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The Current Challenges to Asymmetric Federalism in India in Comparative Perspective

by

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Abstract

The article examines the various facets of the challenges to asymmetric federalism in India in comparative perspective and in the appropriate theoretical framework of asymmetric federalism. Asymmetry, conceptually speaking, is linked to the so-called politics of difference and recognition in post-liberal political theory. The abrogation of Article 370 that ensured federal asymmetry in India in 2019 by the Union government and its judicial approval in 2023 has been very challenging to Indian federalism. Since the States in India are based mostly on some ethnic identity, any attack on the States, let alone taking away statehood, affects the sensitive ethnic identity. The erstwhile Jammu and Kashmir – now demoted to a Union Territory – was India's only Muslim majority State bordering Pakistan. The problems of autonomy of Sabah and Sarawak in Malaysia are discussed in comparative terms. This article argues that in multi-ethnic countries, different forms and layered of federal asymmetry are a must to accommodate ethnic diversity for recognition, and political stability.

Keywords

Indian federalism; Jammu & Kashmir asymmetry; recognition; political centralisation



1. Introduction

The most powerful challenge to federalism in India in general, and asymmetric federalism, in particular is the abrogation of Article 370 of the Indian Constitution that was designed to ensure federal asymmetry (special status with a constitution of its own) for the State of Jammu & Kashmir – a princely State before 1947. It was a kingdom ruled by a Hindu king, but most of the subjects was Muslims. The Muslims were a large in Kashmir, but in the other two regions within the State, it was not so. In Jammu, the Hindus were a majority with the Muslim as minority, and Ladakh, another region, was predominantly Buddhist. Historically, there was hardly any internal territorial integration. The BJP-led NDA (Union Government), as part of its electoral pledge, abrogated Article 370 of the Constitution of India by a Presidential Order based on a resolution in Lok Sabha on 05 August 2019 which guaranteed statehood with ‘special status’ for Jammu and Kashmir. The matter provoked a lot of political controversy in India and abroad. As many as 22 writ petitions were submitted to the Supreme Court challenging the governmental action. On 11 December 2023 a five-member bench of the Supreme Court of India heard them and upheld the government decision in a rather complex judgment in which the constitutional position of Article 370 as ‘temporary’ⁱ provision of the Indian Constitution received greater attention. This Article was designed to offer more autonomy to the State of Jammu & Kashmir unlike most other States in India. Its ‘special status’ and ‘limited sovereignty’ was recognised by the Supreme Court in 2016 (AIR 2016) (quoted in Bakshi 2017: 391)ⁱⁱ But in the current judgment the five-member bench refused to consider thatⁱⁱⁱ. The demotion of the State of Jammu & Kashmir to a Union Territory, and its territorial contraction to make way for another Union Territory of Ladakh remains challenging especially those States which are placed under Part XX1 of the Indian Constitution as ‘Temporary, Transitional and Special Provisions. By comparison, a year earlier the government of the Philippines, a unitary presidential system of government, approved the Bonsamaro Organic Law giving *more autonomy* to 13 rebellious Muslim groups in the South of the country, predominantly a (Catholic) Christian country^{iv}. The first case i.e, India (80 per cent approx.) Hindu majority country is a federal (Union of States^v) democratic republic while the latter i Presidential. In India, the ethnic self-rule for the religious minorities, especially the Muslims being the largest group) (numbering some 140



million scattered all over India with significant regional concentrations) is constitutionally prohibited to demand territorial autonomy as it would go against India's version of secularism. The event in the Philippines little affected the country's system of government and raised little criticisms but more praise in the public domain. On the contrary, there had been international condemnation of violence, and pressure to concede self-government to the Muslim tribes^{VI}. India and the Philippines perhaps are not comparable, but what is of special significance is that while the Philippines' move is likely to have little effect on the country system of governance, the Indian case casts a large shadow over the future of federalism in India, in general, and asymmetric federalism, in particular. True, by virtue of Article 2 and 3 of the Indian Constitution, the territory of India has been reorganized since 1956 in many rounds (latest being Telangana in 2014) (Bhattacharyya 2014; 2019) – 1956; 1960; 1966; 1987; 2000; and 2014. But the case of Kashmir being the only Muslim majority region of the State bordering with Pakistan carries special significance. After the Supreme Court verdict approving the government action, the issue is, arguably, settled. But the fear and apprehensions among many remain.^{VII} Can the Union (federal government) with a huge majority in Parliament resort to similar action to other such 'temporary and transitional' provisions in the Constitution those that provide for asymmetry? Those familiar with the Indian Constitution will know that Part XXI of the Constitution provides for mainly three forms of asymmetry mostly for the States in the North-East, and for some States in the mainland (Bakshi 2017: 389-402). There are inter-State asymmetry of different kinds, and intra-State asymmetry providing for sub-State asymmetry. There are structural asymmetries in Indian federalism which affects the federal balance of power. Above all, there were Special Category States mostly in the Northeast but some in the mainland designed to offer them asymmetric Plan grants and loans so that these States received 90 per cent Planning Commission money as grants and 10 per cent as loans whereas the General Category States the grant portion was 30 per cent and loan 70 per cent (Bhattacharjee 2015). Intra-State asymmetry includes various provisions for development grants to specific Development Council governed under the State law. In the erstwhile State of Jammu & Kashmir, there were District Councils in Ladakh, Kargil and Ley. This suggests that a post-colonial federation in the midst of complex ethnic diversity required many types of asymmetric arrangements to accommodate diversity and to cater to the development and empowerment needs of specific region and sub-regions and peoples. As shall show below later in this article,



performance records when measured by a set of criteria of such units and sub-units were quite remarkable. This includes Jammu & Kashmir too.

