asymmetric federalism is applicable. The Constitution of India English edition is available at, <http://lawmin.nic.in/coi/coiason29july08.pdf> last visited 25 March 2011.

Brief Background

India is a union of 28 states and 7 Union Territories. It has a parliamentary system of governance with a bicameral legislature and a constitutional division of powers between the states and the union.³ All states have democratically elected legislatures in addition to representatives in the Union Parliament. The question of representation of states at the union level has long been controversial: states with smaller populations complain of inadequate representation in the Union. This contributes to persistent resentment against the present constitutional setup. States like Assam, Manipur, Meghalaya, Mizoram and Nagaland, in the north-eastern parts of the country have small, ethnically diverse populations, many of which had minimal cultural and historical connections with the rest of India.⁴ These states have also witnessed powerful separatist movements. Prior to independence, Naga and Manipuri leaders refused to join the Indian Union, which subsequently led to armed movements. Currently, a ceasefire operates with the Naga groups.⁵ In the valley areas of Manipur, however, military outfits like the People's Liberation Army (PLA operating since 1978), People's Revolutionary Party of Kangleipak (PREPAK since 1977), and Kangleipak Communist Party (KCP since 1980) continue to operate.⁶

The state of Assam paints a different picture. Here, the roots of separatist demands lie in the rise of Assamese nationalism with demands for Assamese as the state's official language. This nationalism was further fuelled by the Indian states' inability to deal with large-scale immigration from Bangladesh. Events took a radical turn with outcries against exploitation of natural resources like oil, with meagre benefits to the state. Ultimately the repression of dissenters by the state brought armed movements to the fore. The United Liberation Front of Assam (ULFA) is the major armed group with whom the government has presently entered into a ceasefire.⁷

Given this backdrop, matters of federalism and bicameralism assume importance in these areas as both measures were adopted and have the potential to realise the coexistence of different communities within a single Indian state.

³ We use the terms 'Union' and 'Centre' interchangeably.

⁴ Assam has about 60 notified tribes (scheduled tribes) that comprise about 12.5% of the state's population. Tribal groups comprise 89.1% of the population of Nagaland and 34.2% of the population of Manipur. Census data of 2001 available at http://www.censusindia.gov.in/Tables_Published/SCST/cst_main.html.

⁵ For a history of the Naga Movement, see, *R. Vashum*, Indo-Naga Conflict, New Delhi 2001.

⁶ For a history of the resistance movements in Manipur see, *N. Lokendra Singh*, Unquiet Valley, New Delhi 1998; *N. Sanajaoba*, Manipur - A British Anthology, Vol. I, New Delhi 2003; *Phanjoubam Tarapot*, Bleeding Manipur, New Delhi 2003.

⁷ For a history of the rise of Assamese national identity and its causes see, *Sanjib Baruah*, India Against Itself, Philadelphia 1999, chapters 4-7; *A. K. Baruah*, Middle Class Hegemony and the National Question in Assam, in: Milton Sangma (ed.), Essays On North-East India, New Delhi 1994, pp. 242-277; *Sanjoy Hazarika*, Strangers of The Mist: The Tales of War and Peace From India's Northeast, New Delhi 1994.

B. Indian Federalism and Self-Rule

I. The Nature of Indian Federalism⁸

Federalism is one of the “basic features” of the Indian Constitution, which grants it the highest possible constitutional status.⁹ It is one of the supreme values against which the validity of constitutional amendments is tested. We highlight the important features of Indian federalism, with reference to decisions of the Supreme Court of India (‘the Court’). The object is twofold: first, to introduce the basic tenets of Indian federalism; and second, to argue that it is controlled by substantive constitutional values, including that of self-rule.

1. *Constitutional division of power between two sets of governments independent in their respective spheres*

The hallmark of federalism is the division of powers between two sets of government, each independent of the other in its respective sphere.¹⁰ Since the constitution itself divides the power between the centre and the states, it ensures that the authority of the states is independent of the centre: states are sovereign in their own sphere. The division of powers is delineated in Lists I, II and III of the Constitution’s seventh schedule.¹¹ Matters of national importance are ostensibly for the centre while those of local importance are for the states.¹² Cumulatively, the scheme of the constitution thus reflects the principle of self-rule: people of the states are to control their own affairs.

2. *A federal state with a strong centre*

According to the Court the Constitution is “both unitary as well as federal according to the requirement of time and circumstances”.¹³ This description is nebulous, and reflects a constant tension between instrumental benefits of centralised coordination and the value of self-rule. On the one hand, the Constitution empowers the centre to use emergency provisions, while on the other, the framers hoped that such powers would seldom be used.¹⁴ The Court seeks to reconcile this latent tension by referring to the constitutional logic of

⁸ The research in this section relies in part on a previous research project co-authored by the authors and conducted by the West Bengal National University of Juridical Sciences for the Commission on Centre-State Relations, Government of India.

⁹ S.R. Bommai v. Union of India (1994) 3 Supreme Court Cases (SCC) 1.

¹⁰ See State of West Bengal v. Union of India All India Reporter (AIR) 1963 Supreme Court (SC) 1241, State of Andhra Pradesh and others, etc v. McDowell and Co. and others, etc. AIR 1996 SC 1627, Kuldeep Nayyar v. Union of India (2006) 7 SCC 1.

¹¹ Constitution of India, note 2, Article 245.

¹² S.R. Bommai, note 9, para. 248 and 253.

¹³ *Ibid.*, para. 253.

¹⁴ *Ibid.*, para. 360.

division of powers, which reserves local matters for the states.¹⁵ Thereby, the Court is both able to endorse the strong centre model¹⁶ and hold that federalism requires preserving the powers of the states.¹⁷ Ultimately, the Court notes that the Constitution has created a delicate balance between the centre and the states.¹⁸ States are not mere appendages of the centre. They are supreme within their own sphere and can rule themselves on matters that concern them.

The Court's decisions recognise that the Constitution of India promotes a strong centre. But because this strong centre is paired with autonomy for the states, it cannot by itself provide normative guidance on how the principle of federalism is to be interpreted. According to the Court, guidance must be sought in the Constitution's other substantive values.

3. *Federalism as an instrument to achieve larger substantive goals and values*

To provide content to the meaning of federalism, the Court has turned to the substantive goals that federalism is designed to serve: "Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the centre and the States which ...promote social, economic and cultural advancement of its people and to create fraternity among the people."¹⁹

The Court further states that Indian federalism was designed to suit the parliamentary form of government and Indian conditions. It aims to promote the values of justice, equality, and dignity that transcend regional, religious, sectional, and linguistic barriers.²⁰ Finally, the federal structure aims to establish a constitutional culture that promotes national integration and the successful functioning of democratic institutions.²¹

These substantive goals and values, which have remained largely unexplored to date, hold great potential to interpret the requirements of Indian federalism; and the present federal arrangement is to be understood as a strategy adopted to realise substantive values. This follows an interpretivist view: that any strategy or principle adopted must be justified according to the values that the Constitution seeks to uphold, the values in turn comple-

¹⁵ *Ibid.*, para. 248 and 253.

¹⁶ *Ibid.* See also *Kuldeep Nayyar*, note 10; *Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan & Ors.* (1963) 1 Supreme Court Reporter (SCR) 491.

¹⁷ *Kuldeep Nayyar*, note 10.

¹⁸ *Ibid.* para. 276. For a similar interpretation see *State of Andhra Pradesh and others etc.*, note 10.

¹⁹ *S.R. Bommai*, note 9, para. 243.

²⁰ *Ibid.*, para. 253.

²¹ *Ibid.*

menting and contributing to each other.²² With this requirement in mind, we proceed to evaluate two strategies in the Indian Constitution closely related to federalism: asymmetric federalism and bicameralism. These two strategies seek to address the same overarching issues as those that the constitution sought to tackle through federalism: promoting the coexistence of diverse communities by meeting the demands of self-rule, while uniting these communities at the national level.

II. Asymmetric Federalism in India: The Sixth Schedule

The discourse on Indian Federalism has primarily focused on centre-state relations. Equally pressing constitutional issues lie in the realm of asymmetric federalism. Asymmetric federalism is defined as an unequal allocation of powers between federal units.²³ In India, this definition would involve a comparison of powers between different states vis-à-vis the centre.²⁴ However, we extend the concept of asymmetric federalism to the constitutional allocation of special powers to both states *and special systems of governance applicable to sub-state communities*. This is justified because the systems that we examine often exercise powers similar to state governments, both in theory and practice. Moreover, due to the linguistic reorganisation of states in India, states are proxies for large linguistic communities. Federalism thus becomes a tool to ensure a measure of self-rule for these communities. Similarly, asymmetric federalism measures stem from the logic of ensuring self-rule to distinct sub-state groups, creating an asymmetry in the degree of self-rule available to different communities.

The Constitution of India designed different models of asymmetric federalism to ensure peaceful co-existence of diverse communities. Part XXI of the Constitution, called ‘Temporary, Transitional, and Special Provisions’, provides for such models. Provisions for the state of Kashmir²⁵ and Nagaland²⁶ and the Constitution’s sixth schedule, applicable to the states of Assam, Meghalaya, Tripura and Mizoram, are examples of such models.²⁷ We

²² See Ronald Dworkin’s theory of law and values. *Ronald Dworkin*, *Justice for Hedgehogs*, Cambridge Massachusetts 2011; *Ronald Dworkin*, *Law’s Empire*, Oxford 1998, Chapters 2, 3, 6 and 7.

²³ *Ronald L. Watts*, *Federalism, Federal Political Systems and Federations*, *Annual Review of Political Science*, 117(1) (1998), pp. 123-124.

²⁴ For a discussion of asymmetric federalism focussed on states and their fiscal relations, see *M. Govinda Rao and Nirvikar Singh*, *Asymmetric Federalism in India*, University of California Santa Cruz International Economics Working Paper No. 04-08.

²⁵ Constitution of India, note 2, Article 370.

²⁶ *Ibid.*, Article 371.

²⁷ *Govinda Rao and Nirvikar Singh* argue that the schedule does not qualify as asymmetric federalism. Rather such provisions are forms of affirmative action. However, their paper neither provides an analysis of the nature of the constitutional provisions, nor does it consider the fact that the schedule creates institutions equivalent to governments. See *Govinda Rao and Nirvikar Singh*, note 24, p. 9.

focus on the sixth schedule model ('the schedule') and not on Kashmir and Nagaland, because the unique political history of these two states demanded different models of asymmetric federalism tailored to their context. Moreover, the post-independence political scenario in these states unfolded primarily in the context of demands for secession, while that of the schedule areas unfolded in the context of the rise of multiple ethnic identities.

1. *History of the Sixth Schedule*

The British introduced to India the idea of autonomous administration of regions, under the supervision of a central authority.²⁸ This prepared the ground for the model of asymmetric federalism found in the sixth schedule. Through successive legislation starting with the *Government of India Act, 1858*, the administration of tribal areas in the province of Assam was removed from the purview of regular legislative and judicial bodies, and vested in the Lieutenant Governor.²⁹ The Lieutenant Governor was also granted the power to alter the boundaries of these regions. Some of these powers were challenged as an invalid delegation of legislative powers, but the Privy Council upheld the delegation.³⁰ *The Government of India Act, 1935* continued this system special of government.³¹

The Constituent Assembly of independent India chose to retain this broad framework, albeit with significant changes. It sought to strike a balance between 1. the value of self-rule; and 2. territorial unity and national security. For this purpose it constituted the 'Sub-Committee on North East Frontier' to suggest measures for the tribal areas in Assam that virtually drafted the original schedule. The two underpinning features of the schedule were autonomy of the administration from the regular organs of the government, and formation of regional councils with significant legislative, executive and judicial powers. The formation of councils was a significant departure from the colonial framework. These councils were to be supervised by the Governor of Assam. The objectives of the model were two-fold. First, the Governor, largely seen as an emissary of the Union government, was vested with large supervisory powers. This ensured the control of the Union government. Secondly, the fears of the tribal leaders that there would be forceful assimilation with India were assuaged.