Article 370 was designed to ensure greater autonomy (federal asymmetry), and the lone State in India to have a constitution of its own. However, the extent of its autonomy and the degree of integration with the Indian Union remained a matter of considerable debate, and some irritation among the officials both the governments. The Supreme Court in a verdict in 2016 defended though Jammu & Kashmir's 'limited sovereignty' (quoted in Bakshi 2017: 391). However, in the most recent verdict on 11 December 2023 relating the abrogation of Article 370, the Court put things in the right perspective, as it were:

In view of the above discussion, the following are the conclusions: a. The State of Jammu and Kashmir does not retain any element of sovereignty after the execution of the IoA* and the issuance of the Proclamation dated 25 November 1949 by which the Constitution of India was adopted. The State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country. Article 370 was a feature of asymmetric federalism and not sovereignty;^{VIII}

Nonetheless, the governmental action of abrogation of Article 370 and its approval by the highest court of India raises other important issues. As per the verdict of the Supreme Court on the issue of Article 370, the said Article was indeed a case of asymmetric federalism. Its abrogation is an attack on asymmetric federalism in India. The other profoundly important issue is that such an attack adversely affects the sense of ethnic identity of the people inhabiting the territory. In India, the territorial units and sub-units are not merely some pieces of land; most of them have ethnic bases. Most of India's States and sub-States (e.g., the Autonomous Tribal District Councils) were so designed as to respond to the specific needs of some specific ethnic people. The territorial re-sizing that took place in India since 1956 was to create ethnically homogeneous units as far as possible – initially language was a predominant consideration in the so-called 'balanced approach' of the States Reorganization Committee (1955) but subsequently other factors came to be considered (Bhattacharyya 2019; Tillin 2013). As far as Jammu & Kashmir was concerned, it was three distinct ethno-regions with their specific history of evolution (Bhattacharyya 2023). This erstwhile princely State had a Hindu king over the subjects who were, and still are, overwhelmingly Muslims with a minority of Hindus; Jammu with a preponderance of Hindus (with a minority of Muslims), and Ladakh with preponderance of Buddhists. Historically the



State was never internally cohesive and integrated (Bhattacharyya 2023). After the signing of the Instrument of Accession on 26 October 1947 it was considered part of the Union of India although the degree of its integration with the mainstream of India remained for long a matter of political speculation. It has often been argued that rather than integrating with the rest of India, Article 370 has stood in the way: the State based political parties have made skilful political use of the so-called ‘autonomy’ and ghettoized its people. There are counterarguments that despite the Article 370 and ‘autonomy’ the State never enjoyed any real autonomy because of successive central intervention in the State, and the frequent use or misuse of Article 356 that provides for imposition of Presidential rule (State emergency) for long. Therefore, if the State of Jammu and Kashmir was a challenge to Indian federalism for long, bifurcation of the State into two Union Territories since 2019 has posed a challenge to asymmetric federalism in India generally.

Does it contain a message for the other cases of asymmetric federalism in India? The other powerful challenge to asymmetric federalism is posed by India’s neo-liberal macro-economic reforms since 1991 which have cleared the deck for free market economy, and withdrawal of the public sector. This has implications for the small hilly States in the peripheries of India which enjoy different degrees of asymmetry but have relied on state support for meeting various needs of the peoples inhabiting the regions with little potential for investment, foreign and or national.

2. Research Questions and Hypothesis

Indian federalism has been passing through challenges since 2014 when the BJP led NDA government came to power and returned in 2019 with greater majority. The party also is in power in as many as seventeen States. Ideologically the BJP does not believe in cultural diversity which is the *sine qua non* of Indian federalism and various asymmetric arrangements. In this context, we seek to provide answers to two research questions. First, can federal asymmetry sustain itself in the changed political environment with not too friendly a federal government that does not defend cultural diversity, doctrinally, let alone promoting it? Second, are asymmetrical arrangements always good for federalism and democracy?



2.1 Hypothesis

Asymmetric federalism is a dependable variable and can work well if federalism and democracy are allowed the appropriate space, and there is no risk of being attacked or potential attack from a very dominant Union government particularly when such federal units are heavily dependent upon the Centre (Union Government) for financing. Again, the peripheral asymmetric States being located on India's international border makes them more vulnerable and Centre-dependence. This creates two possibilities: the very dominant Centre resorts to carrot and stick policy to bring them under its suzerainty. Second, there is more concern for the small asymmetric States for its identity. Finally, such units and sub-State units (considered also as instance of asymmetry) can perform if given the opportunity, which militates against holding such arrangements useless and wastage of public money.

2.2 Objectives

In Asia, while federal elements are introduced into non-federal countries such as the Philippines, Indonesia, China, the formally federal states are still few in number: India, Pakistan, Malaysia, Nepal and Myanmar are the only constitutionally declared in Asia. Sri Lanka is still not a federal country despite significant devolutionary measures introduced for the Tamil minorities. Nepal being a very inclusive, participatory federal democracy, is still fledgling, and its constitution left little scope for asymmetry. In Myanmar, a formally declared a federation (Union of Myanmar) but under the heavy-handed rule of the military junta, both federalism and democracy do not look prospective at all. Although a democratic regime was somehow functioning with a space for negotiation for federalism prior to the military takeover, there is little democracy and federalism in Myanmar.^{IX}

The first objective of the article is to introduce the concept of federal asymmetry and its links with the politics of recognition. Second, we seek to analytically present the constitutional provisions for federal asymmetry in India and Malaysia, the other federation with distinct federal asymmetry. Third, we discuss the effects of such institutional arrangements on identity and governance in India and Malaysia. In conclusion, we will make a comparative assessment of the merits and demerit of asymmetric federalism and point out the current challenges to such institutional innovations.