The schedule faced considerable opposition in the Assembly. Some argued that the exemption from regular laws was undemocratic, and would further segregate the tribal

²⁸ The colonial government also followed a policy of non-interference, which is interpreted by some as a measure to protect tribals. See *D. R. Syiemlieh*, *British Administration In Meghalaya. Policy and Pattern*, New Delhi 1989, p. 142.

²⁹ *Vijay Hansaria* (ed.), *Justice B.L. Hansaria's Sixth Schedule to the Indian Constitution*, 3rd edition, New Delhi 2010, p. 1.

³⁰ *Queen v. Burah* [1878] UKPC 1, with respect to the Garo Hills Act, 1861.

³¹ *Hansaria*, note 29, p. 6.

populations from India,³² in turn hampering their development. Instead it was suggested that special measures for development of tribal areas be taken up by the parliament.³³ Others felt that the Assembly was playing into the hands of the colonial rulers who had promised autonomy from India to the tribes.³⁴ Many argued that the tribes were ignorant of the ways of modern government, and that conferring such powers upon them would result in a travesty of justice.³⁵ It would result in unfair treatment of non-tribal residents of those areas.³⁶ Opposition on the ground of threat to national security also existed. Given that these provinces had strategic locations, they needed to be assimilated into the Indian Union at the cost of aspirations of self-rule.³⁷

Supporters of the schedule argued that it would prevent alienation, promote development, and insulate tribal populations from exploitation.³⁸ The chairman of the drafting committee pointed out that the schedule adopted the U.S.'s policy towards 'Red Indian' communities that created autonomous reserves to protect their way of life.³⁹ Many supporters, however, suggested a sunset clause, which would allow the schedule areas to later adopt a structure of government applicable to the rest of India.⁴⁰ Others argued that the same could be achieved by way of a constitutional amendment. Moreover, most of the laws made by the special governments in the schedule areas would need assent of the Governor, thus ensuring control by the Union.⁴¹

Finally the schedule was adopted without substantial amendments. It created autonomous districts in tribal areas with a unique governmental setup.⁴² The Governor was vested with the power to alter the boundaries of districts and create new ones. District Councils and Regional Councils were to be constituted,⁴³ vested with law-making, administrative, and adjudicatory powers. The Governor was given the power to make rules for these Councils in consultation with them.⁴⁴ The law-making power of the councils initially included allotment, occupation and use of land; forest management; establishment of village and

³² CAD, Volume IX, proceedings of Tuesday, 6th September, 1949 available at <http://parliamentofindia.nic.in/ls/debates/vol9p27a.htm>, last visited 25 March 2011.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, see interjection by *Shri Kuladhar Chaliha*.

³⁶ *Ibid.*

³⁷ *Ibid.*, see interjection by *Shri Brajeshwar Prasad*.

³⁸ *Ibid.*, interjections by Rev J.J.M. Nichols Roy and Gopinath Bordoloi.

³⁹ *Ibid.*, interjection by B.R. Ambedkar.

⁴⁰ *Ibid.*, interjection by Prof. Shiban Lal Saksena.

⁴¹ *Ibid.*, interjections of Shri Gopinath Bordoloi and Rev. J.J.M. Nichols Roy.

⁴² Constitution of India, note 2, Sixth Schedule, para. 1.

⁴³ *Ibid.*, para. 1(2).

⁴⁴ *Ibid.*, para. 2(6).

town committees; and matters related to administration including police, public health, and sanitation. Later however, particular district councils were granted larger powers including industries, agriculture, communication, education, social security, water, and the like, that were previously exercised by state legislatures.⁴⁵ The councils also had taxing powers including those on land and buildings, professions, trades and employment, and taxes for maintenance of schools, dispensaries and roads.⁴⁶ Issuance of trading licences to outsiders was also within their purview.⁴⁷ They had the power to create village councils for the trial of cases where both parties involved belonged to these tribal areas.⁴⁸ The Governor could also direct the exemption of these areas from Acts of Parliament.⁴⁹ In addition the Governor could nullify any acts and resolutions by the councils that would endanger the safety of India or is prejudicial to public order.

In summary, the district and regional councils were vested with large powers over their areas including the power to impose taxes, control trade and commerce, and administer public services. The Governor was given powers of supervision over their functioning.

2. *The Failure of the Sixth Schedule*

Over the past sixty years, the schedule areas have witnessed disturbing changes. It was hoped that the schedule would satisfy the demands of self-rule of tribal communities and would build their confidence in India. To boost the latter objective, tribal communities were conferred with extensive affirmative action benefits. Tribal people resident in their own areas were exempt from income tax⁵⁰ and a significant quota of seats in educational institutions and government jobs were reserved for them. The combination of these measures led to unexpected developments. Three of them are most notable.

First, the schedule failed to halt demands for self-rule. Many areas under the schedule, such as Meghalaya, started agitating for states within India, while others like Mizoram and Nagaland demanded secession. As a result, the state of Assam disintegrated into separate states with their own governments and autonomous districts. Nagaland became a state in 1963⁵¹, Meghalaya in 1972⁵², and Mizoram in 1987⁵³. Out of these, Nagaland witnessed a

⁴⁵ *Ibid.*, para. 3-A for the North Cachar Hills Autonomous Council and the Karbi Anglong Autonomous Council introduced to Sixth Schedule by the Constitution (Amendment) Act, 1995; and para. 3-B for the Bodoland Territorial Council introduced to Sixth Schedule by the Constitution (Amendment) Act, 2003.