3. Concept and Debate

Federalism is a complex and difficult system of governance in multi-ethnic countries. And yet, it is unavoidable if the country is to survive. It combines two or more types or tiers of rule, but generally two tiers of rule: a shared rule for national purposes and a regional self-rule for regional purposes. Every country must deal with certain issues of national and international significance which must be under the authority of national level government: defence; foreign affairs; currency, telecommunication, railways, international treaty and peace making and so on. There are issues of regional character which relate to the day to day lives of the citizens. These are better left to the regional government, which is closer to the people. Federalism as a political principal advocate for the combination of the above two types of rule. Dynamic political equilibrium that is to be the outcome of federalism, if at all, is tricky and elastic. If such an outcome does not occur, and federations fail, federalism, or federation as such may not be responsible for this. The experiences of failure in Asia, Central America, and Africa (very few in number) (1966) suggest that what was the reason behind such failures was the inappropriate way of combination of the two types of rule.

The other precondition of the success of federalism is *democracy*. If democratic participation and power-sharing, as per the Constitution, are absent, a federation falls victim to *ethnocratic oligarchy*, or ethnic majority rule, or worse, ethnic zealots ruling at the regional level, who fail federalism rather than the other way round. The result could be ethnic exclusion, ethnic cleansing, or pogroms. Therefore, even if regional self-rule is allowed for some regionally concentrated ethnic group, it is not supposed to be an *ethnocracy*, but a democratic system of governance in which power is transferred every five years or so peacefully, constitutionally. Even if some region has a one hundred per cent one ethnic group that does not and should not mean that one ethnic leader rules; she/he must seek mandate regularly for democratic legitimacy. The other important issue little highlighted is the question of *shared rule at the regional level*. The existing scholarship focuses merely on shared rule at the national level, but not at the regional level. In the multi-ethnic context at the regional level, self-rule is also required to be a shared rule so that the smallest ethnic minority is not deprived of the benefits of participation and power-sharing. This has been pointed out by Bhattacharyya very recently (Bhattacharyya 2023).



How to conceptualize asymmetry in the federal template of Watts (2008)? Ronald Watts (2008) has offered a very useful six-point template of federation as a descriptive category:

- at least two orders of government – one for the national level, and the other for the regional level – each elected separately by the people and acting also directly on them;
- a constitutional distribution of powers – legislative, administrative, and financial – between the two tiers of government that ensure some areas of genuine autonomy for each level of government.
- Provision for representation of regional views in the national level policy making through a second chamber of parliament.
- A supreme written constitution not unilaterally amendable requiring the consent of the federal units;
- Provision for an umpire (court or other body) to see that the constitution is honoured in the legislation and administration of the country; and
- Some mechanisms for inter-governmental collaboration and adjustment, which is much required in federal governance (Watts 2008: 9).

As is obvious in the above, federal asymmetry is not included in the template, a neglect which required to be rectified. Watts' template is based on the presumption of federal symmetry. The first point in the template is to be revised as two or types of government *with symmetrical and or asymmetrical status and powers*. However, Watts has discussed at some length the issue of asymmetry in chapter 8 of his now classic book (2008). There he made a distinction between political asymmetry and constitutional asymmetry. He referred to social, cultural and other factors as the sources of political asymmetry but argued that such asymmetry produced impact on the operation of the federation. By constitutional asymmetry he referred to asymmetric distribution of powers by the constitution Watts (2008: 128) has listed eight federation with asymmetric units: Belgium, Bosnia-Herzegovina; Canada, India, Comoros; European Union, Malaysia, St. Kitts and Nevis, and Spain.^x

In the standard discourse on federal asymmetry (Tarlton 1965; Agronoff 1999; McGarry 2007), asymmetric federalism refers to a system of unequal status and powers of some federal units and sub-units designed to meet some special socio-economic and historical, and geo-strategic needs of some people living in the peripheries of the federations. It entails special



institutional arrangements for meeting the special diversity needs of those areas. It could be both *de jure* and *de facto*, covering recognition of identity, territorial autonomy, and local/regional self-rule. Many federations have areas of asymmetry for special circumstances, but asymmetric in Asian federations has been distinctive.

Is a theoretical framework of asymmetric federalism possible given the wide variety of contexts? The current understanding of asymmetric federalism is that it is a tool of governance that provides for the space for accommodation of specific ethnic diversity and adds legitimacy to the political system. Watts (2008) has recently cleared the deck, to some extent, for us by accepting the premise of multi-tiered federalism, in the standard theoretical literature on the subject though the interest in asymmetric federalism is still intermittent (Tarlton 1965; McGarry 2007, 2005; Sweden 2002; Agranoff 1999) and more or less has remained confined to the two-tiered structure of federalism in discussing asymmetric federalism. That is most often at variance with the very complex social and cultural diversity at many layers of society which may require multiple levels of institutional arrangements for accommodating diversity, and power-sharing. In other words, we ought to go beyond the simple and often unclear idea of 'self-rule' because self-rule often empowers one dominant ethnic identity to the exclusion of the others. For responding to multiple identities, self-rule need to reflect elements of 'shared rule' (so far conceived only for the national/federal level) so that the micro-minorities within the self-rule structure do not fall victim to majoritarianism. In defending a case for sustainable federalism for Russia, for example, Smith has also drawn our attention to what needs to be done. To avoid the danger of secession (in the case of Russian federation), he asserted:

it is important to ensure, first, that federal sub-units are not defined as the possession of one ethnic group, but rather as belonging to all residents; secondly, that a civic identity is developed which can be a source of allegiance and identity for non-dominant groups... (Smith 2000: 365).

The observations of Smith above are profound and contain original insights not only about the method of recasting federal subunits but also the units below, i.e., the sub-State level units which, ethnically distinct, demands also recognition, which is not otherwise met by the designing of the federal subunits. His second suggestion takes one to a greater theoretical debate on nationhood. In a multi-ethnic country in which ethnic identities are



thick, and where such groups find little in common to share with other ethnic groups, what then holds them together? In my other writings, (Bhattacharyya 2007; 2008; 2015) I made a conceptual distinction between ethnic and civic nationhood, and argued that in multiethnic countries, it is not ethnic identity/identities which provides for the cementing glue to hold them together but a thin layer of civic nationhood which implies, *inter alia*, sharing in certain civic values deriving mostly from the constitution but on which a societal consensus has been built. The construction of ethnic identity is always and everywhere exclusivist; the *ethnie* define them always in terms of having an other; in such a construction, there is always the ethnic other to which it is opposed and from which it is different. This ethnic other is the enemy to be fought out.

The term ‘asymmetry’ does not suggest a desirable value to be upheld, not particularly in left radical thinking. The term ‘asymmetric federalism’ may appear on the face of it to be sacrilegious. This is so perceived because while symmetry implies balance of elements, asymmetry implies just its opposite. That, at least, is the dictionary connotation of the terms. But then, if we take the view that the basic objective of federal governance, however difficult it is, is to obtain and maintain a dynamic political equilibrium among constituent parts, or elements, premised on the protection and maintenance of diversity for identity of sorts, then asymmetric federalism serves to play a supplementary role for the same objective. It is so argued because not all identity demands could be responded to and met at ‘sub-national’ levels. This is particularly so in complex multi-ethnic countries. This is, however, not to argue that the tool of asymmetric federalism, or the practice of it, is something unique discovered recently. The fact of the matter is that all federations starting with the US have had some space for asymmetric federalism, theoretically and practically speaking, since their beginning.

What then is asymmetric federalism? Why is it provided for and how? What is the motive behind asymmetric federal demands? Given the growing global interest in federalism as the mode of governance for multi-ethnic countries, it is time perhaps to alert the scholars of comparative federalism to the need to pay more serious attention to federal asymmetries across federal states because a symmetric approach, as it is constitutionally and conventionally assumed so far in most standard literature on federalism, does not answer all the questions why federations have succeeded in cases, and where they failed. Following Riker (1975), Rao and Singh (2005: 4-5) argued that the ‘differences in bargaining strength’ provides for a ‘source of asymmetry’ – bargaining for economic gain, greater freedom of



action, and political representation (Rao and Singh 2005: 5). About half a century back, Charles D. Tarlton's seminal essay titled 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) pointed our attention to this direction when he argued that even in the US federation known for its symmetry of relations between the States and the federation (although the US federation had has peripheral asymmetric structural elements from quite early on) (Watts 1999), in actual practice, there had been significant areas of asymmetry in respect of the relations between the States and the Federal government. This has recently been pointed out by John Kincaid (2011).

Defined very simply, asymmetric federalism refers to institutional arrangements, constitutionally guaranteed, for different status and rights of the units of the federation premised on the political recognition of diversity 'while deflecting the secessionist potential of certain forces' (Agranoff 1999: 9). Taking a broader perspective, one would also go beyond to examine not only the structures as designed in the institutional arrangements, but also the processes and outcomes to assess the effectiveness of such techniques. In fact, the above is the main thrust of the collection of some ten long chapters edited by Agranoff (1999). If Tarlton (1965) found out different relationships of the States with the Central government, the scholars found out that Tarlton was stating almost a universal fact about federalism across the globe.

Sociologically oriented scholars on federalism (Livingstone 1952; Duchacek 1970; Watts 1966 & 1999) point out the inadequacies of a symmetric approach in federalism to adequately respond to the federal qualities of society marked by differences of kinds. Agranoff (1999: 17-23) has identified a 9-point 'guiding principles' of asymmetric federalism: *de jure* and *de facto*; conditions and outcomes; levels of asymmetry; normative dimension; analytic dimension; asymmetry and political stability; relational symmetry and asymmetry; neutrality of asymmetry; and asymmetry as a social reality. *De jure* and *de facto* asymmetry refer to constitutional/legal status and rights of units, and the actual practices either following from the *de jure* position/or not. Also, the *de jure* asymmetry may vary enormously relative to social and cultural contexts, and the compulsions in federation-building. It may affect variously the principles of representation and other institutional principles of federalism and democracy. Differentiated federal structures, as Watts argues (Watt 1999: 16) are the examples of *de jure* asymmetric federal arrangements. 'Conditions and outcomes' refer to the social basis of federalism and the effect on the 'politics of recognition' that is embedded



in asymmetric arrangements respectively. The levels of asymmetry refer mostly vertical relationship of the units, especially special units with Centre suggesting more diffuse centres of power within the federation. It is argued, for example, that Quebec's current relationship with the federal government in Canada 'reflects the possibility of greater vertical asymmetry' (Agranoff 199: 18). What is the normative implication of asymmetry? This principle takes one down to the issues of ethnic and democratic rights of groups and their self-rule because only through that the ethnic groups can resist rule over them by other groups. The analytical dimensions of asymmetry entail institutional designing, that is, the recognition of the nature of society at stake, the details of regional or local autonomy and so on (Agranoff 1999: 19). The remaining principles suggest the cardinal issue of political stability and recognition in favour of increasing devolution.

From the developing literature on asymmetric pressures on the federations, it also found out that such pressures act upon the actual operation of the political systems, federal or unitary (McGarry 2007), including that of coalition-building, as Sweden (2002) has pointed out. In this context, it is worth considering a little more of the views of Watts (1999, 2008: 125-30) Asserting like others before him on the subject that all federations contain some asymmetric elements, he pointed, for example, the case of US federation in which beyond the 50 symmetric states (constituent units), there are what he terms 'peripheral unit' (two federacies, three associated states, three home rule territories, three unincorporated territories and some 130 Native American Nations (de facto federacies). He pointed out that they exist 'in an asymmetric federal relationship to the federation' (Watts 1999: 25). According to Watts again (1999: 25), the current Russian Federation of 89 constituent units of varying sizes and powers and jurisdiction provides the 'most complex' *de jure* and *de facto* asymmetry. In his subsequent writing on the subject (Watts 2008: 125-30), Watts has distinguished between political asymmetry – a function of social, economic, cultural, and political factors – , and constitutional asymmetry, which is constitutional and legal allowing a variety of units within the federations with differential powers and jurisdiction, and influences within the federation (Watts 2008: 25-27). The movements for more powers to the units, or to increase regional autonomy and so on fall, Watts believes, within this category. Watts' conclusion which is not to be ignored is that more and more asymmetric pressures within the federation also induce counter-movements for more symmetry. Second, extreme asymmetry may prove to be dysfunctional in the end d (Watts 2008: 30).