⁴⁶ *Ibid.*, para. 8.

⁴⁷ *Ibid.*, para. 10.

⁴⁸ *Ibid.*, para. 4.

⁴⁹ *Ibid.*, para. 12.

⁵⁰ S. 10 (26) of Income Tax Act, 1961, available at <http://law.incometaxindia.gov.in/DIT/Income-tax-acts.aspx>, last visited 27 March 2011.

⁵¹ The State of Nagaland Act, 1962, available at <http://www.legalindia.in/the-state-of-nagaland-act-1962>, last visited 27 March 2011.

prolonged secessionist movement resulting in the prevailing cease-fire. These events demonstrate that the objectives with regard to self-rule were turned on their heads. Educated elites in these areas spearheaded demands for separate states resulting in a situation where they have both state governments and autonomous districts within them.

Second, the application of the sixth schedule fuelled demands for more autonomous regions within the state of Assam by different communities.⁵⁴ Some common trends are obvious in all such demands. The articulated rationale behind them was that these communities had unique 'ethnic' identities. This identity was the basis for mass mobilisations demanding for autonomy and affirmative action benefits. Armed groups complemented most of these movements. The targets of these groups are not only state institutions and security forces, but also populations of other neighbouring communities, very often resulting in situations of ethnic cleansing.⁵⁵ The result of these demands has been the creation of new autonomous district/territorial councils with large powers of legislation and administration.⁵⁶ The situation is fast spiralling out of control as Assam consists of several small communities, many of which now demand autonomous district councils. This demand for exclusive governments of their own has created a situation of ethnic strife amongst peacefully co-existing communities. Although the development of national consciousness through identity politics and the creation of a monopoly over government jobs are identified as the prime causes for the demands,⁵⁷ the peculiar nature of the demands can be explained to a great extent by the existence of the sixth schedule. The schedule offered a

⁵² The North-Eastern Areas (Reorganization) Act, 1971, available at [http://www.helplinelaw.com/docs/THE%20NORTHEASTERN%20AREAS%20\(REORGANIZATION\)%20ACT,%201971](http://www.helplinelaw.com/docs/THE%20NORTHEASTERN%20AREAS%20(REORGANIZATION)%20ACT,%201971), last visited 27 March 2011.

⁵³ After signing the accord between the Mizo National Front and the Union of India on 30 June 1986.

⁵⁴ For an analysis of such movements in the 1970s, see *S. Chaube*, *Hill Politics in North-East India*, New Delhi 1973.

⁵⁵ For particular instances of such movements oppressing other communities see *H.K. Gohain*, *Bodo Agitation and Ideological Blinkers*, *Economic and Political Weekly*, 24 (1989) p. 2271; *Sanjay K Roy*, *Conflicting Nations in North-East India*, *Economic and Political Weekly*, 40 (2005) p. 2176, pp. 2178-2181.

⁵⁶ The autonomous district councils of North Cachar and Karbi Anglong (1995), and the Bodo Territorial council (2003) are good examples of autonomous governments having much greater powers than any of the other sixth schedule areas. The National Commission on the Review of the Constitution in fact suggested that similar powers be extended to other autonomous districts under the schedule, along with improved accountability measures. See *National Commission To Review The Working of The Constitution*, *Empowering and strengthening of Panchayati Raj Institutions/Autonomous District Councils/ Traditional Tribal Governing Institutions in North-East India*, New Delhi 2001.

⁵⁷ See *Sujata Miri*, *Communalism in Assam*, New Delhi 1993; *Hazarika*, note 7; *B. Pakem*, *Insurgency In North-East India*, New Delhi 1997; *Udayan Misra*, *The Periphery Strikes Back, Challenges to the Nation-State in Assam and Nagaland*, Shimla 2000; *Baruah*, note 7.

ready-made model for the educated elite of communities to gain access to power without contesting the sovereignty of India. However, this required politics on the basis of ethnic identity and the creation of a distinct territory for that identity. In an area inhabited by several communities, it became necessary for communities to evict others from their areas, often through violent measures. Once a group asserted a distinct ethnic identity and a territory, it could stake a claim under the schedule. In short, the schedule presented an easy access to political and financial power. Access is unfortunately guaranteed only through a politics of exclusion.

Third, the schedule contributed to situations that violate the basic democratic rights of non-tribal populations residing in scheduled areas. Since independence, people have migrated to the scheduled areas for purposes of trade and employment. Due to the provisions of the schedule, those who do not belong to the scheduled tribes of the areas do not have a say in the matters governed by the autonomous district councils. The constitutive rules of the district councils inevitably bar people from other communities from voting and contesting for the membership of district councils. Given that tribal persons resident in their own areas are exempt from income tax, and the extensive powers of the district councils including the power to levy certain taxes and tolls, the non-local populations in the sixth schedule areas end up paying taxes without effective representation in local government. Even in areas inhabited by significant non-local populations outside the jurisdiction of such councils, tribal leaders are increasingly demanding that matters of local government be left to traditional tribal institutions, with membership on the basis of ethnic identity.⁵⁸

Given these drawbacks, asymmetric federalism introduced by the schedule warrants significant reconsideration. It has effectively provided an incentive for mutually co-existing communities to isolate themselves from their neighbours, often at the cost of ethnic violence. Broadly, it has proved to be an instrument which incentivizes segregation, with disastrous effects on an area populated by numerous and diverse communities. Given its failure, the strategy should either be repealed or considerably amended to delink ethnic identity from requirements for exercise of political power and availing affirmative action benefits. Though politically this may prove difficult to achieve, Indian policy makers should imagine other strategies to reduce the resulting self-rule deficit. For example, state legislatures could become more representative and powerful, or Indian bicameralism could be redesigned to strengthen the voices of sub-state communities at the centre. We explore the bicameral option in the following part.

⁵⁸ AK Baruah, *Tribal Traditions and Crises of Governance in North East India, With Special Reference to Meghalaya*, Working Paper No. 22, Crisis States Programme, London School of Economics.

C. Indian Bicameralism

I. The Theory of Bicameralism

Most democracies in the world have unicameral parliaments, with members elected through equal representation by population. However, there exist today an increasing number of ⁵⁹ bicameral parliaments, particularly in larger federal countries in the western hemisphere.⁶⁰ In these parliaments, while one house – generally the lower house – elects its members through representation by population, the second house contains a distinct membership, which may be selected according to a different principle.⁶¹

The lower house, more active in the drafting of legislation, generally follows the democratic principle of one person, one vote.⁶² The upper house is then designed to fulfil a different purpose. In theory, there exist two well-defined purposes for an upper house: to act as a check on the lower house; and to represent the institutions of federal units in national matters. In practice, however, they sometimes fulfil a third, less well-defined purpose: they over-represent elements of the population in society. While this third purpose is currently undertheorised, it shows some promise in countries with fractious populations as a mechanism between federalism and consociation to promote self-rule.

1. Checking and Balancing the Lower House

James Madison, one of the prominent framers of the U.S. Constitution, noted that a single house could “yield to the impulse of sudden and violent passions” or be seduced by factious leaders, thereby creating unacceptable laws.⁶³ According to this view, a second parliamentary house has the potential to check and balance the lower house, to ensure that good laws get passed. To further this objective, members of the upper house are often granted a strong degree of independence from other political institutions and, sometimes, from electors themselves.⁶⁴

⁵⁹ *Samuel C. Patterson and Anthony Mughan*, Senates and the Theory of Bicameralism, in: Samuel C. Patterson and Anthony Mughan (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus 1999, pp. 1-9; also see *Arend Lijphart*, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven 1999, pp. 200-215.

⁶⁰ *Patterson and Mughan*, *ibid.*, p. 4.

⁶¹ For a discussion of the theory and practice of equal-sized single member constituencies, see *Ian McLean and David Butler* (eds.), *Fixing the Boundaries: Defining and Redefining Single-Member Electoral Districts*, Aldershot 1996.

⁶² *James Madison*, The Federalist #62, available at <http://www.constitution.org/fed/federa62.htm>, last visited 27 March 2011; see also *John Stuart Mill*, *Considerations on Representative Government*, London 1861, p. 249.

⁶³ See *Janet Ajzenstat*, Bicameralism and Canada’s Founders: The Origins of the Canadian Senate, in: *Serge Joyal* (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal & Kingston 2003, p. 3. For example, upper house members might be appointed rather than elected,

Members in the upper house are also often selected for their experience or expertise. Members of the Irish Seanad, for example, are selected to sit on functional panels according to their expertise on culture and education, agriculture, labour, industry and commerce, public administration, or social services.⁶⁴ The generally smaller size of the upper house and slower pace of deliberation allow these experienced expert members to properly scrutinise the legislation that emerges from the lower house. While the upper house may thus slow down the legislative process, this is perceived to be an acceptable tradeoff so long as the majority's 'sudden and violent passions' are cooled.⁶⁵

2. Representation for State Institutions

Alternatively or in addition to checking the lower house, upper houses can represent the institutions of federal units (such as states in the U.S.) at the national level. In the U.S., for example, the Constitution initially provided for the election of senators by state legislatures. This structure was designed to effectively give state legislatures a veto over national policy, though the Seventeenth Amendment in 1913 subsequently provided for citizens rather than legislatures to elect senators directly.⁶⁶ In Germany, state (or "Länder") governments appoint members of the German upper house (the Bundesrat) in proportion to the size of the Länder. These members are then expected to advocate the positions of the state institutions at the national level.

Allowing state institutions to elect members of the upper house aims to protect decentralisation, and is thus tightly tied to the rationale for the creation of a federalist constitution.⁶⁷ A federal constitution divides power between the country and its federal units. However, where the central government is more powerful legally and practically than the federal unit governments, its temptation may be over time to wrestle for itself the power to legislate on federal issues.⁶⁸ Bicameralism has the potential to play a role to safeguard the institutional interests of state governments vis-à-vis the central government, by promoting

and to terms longer than those in the lower house: see the Constitutions of Canada, the U.K., and Germany: *Patterson and Mughan*, note 59, p. 5.

⁶⁴ *Seanad Éireann Committee on Procedure and Privileges, Sub-Committee on Seanad Reform*, Report on Seanad Reform, Ireland, 2004.

⁶⁵ See *William Riker*, The Justification of Bicameralism, *International Political Science Review* 12 (1992), for an in depth examination of this position.

⁶⁶ *Larry Kramer*, Understanding Federalism, *Vand. L. Rev.* (1994) 47, p. 1508. *William H. Riker*, *Federalism: Origin, Operation, Significance*, Boston 1964, p. 91, notes that the adoption of the Seventeenth Amendment in 1913 "formalized the severance that had already occurred".

⁶⁷ While most of the world's parliaments are unicameral, all 24 of the world's federations are bicameral: *Patterson and Mughan*, note 59.

⁶⁸ *Malcolm M. Feeley and Edward Rubin*, Political Identity and Tragic Compromise, Ann Arbor 2008, argue in fact that the U.S. central government has effectively seized control of all heads of legislation, following the development of a national polity. Effectively, for Feeley and Rubin, the U.S. no longer has a federal system of governance.

an upper house whose membership is comprised of state government representatives.⁶⁹ In the U.S., the framers of the Constitution expected the Senate to become “an assembly of ambassadors from the states” where senators would advocate for the resolution of issues at the state rather than at the federal level.⁷⁰ More generally, where state legislatures elect members to the upper house, they expect to maintain control over these representatives.

3. Over-Representation of Minorities

In addition to both roles above, many upper houses fulfil one additional role. This role is currently undertheorised, although its theoretical haziness has not prevented it from becoming widely accepted in practice. According to this practice, an upper house will be used to *over-represent* sub-state populations, classes, or interests.⁷¹ Contrary to the principle of popular representation, in other words, the population of small states or minority groups will be represented disproportionately to the majority in the upper house, sometimes even equally to the majority.