4. Comparative Evidence

Indian federation (with 28 States and 8 Union Territories) has offered greater scope of asymmetry than other federations in Asia. To begin with, Indian federation was built from above by successively right-sizing, mostly ethnically, a large, centralized state left over by the departing British colonial rulers, and the additional territory of some 560 princely States interspersed between the British ruled Provinces – such rulers were under colonial rule by very nominally maintained their so-called sovereign status. These autocratic kingdoms faced the difficult problems of staying sovereign or joining the Indian Union, and if yes, how and at what cost (Menon 1956). During the foundation of the republic in 1947-50, most of these kingdoms were ‘integrated’ with the Indian Union by various means, and in the Constitution of India (1950), most of them were given a *secondary status* called ‘Part B State’ with lesser powers than that of the provinces. As discussed in greater detail by Bhattacharyya (Bhattacharyya 2023: 41-64), the integration of such numerous princely States was ‘asymmetric’. In the period since 1956, by way of merger, bifurcation, separation, cutting and pasting, as it is called commonly, much of asymmetry was symmetrized. But the process of creation of more new States followed to further right-size the federal units, to make them more ethnically homogeneous (Bhattacharyya 2019: 99-112). The federation became more symmetric. Nonetheless, the scope of much asymmetry remained, and was unavoidable.

Until 2018 India had two types of States: general category States and *Special Category States* – the latter numbering 11 and located mostly in the border and hilly regions, and in some cases, with the preponderant of aboriginal population. This was an important area of asymmetry in Indian federalism, but the system was not provided for in the Constitution. The Special Category States received higher per capita funds transfer from the Centre by way of the Finance Commission, by the Central Government, and by the then Planning Commission (now defunct). For example, of the total money received from the Centre by way of the Planning Commission,^{XI} 90 per cent was grants for the SCSs and 10 per cent as loans. But for the General Category States it was 70 per cent loans and 30 per cent as grants (Bhattacharjee 2016). This system has been withdrawn, but by way of the Finance Commission (a constitutional body under Article 280)^{XII}-formed in every five years), the formerly SCSs continue to receive discriminatory (in their favour) fund transfer in the form



of numerous Central Plan Assistance, and special finance packages. In India, there are not only asymmetric constitutional arrangements, and bodies with relatively autonomous powers, but also the money made available to run the government.

Table 1 Criteria-based Tax Devolution (14th -15th FC) (2015-21) (in %)

Criterion	14 th FC 2015-20	15 th 2020-21	15 th FC 2021-26
Income Distance	50.00	45.00	45.00
Area	15.00	15.00	15.00
Population 1971	17.5	--	--
Population 2011	10.00	15.00	15.00
Demographic performance	---	12.5	12.5
Forest cover	7.5	--	--
Forest & ecology	--	10.0	10.0
Tax effort	--	2.5	2.5
	100	100	100

Source: 15th Finance Commission 2020.

(https://fincomindia.nic.in/writereaddata/html_en_files/15thFcReportIndex.html)

(sighted on 30/12/23)

Note: 'Demographic change' refers to 2011 population.

The data presented in table 1 above need to be explained. Except Assam, all other States in the Northeast are small in population, so they do not gain much from the weightage to population. They gain in terms of 'income distance' and areas, in the case of Arunachal Pradesh. 'Income distance' is a formula used by the Finance Commission so that the backward States get a higher per capita tax devolution (Reddy, Reddy 2019: 94).

There are two vital financial issues to be mentioned. First, on average the States in India raise about 35 per cent of the total tax revenues but spend a greater sum above 55 per cent of the total public expenditure. The latest figure is 58 per cent. This requires some explanation. Although the Centre taxes and collects more revenues, greater than that of the States, after devolution, the Centre's receipts decrease, and the States' revenues increase. In the constitutional federal structure of India, the States have to perform a greater number of



tasks relating to social welfare, law and order, public health, sanitation and so on. This also enhances the popularity of the States, if so efficiently carried out. The Centre in India does not have the *line administration*; the States have it. The States must implement not only their own laws, but also many laws of the Centre, as a Constitutional obligation. Second, the principles of equity and justice in federalism are kept in mind in the horizontal transfer from the Centre to the States. As a result, the poorer States and those on the borders with limited resource bases receives greater per capital transfer from Centre as recommended by the Finance Commission (Rao, Singh 2005; Reddy, Reddy 2019). In short, there is greater financial asymmetry in Indian federalism than the other federations in Asia.

The General and Special Category States were one type of inter-State federal asymmetry. There are other types constitutionally guaranteed. These are de jure asymmetry. Most of the States in the Northeast (eight States) – Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, Sikkim and Tripura – which enjoy different degrees of asymmetry. In other words, there is asymmetry within asymmetry in such a case. For example, the case of Nagaland (created in 1963) (after a prolonged insurgency and negotiations) is a case apart. Nagaland enjoys a very special kind of asymmetry unlike the other States in the region, and the mainland. Under Article 371A this State is given a semi-sovereign status. This Article states:

Notwithstanding anything contained in the Constitution (of India) ...No act of Parliament (of India) in respect of:

- a. Religious or social practices of the Nagas;
- b. Naga custom, laws and procedure.
- c. Administration of civil and criminal justice involving decisions according to customary laws
- d. Ownership and transfer of land and in resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides' (Bakshi 2017: 391).

These provisions are clear enough that the Nagaland Legislative Assembly enjoys near-sovereign powers than any other such bodies in India. Beyond Nagaland, the other States in the region also enjoy various forms of asymmetric status and powers. This applies to some States in the mainland India too (Bhattacharyya 2023: 59-60). Prior to the demotion of the State of Jammu & Kashmir in 2019,^{XIII} and its division between two Union Territories of



Jammu and Kashmir, and Ladakh, there were two Autonomous Hill Development Councils one each for Leh and Kargil since 1997. The Council had the powers to levy taxes and fees and to raise other resources, and to spend them relating to economic development, health care, education, and equitable development down to the grassroots. Additional funds were made available from the then State government.

How have the asymmetric States performed in India? Bhattacharyya (2023) have provided a detailed empirical survey-based analysis of performance records of asymmetric States in terms of certain agreed upon criteria, which is neglected in the existing scholarship. Using the methodology formulated by Malhotra (2014), and the detailed data provided, it has been found that in terms of *policy effectiveness* index – a composite index of many composite sub-index – the asymmetric States improved upon a lot (Table 2) in delivering governance (law and order, safety of women, sanitation, electricity, safe drinking water and so on).

Table 2 Policy Effectiveness Index in Asymmetric States in India (1981-2011)

States	1981	1991	2001	2011
Arunachal Pradesh	0.188	0.243	0.303	0.345
Assam	0.177	0.193	0.220	0.232
Himachal Pradesh	0.239	0.268	0.290	0.359
Jammu & Kashmir	0.188	0.258	0.308	0.347
Manipur	0.275	0.280	0.330	0.328
Meghalaya	0.248	0.327	0.374	0.383
Mizoram	0.229	0.335	0.424	0.493
Nagaland	0.261	0.372	0.341	0.371
Sikkim	0.237	0.388	0.503	0.566
Tripura	0.193	0.257	0.263	0.302
Uttarakhand	--	--	0.255	0.311
All India	0.205	0.228	0.246	0.285

Source: Bhattacharyya 2023: 103.

As is evident from the data in table 2 above, the performance records of the asymmetric States have remained higher than that of India average. The erstwhile State of Jammu &



Kashmir performed far better especially during 2001-11 than that of India as a whole. Even in the high days of insurgency and violence, this State performance records were competitive. From other reliable sources, it was found that in 2019, Jammu & Kashmir's records (0.688) was even higher than that of Karnataka (0.683) (Bhattacharyya 2023: 104).

Below the State level there are constitutional provisions for sub-State level autonomous tribal district councils under the 6th Schedule of the Constitution applicable to the hill tribes of Northeast India. These councils (at present ten are working in the region) have wide ranging autonomy to manage their own affairs independently but based on democracy. Such Councils are to be elected every five years based on adult suffrage, and all decisions at the Council are to be taken after adequate debate and discussion and by a majority. Although each such Council are named after a particular tribe, there are tribal and, in some cases, non-tribal ethnic minorities who may be excluded but for the fact that the State Governor has the power to nominate some members from the communities which may not otherwise be elected lacking in territorial concentration. This is a kind of consociational arrangement. Bhattacharyya (2023) has presented a detailed empirically survey-based data on the working of two such Councils one each in Assam and Tripura and assessed their comparative merits and demerits in institutional functioning and effectiveness (Bhattacharyya 2023: chapter 9-10, 115-62). Of the two – Tripura Tribal Autonomous District Council in Tripura and the Bodoland Territorial Authority – while the former is a relative success story, the latter seems to be a case of failure due to a deviational principle in providing for formation of such bodies under the 6th Schedule. The 6th Schedule originally was meant for the hill tribes of Northeast India on the proviso that the aggrieved tribal community demanding a Council formed a majority in the proposed 'homeland'. In the case of the BTA, both principles have been violated: the Bodos are Plain Tribes, and secondly, they constitute only 30 per cent of the population in all four Bodo districts on the Northern banks of the river Brahmaputra in Assam. The persistent ethnic violence, predictably, has been the consequences (Bhattacharyya, Mukherjee 2018). This suggests that although overall India's federalism is a success story, there are pocket at the grassroots where things do not run because of ill-designed institutional engineering dictated often by short term political gains by the political actors.

In the Malaysian federation (13 States), the two Borneo States of Sabah and Sarawak exemplify asymmetry. These States are mentioned in the very article 1 of the Federal



Constitution. The States of Sabah and Sarawak were constituent units of the Malaysian Federation in 1963. These two States like some other federal units have Constitutions of their own. Like some other States these two States are provided with the powers to confer the Supreme Head of the Federation the religious head of their States. The Federal Constitution is the supreme Law of the land and protects all the constitutions of the units including that of Sabah and Sarawak. These two States have more liberal scope of borrowing with the State law with the approval of the Centra Bank (Article 112 of the Federal Constitution). Under Article 161 of the Federal Constitution, the States of Sabah and Sarawak have the freedom to use English language in Parliament and Legislative Assembly, in the judiciary and other official communications. In addition, these two States have been given the freedom to use 'native language currently in use Under Article 161 Clause 5 it is stated:

Notwithstanding anything contained Article 152^{XIV}, in the States of Sabah and Sarawak a native language in current use in the state may be used in native courts of Sabah and Sarawak until otherwise provided in enactment of the Legislature, may be used by a member of the Legislative Assembly, or any committee thereof. (Federal Constitution 10th April 2002, p. 204).

While these two States have good sources of revenues,^{XV} the Federal government under Article 112D offers special grants for these States. In November 29, 2023, for example, Prime Minister Datuk Seri Anwar Ibrahim said that 'the Federal Government, together with the Sabah and Sarawak State governments, have reached an agreement to review the amount of special grants under Article 112D of the Federal Constitution effective from 2023 as an interim solution and on the process of finalising the special grant review formula for the long term. This interim rate is an increase to the RM16 million per year for Sarawak since 1969 and RM125.6 million for Sabah for the year 2022 through an interim review that was implemented for Sabah in 2022.'^{XVI}

The two Borneo States have great strategic significance for the pursuit of the Malay political elites to show up a Malay majority called *Bumiputera* (songs of the soil). At the time of independence from British colonialism, the Malays were slightly less than 50 per cent of the total population (49.8), and it was not until 1990 that the Malays were estimated to be 55.1 per cent (Bhattacharyya 2010: 39). In 2000, the figure jumped off to 65.1 per cent. The World Factbook shows that Bumiputera^{XVII} now are 62.5% followed by the Chinses 20.6%,