At a theoretical level, the justification for these measures generally comes from the U.S. Constitution, which represents states equally in the U.S. Senate.⁷² Therefore, the reasoning goes, where a lower house follows proportional representation, an upper house should represent sub-state territorial units equally – over-representing the populations of smaller states in the process. States should be represented ‘as states’ to prevent the interests of small states from being eclipsed by the interests of large states. And detaching population from equal representation in the upper house aims to offset the sway that larger States could have in both houses.⁷³

⁶⁹ Larry Kramer, note 66, pp. 1503-1514.

⁷⁰ Barbara Sinclair, Coequal Partner: The U.S. Senate, in: Patterson and Mughan (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus 1999, p. 34.

⁷¹ We do not refer here to the situations where an upper houses *addresses* the population imbalances extant in lower houses – for example by requiring that women comprise 50% of the population in the upper house, or by ensuring that an ethnic minority is represented in proportion to its population. These situations can be justified theoretically under the upper house’s function as a check and balance on the lower house – which assumes that a body with 50% women would contain greater expertise or experience to evaluate legislation than a body containing 5% women. Rather, we refer only to those situations where an upper house mandates *over-representation* for certain populations.

⁷² See e.g., David E. Smith, *The Canadian Senate in Bicameral Perspective*, Toronto 2003, p. 39. (“Canadian Senate reformers, who come mainly from western Canada, infer from this American representational guarantee an equality of status owed but still denied under the system of Canadian senatorial regions”).

⁷³ *Commission on Centre-State Relations*, Commission on Centre-State Relations Report. Constitutional Governance and the Management of Centre-State Relations, Volume II, available at <http://interstatecouncil.nic.in/volume2.pdf>, last visited 22 February 2011, p. 154.

In reality, there currently exists little clear theoretical justification for the over-representation of smaller state populations.⁷⁴ In the U.S., it resulted purely from a political compromise exacted by the representatives of the small states during the constitutional discussions in 1787.⁷⁵ Why can the equal representation of states not be justified along this ground? Because states 'as states' do not have any interests. Political philosopher Robert Dahl notes that "states consist of people; and it is the interests of people we are concerned with."⁷⁶ Having their citizens represented by population does not harm small states nor does it advantage large states. The standard institutional measure to represent people is the principle of one person, one vote. Where more people vote for one measure than for another, the more popular measure should prevail. While true that without over-representation for smaller sub-state territories, countries like Canada and the U.S. may never have existed,⁷⁷ claims to represent sub-state territories equally on the grounds that sub-state territories *ought* to be represented equally in theory have no foundation: they are political claims. They should not form the backbone of constitutional discussions.

In certain limited instances, however, where a country is comprised of fractious sub-state communities with distinct identities, bicameralism might play a role to unite these communities within the national framework. Generally, *federalism* is proposed as the institutional measure to deal with fractious sub-state communities.⁷⁸ However, as we have seen above with respect to India, federalism has its limits. It works to satisfy sub-state communities where legislative headings can be neatly parsed. But this is not always the case. Moreover, where federalism is pushed too far to serve the interests of minority communities, it can engender additional problems of marginalisation and representation, which have the potential to further fracture the country. In these situations, federalism fails because it is unable to provide for self-rule among sub-state communities.

Where federalism fails along these lines, Arend Lijphart has instead promoted the model of 'consociation'. Consociation is a model of political governance that aims, through legislative and executive power-sharing and group autonomy, to achieve a stable democ-

⁷⁴ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York 1996, ch. 4, thoroughly canvasses the arguments of the framers of the U.S. Constitution on whether justification exists for equal representation of states.

⁷⁵ This compromise became known as the 'Great Compromise': see Rakove, *ibid.*, p. 70; also see Robert A. Dahl, *How Democratic is the American Constitution?*, New Haven CT 2003; Frances E. Lee and Bruce I. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation*, Chicago 1999.

⁷⁶ Robert A. Dahl, *A Preface to Democratic Theory*, Chicago 2006, p. 113.

⁷⁷ George Brown stated before the Canadian Legislative Assembly on February 8, 1865: "Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. On no other condition could we have advanced a step": *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Quebec 1865, p. 88.

⁷⁸ See Feeley and Rubin, note 68, ch. 2.

ratic government in countries with fractious populations.⁷⁹ But though it fosters self-rule among sub-state communities, consociation has been extensively criticised as inimical to the survival of the country. Several authors argue that it either brings about a complete collapse of the country or the further entrenchment of the country's extant identity conflicts.⁸⁰ By representing communities rather than individuals, consociation strays too far away from the ideal of proportional representation.

Thus, returning to bicameralism, the over-representation of fractious sub-state communities in an upper house can be justified if bicameralism is to act as a structure midway between consociation and federalism. In instances where the federal principle's ability to provide for self-rule is maxed out, and where a country does not wish to lapse into complete consociation, bicameralism would allow a country to represent its sub-state communities equally in the upper house. Sub-state communities in this model would have the increased ability to participate in their own rule through a shared constitutional framework. Perhaps more importantly, they would also *perceive* themselves as having the ability to meaningfully rule themselves. In essence, bicameralism *could* be used as a political compromise in these limited instances – but a political compromise fuelled by the value of self-rule. The democratic principle of proportional representation would be stretched in upper houses to recognise that sub-state communities in fractious countries equally deserve representation as fulfilment of their right to self-rule.

Of course, there exists a fine balance between political expediency (those instances where small populations advocate for over-representation without any justification) and a theoretically sound model (where even the majority population of a fractious country recognises the minorities' claims to self-rule). But where the interests of sub-state communities are truly different, and where these interests crucially intersect with their own identity, the value of self-rule will justify a third role for bicameralism.