Indian 6.2%, other 0.9%, non-citizens 9.8% (2019 est.),^{xviii} The population of Sabah and Sarawak (80.5 per cent and 72.9 per cent of the so-called *Orang Asli* (aboriginal or the original inhabitants) were grouped together with the Malays, without that it was difficult for the Malays to prove their majority. Like the Peninsular Malaysia with 11 States, the *orang asli* also come under the purview of reservation for the majority – perhaps the only known country where reservation is provided for the majority. This is discriminatory for the minorities who are significant in number: the Chinese were 38.4 per cent in 1947 who today are about 20.6 per cent and the Indians who were about 11 per cent in 1947 are about 6 per cent (Bhattacharyya 2010: 39). The Article 153 of the Federal Constitution of Malaysia clearly stated: It shall be the responsibility of the Yang Di-Pertuan Angon (Head of the Federation) to safeguard the special interest of the Malays and the natives of any of the States of Sabha and Sarawak. No wonder, the non-Malays ethnic minorities are suspicious (Bhattacharyya 2010: 84)

5. Conclusion

Federations in Asia generally are passing through challenges: military junta rules over Myanmar since February 2021; Nepal is still in fledging federal functioning; relative lack of democracy in Pakistan with the surreptitious control of the Punjabi dominated army casting a big shadow over democracy and federalism; the Provinces were empowered hugely by the 18th Amendment in 2010 but nothing concrete is in sight as yet (Bhattacharyya 2021); the increasing Malay domination over the federation by enforcing Malays (*Bhumiputera*) special rights as *staatvolk*;^{xix} and the ongoing neo-liberal reforms in India coupled with increasing Hindutva hegemony over the federation are the most general trends affecting the prospects of federalism in Asia, which do not augur well for federal asymmetry as examined above.

Asymmetry in federalism in both India and Malaysia^{xx} have some negative aspects. In India, while asymmetry has been effective in ensuring equity and helping maintain diversity and overall balance in the system, some kinds of asymmetry look rather odd, federally speaking. In the case of India, there are undesirable structural asymmetry. To take the case of India's largest State: Uttar Pradesh has a population about 241 million and sends as many as 80 Members to Lok Sabha (popular chamber)(total member 542) and 32 to Rajya Sabha



(total member 249), the second chamber. This does not compare with any other States in the federation. The States in the Northeast except Assam send only 1 or 2 members to parliament. This creates a structural imbalance in federalism. India's second chamber is strictly speaking not a chamber for the States because there is no equality of membership from the States – this is so because the federal units in India were not the compacting parties to the federation. Therefore, the same criterion of population size as applied in deciding the territorial constituencies of Lok Sabha is also applied with higher weightage in the case of Rajya Sabha.

Second, the abrogation of Article 370 by the incumbent government in Delhi, and the Supreme Court's approval of the government action has raised concern about the very existence of the States placed in similar position, i.e. as under 'Temporary, Transitional and Special Provisions' of the Indian Constitution. However, India's ongoing neo-liberal reforms have made little difference to asymmetric arrangements. Going by the latest Finance Commission's recommendations (2021-26), the States do get a better deal in devolution, and more fiscal space. India's neo-liberal reforms have empowered the States in carrying out reforms in the days of market freedom. India's previous political economy with the public sector domination and with heavy centralisation has passed into a capitalist political economy – a big challenge – but her federalism generally has received, as it were, a better deal.

But in the case of Sabah and Sarawak in Malaysia, different challenges were found. Constitutionally, these State are asymmetric but because of several amendments passed in the national parliament, the latter appear to be like any other States. Second, with the opposition parties leading governments at national level and Sabha, for example, the latter are not received well by the national level officials with equal respect, if invited at all (Loh 2020: 202-06). There are also the ill-effects of increasing centralisation. It is remarked: In Sabha's case, the federal government also imposed a ban on export of timber log, ostensibly to promote the development of local wood-based factories. Consequently, Sabha's economic performance turned sluggish under the PBS' (the Opposition party) (Loh 2020: 207. The way these two States are treated by the federal government; it appeared as if the indigenous population in these State are 'second class *bhumiputera*' (Bhattacharyya 2019: 188). It is ironic that such slogans in public from such States would be raised: 'Decentralisation or complete independence' (Bhattacharyya 2019: 188).^{XXI} It has been argued in other writings of Bhattacharyya (Bhattacharyya 2015) based on a distinction between the *diversity-problematic*



and the *equality-problematic* that one of the criteria of assessing the success of democratic federalism is the production of more equality, reduction of poverty, more health care and so on. Judged thus, the poverty level in Sabah exceeding 32 per cent and child poverty at 40 per cent do not suggest a particularly desirable scenario (Bhattacharyya 2019: 188). Regarding the issue of minorities in these two States, the story is as dismal. The Chinese, for example, speak Mandarin and other dialects of antiquity. Bhasa Malay is the official language of the federation, but there is no official recognition of the Chinese even though they are predominant in one State of Penang. The *orang asli*, the indigenous peoples in the Borneo States suffer from the imposition of *basha Malay*. They speak different languages of their own such as Kadazan, Iban and Dasum which have fared very badly (Bhattacharyya 2019: 193). As a result of the increasing federal control (allegedly violative of the terms of agreement) there has taken place depletion of resources of the States of Sabah and Sarawak such as oil, gas, palm oil and logging. In short, there is a strong undercurrent of discontent among the peoples in these two States against increasing centralization, and the resultant loss of their special autonomy.