II. Indian Bicameralism

1. The Purpose of the Upper House

How does the theory relate to the practice of Indian bicameralism? India has a bicameral Parliament. Its lower house, the Lok Sabha (or House of the People), is directly elected

⁷⁹ For more on consociation, see *Arend Lijphart*, The Wave of Power-Sharing Democracy, in: Andrew Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford 2002; *Arend Lijphart*, *Democracy in Plural Societies: A Comparative Exploration*, New Haven 1977; *Lijphart*, note 59.

⁸⁰ See *Rupert Taylor*, Consociation or Social Transformation?, in: John Garry (ed.), *Northern Ireland and the Divided World: Post-Agreement Northern Ireland in Comparative Perspective*, Oxford 2001, p. 37; *Donald L. Horowitz*, *Ethnic Groups in Conflict*, Berkeley 1985. For a response to these arguments, see *Brendan O'Leary*, Debating Consociational Politics, in: Sid Noel (ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, Montreal 2005.

from territorial constituencies throughout India. Seat allocation in the Lok Sabha follows the principle of equal representation by population.⁸¹ The upper house is the Rajya Sabha (or Council of States).⁸² Members of the Rajya Sabha are mostly elected indirectly, by state legislatures, with the number of representatives per state based on the population of the state.⁸³ Twelve additional members of the Rajya Sabha are appointed by the President for their special knowledge and practical experience in literature, science, art, and social service.

The Lok Sabha has supremacy over the Rajya Sabha. Only the Lok Sabha can introduce money bills, and the Lok Sabha therefore holds control over public expenditure.⁸⁴ It is also to the Lok Sabha, and not to parliament or to the Rajya Sabha, that ministers are responsible.⁸⁵ In practice, the Rajya Sabha has undertaken a decidedly minor role in the Indian Parliament. A few years after the creation of India, academic Norman Palmer described the Rajya Sabha as “one of the weakest second chambers in the world, weaker than even the House of Lords”.⁸⁶

In the eyes of India’s Constituent Assembly and in accordance with bicameralism theory, the Rajya Sabha was meant to serve as a check and balance on the Lok Sabha. In the constitutional debates, Shri Lokenath Misra noted that the Rajya Sabha ought to be “a sobering House, a reviewing House, a House standing for quality”.⁸⁷ The Rajya Sabha was to provide the “guidance of mature and experienced persons” to promote the greater interests of the country.⁸⁸ The Constituent Assembly hoped that members of the Rajya Sabha would be “disinclined from active politics”.⁸⁹

⁸¹ Constitution of India, note 2, Article 81. 20 members of the Lok Sabha can also be selected from the Union territories in a manner as Parliament may by law provide.

⁸² See *ibid.*, Article 79.

⁸³ See *ibid.*, Article 80 and Schedule IV. The specific formula used to determine Rajya Sabha representation attributes one Rajya Sabha seat per million units of population for the first five million people in a state, followed by one additional seat for every additional two million units of population in the state.

⁸⁴ See *ibid.*, Articles 108-110.

⁸⁵ *Ibid.*, Article 75(3). Only an adverse vote in the Lok Sabha brings down the cabinet: *M.V. Pylee, An Introduction to the Constitution of India*, New Delhi 1998, p. 184.

⁸⁶ *Norman D. Palmer, The Indian Political System*, London 1961, p. 118; also see *W.H. Morris-Jones, Parliament in India*, London 1957, p. 190; *Granville Austin, The Indian Constitution: Cornerstone of a Nation*, Oxford 1966, p. 162; *Charles H. Alexandrowicz, Constitutional Developments in India*, Bombay 1957, p. 165, who disagrees with the House of Lords comparison.

⁸⁷ CAD, Volume VII, proceedings on 3 January 1949, available at <http://parliamentofindia.nic.in/ls/debates/vol7p31a.htm>, last visited 25 March 2011.

⁸⁸ *Sarkaria Commission, Sarkaria Commission Report. Legislative Relations, Chapter II*, available at <http://interstatecouncil.nic.in/SARCOMM.htm>, last visited 25 March 2011, para. 2.26.06.

⁸⁹ CAD, Volume VII, proceedings on 3 January 1949, available at <http://parliamentofindia.nic.in/ls/debates/vol7p31a.htm>, last visited 25 March 2011.

Yet it was the representation of states institutions in debates on national policy that was supposed to be the Rajya Sabha's central role.⁹⁰ With elections to the Rajya Sabha conducted from state legislatures, state institutions were meant to maintain a degree of control over issues at the centre. Specifically, the Rajya Sabha provided state institutions with the opportunity to prevent interference in the legislative powers of the States,⁹¹ maintain a role in the creation and performance of 'All India Services',⁹² and approve Constitutional amendment.⁹³ For these measures to pass, agreement from two-thirds of the members of Rajya Sabha present and voting was (and is still) required.

2. Failure of the Rajya Sabha to Fulfil its Purpose

Ultimately, the Rajya Sabha has failed in its objective to represent the interests of the state institutions at the centre.⁹⁴ It has also failed to act as a check or balance on the Lok Sabha.⁹⁵ The Rajya Sabha has turned into a house of patronage, where national parties use state legislatures to push through their own candidates who have failed to be elected to the Lok Sabha. Members of state legislatures vote along party lines on the election of representatives to the Rajya Sabha.⁹⁶ The Rajya Sabha thus provides a "backdoor entry into Parliament" for parties with a majority in specific states.⁹⁷

To accentuate this problem, the requirement of the *Representation of People Act*, 1951,⁹⁸ that representatives in the Rajya Sabha had to be 'ordinary residents' of the constituencies that they represented, was eliminated by a 2003 amendment to the *Act*. Today, Rajya Sabha candidates in particular states can now be electors from anywhere in the country.⁹⁹ This further removes the connection between a representative and his or her state institutions.

⁹⁰ *Madhav Godbole*, Report of Constitution Review Commission: Some Reflections, Economic and Political Weekly 31 (2002), p. 4007.

⁹¹ See Constitution of India, note 2, Article 249, which provides conditions under which the national parliament can legislate over state matters.

⁹² See *ibid.*, Article 312.

⁹³ See *ibid.*, Article 368.

⁹⁴ *Madhav Godbole*, Reform of Political System: Growing Concern after Election 2004, Economic and Political Weekly, 39 (2004), p. 4007.

⁹⁵ *Godbole*, note 90, p. 4007.

⁹⁶ *Commission on Centre-State Relations*, note 73, p. 158.

⁹⁷ *B. Venkatesh Kumar*, Election to Rajya Sabha: Proposed 'Reform, Economic and Political Weekly, (2002) 37, p. 293; also see *Godbole*, note 94, p. 3107; *Godbole*, note 90, p. 4007.

⁹⁸ Representation of Peoples Act, 1951, Act No. 43 of 1951 (17 July 1951) available at <http://lawmin.nic.in/legislative/election/volume%201/representation%20of%20the%20people%20act,%201951.pdf>, last visited 27 March 2011.

⁹⁹ The Representation of People (Second Amendment) Act, 2003, Act No. 40 of 2003 (28 August 2003).

In light of the Rajya Sabha's structural failures, Madhav Godbole argue that “[t]here is no evidence to show that the Rajya Sabha has done anything notable to safeguard the interests of the states.”¹⁰⁰ Instead it articulates the interests of parties.¹⁰¹ Since seats in the Rajya Sabha are largely representative of the population of the states, just like in the Lok Sabha, the Rajya Sabha has become mostly an “unnecessary duplication of the House of People”.¹⁰² In the extremely limited case where the Rajya Sabha disagrees with the Lok Sabha,¹⁰³ the Constitution of India provides for both houses to sit together.¹⁰⁴ In these cases, because of the Lok Sabha's larger numbers (545:250), its decisions prevail.¹⁰⁵

To summarise the academic literature, the last several decades have exacerbated centralisation in India and have choked the Rajya Sabha's independence such that, today, the Rajya Sabha holds very little purpose.¹⁰⁶

III. A Renewed Bicameralism to Address Issues of Self-Rule in India

There is no doubt that the Constitution of India aimed and succeeded to create a centralised federation.¹⁰⁷ The structure of the Rajya Sabha fell within this general intention, as it strove to unify the country by bringing the representatives of state institutions to the centre. Within this centralised structure, the mode of appointment of Rajya Sabha members and India's federalism were the structural elements designed to bring sub-state communities into the Indian fold while validating their right to self-rule. India's asymmetrical federalism strongly favoured the ability of certain sub-state communities to rule themselves. And bicameralism added a limited benefit for state institutions.

However, the experience of India shows that since independence, sub-state communities have not bought into the scheme. The reasons are dual. On the one hand, federalism is too weak of a structure to deal adequately with fractious communities such as India's.

¹⁰⁰ *Godbole*, note 90, p. 4007.

¹⁰¹ See *Commission on Centre-State Relations*, note 73, p. 159 (“the Rajya Sabha was increasingly unable to function as a Representative of the States because of the trend of voting on party lines in the Rajya Sabha, the perils of a majority party dominating the voting process in Rajya Sabha and the rising threat of coalition politics that created different party alliances at the Centre and the States”).

¹⁰² *Ibid.*, p. 163.

¹⁰³ This can occur occasionally, even though the Rajya Sabha follows the Lok Sabha's party lines, because members in the Rajya Sabha have longer parliamentary terms than members in the Lok Sabha.

¹⁰⁴ Constitution of India, note 2, Article 108.

¹⁰⁵ *Pylee*, note 85, p. 184; *Nirmalendu Bikash Rakshit*, Utility of the Rajya Sabha, *Economic and Political Weekly* 37 (2002), p. 3495.

¹⁰⁶ *Rakshit*, *ibid.*

¹⁰⁷ *Sirdar D.K. Sen*, A Comparative Study of the Indian Constitution, Volume 1, Bombay 1960, p. 113.

Moreover, by pushing its federalism too far, India has created other problems of representation. On the other hand, Indian bicameralism is too weak to enhance the self-rule of India's sub-state communities. There are more conflicts today, despite the efforts of the Constitution of India to create a framework where sub-state communities would have their input into the general policies and direction of India.

Commentators have argued that because of its limits and failings, there exists a good case for the abolition of the Rajya Sabha.¹⁰⁸ This approach would ignore bicameralism's potential to increase self-rule among sub-state communities, and would thus put further pressure on the Indian federation. Instead, the Rajya Sabha could be restructured to account for the ability of bicameralism to foster self-rule, as a middle ground between federalism and consociation. Sub-state communities would be represented equally in the Rajya Sabha. This step would increase their ability to participate meaningfully in their own rule. It might also be enough to convince these communities that they hold a future within India.

The specifics of the remodelled Rajya Sabha would need to be elaborated. Would it represent sub-state communities equally? Would it represent states – or even regions – equally as proxies for sub-state communities?¹⁰⁹ The majority groups would also need to accept to bend the ideal of equal representation to validate the objective of self-rule among sub-state communities, and the Supreme Court of India would need to recognise that the reconfiguration fits within the requirements of federalism as a basic feature of the Constitution. The first issue, however, is to create a theoretically sound framework that reconciles equal representation and self-rule among Indian sub-state communities. This is what this paper has attempted to do. And through this renewed approach to bicameralism, sixty years after independence, India could finally attempt to provide properly for the self-rule of its sub-state communities.

¹⁰⁸ See, e.g., *Godbole*, note 90, p. 4007.

¹⁰⁹ Canada has adopted a similar approach, representing “regions”, partly as proxies for the distinct sets of interests that these regions hold. See *Robert A. MacKay*, *The Unreformed Senate of Canada*, Toronto 1963, p. 49-50.