The lesson that one would draw for aspiring federations world over is that federal governance is a difficult governance, but it does not work in conditions of authoritarianism, centralization, and the lack of fairness. Large or small, many federations remain only on paper, and various units languish under the clutches of heavy doses of authoritarianism. The authoritarian leaders fail to read the writings on the wall and fail to take course correction before it is too long.^{xxii} On the basis of the personal experience of the author in (unattributable) deliberating on the constitution making for State riven with ethnic conflicts in Myanmar, it can be further asserted that in many cases only a *large measure of asymmetric federalism* coupled with minority veto conceded in favour of minority can save the countries from unending civil war and ethnic cleansing.^{xxiii} In multi-ethnic countries in Asia and Africa, if not elsewhere too, a federal solution should be large extent of asymmetry at many levels rather than a symmetrical arrangement – it requires a lot of institutional engineering.

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¹ The ‘temporary’ provisions were so inserted in the Constitution (under Part XX1) in view of the war like situation in J & K in 1947 created by the Partition of India, and the invasion of Kashmir by some tribesmen from across the border backed by the Pakistan state, which resulted in the occupation of a western part of Kashmir known as ‘POK’, or ‘Azad Kashmir’, arguably controversially (see for details, Menon 1956: 390-415; Anderson 2014: 70-92. 2nd edn). As the volumes of writings on J and & suggests, the case of the real status of



the State, and its integration with the Union of India has remained highly controversial. While the official argument was that the King of Jammu & Kashmir signed the Instrument for Accession willingly to integrate with the Union of India, international scholarship (Anderson 2014) believed that the State was handed over to India 'on a British plate' (Anderson 2013: 64). Anderson even went to the extent of claiming that the IOC was backdated by the Indian officials. There was and still is a lot of misunderstanding about the subject. During the debates in the Constituent Assembly of India (dated 17 October 1949) on the question of representation of the State in the body, Jawaharlal Nehru categorically stated that the accession of the State to the Union of India was 'unconditional'. But V. P. Menon, a top civil servant closely associated with the whole issue of accession and integration of the State stated that the accession was conditional. He wrote: 'There was a lot of discussion, at the end of which it was decided that the accession of Jammu and Kashmir should be accepted subject to the provisions that a plebiscite would be held in the state when the law-and-order situation improved' (p. 400).

ⁱⁱ When Jammu and Kashmir acceded to the Union of India on 26 October 1949 under very difficult circumstance (Menon 1956; Anderson 2013) there were no conditions as to the special status accompanied the Instrument of Accession.

ⁱⁱⁱ The tenor of the judgment consists of the following: first, the State of Jammu & Kashmir did not retain any element of sovereignty after signing the Instrument of Accession on 25 November 1949. Neither did it have any 'internal sovereignty'. Second, Article 370 and its placement in Part IX of the Constitution of India is a temporary provision. Third, the power of Article 370 (3) ceased to exist after the dissolution of the Constituent Assembly of J & K. Fourth, the Presidential Proclamation to declare Article 370 ceased is valid. Fifth, since the Solicitor General of Law stated that 'the statehood of Jammu and Kashmir will be restored (except for the carving out of the Union Territory of Ladakh)' the Court did not 'find it necessary to determine whether the reorganisation of the State of Jammu and Kashmir into two Union Territories of Ladakh and Jammu and Kashmir is permissible under Article 3. However, the Court 'uphold the validity of the decision to carve out the Union Territory of Ladakh in view of Article 3(a) read with Explanation I which permits forming a Union Territory by separation of a territory from any State'. Finally, the Court directed that 'steps shall be taken by the Election Commission of India to conduct elections to the Legislative Assembly of Jammu and Kashmir constituted under Section 14 of the Reorganisation Act by 30 September 2024' and 'Restoration of statehood shall take place at the earliest and as soon as possible'. (https://main.sci.gov.in/pdf/LU/article_370.pdf) signed on 25/3/24.

^{iv} 84 per cent Christian (approx.) out of which the Catholics are 79 per cent, the Protestants 6 per cent and the Muslims 6.4 per cent.

^v In the world's first federation of the United States the term 'federal' is not used. The Americans wanted to make a more perfect Union.

^{vi} <https://www.aljazeera.com/news/2018/3/13/philippines-muslim-leaders-tired-of-waiting-for-bangsamoro-law> (sighted on 7/1/24).

^{vii} The BJP, India's (in fact the world's) largest party) operate electorally speaking, within the remit of India's federalism and democracy, is not doctrinally a pro-federal party.

^{viii} https://main.sci.gov.in/pdf/LU/article_370.pdf (sighted on 10.3.24) *note: IOA=Instrument of Accession.

^{ix} And yet, based on long involvement as an expert (unattributable) in constitution-making, a federalism with a heavy bias to asymmetry and adequate minority veto appear to be the only realistic solution to the country.

^x See, for further details, Watts (2008), pp. 125-30.

^{xi} The Planning Commission was an extra-constitutional body formed in 1950 as an essential body for a public sector dominated command economy which became superfluous in the era of India's neo-liberal reforms.

^{xii} The Finance Commission is constitutionally mandated recommend to the President of India who appoints the members and define the Terms of Reference of the Commission, the devolution of tax and non-tax revenues between the Union and the States both vertically and horizontally. Vertical transfers now are 42 per cent of the total pool of taxable money, but in case of horizontal transfer the Commission follows a complex formula that takes into consideration many variables for the sake of equity and diversity so that the weaker units do lose out (Table 1). As per Article 275 of the Constitution the Commission also duty bound to determine the principle of for grants-in-aid to the States. These two bodies had overlapping and often conflictual issue to resolve, but the Finance Commission has been the key to the stability of the Indian federation. In comparative terms federation failed in Pakistan for the Finance Commission there never followed any objective criteria in tax devolution, and its disbursement was arbitrary.

^{xiii} This was very controversial and lots of appeals to the Supreme Court of India were made against the Union government decisions. But the Supreme Court in its recent verdict dated 11 December 2023 upheld the President India's action to abolish Article 370 on the ground that it was a 'temporary' provision.



XIV Article 152 of the Malaysian Federation Constitution says: The national language shall be Malay language and shall be in such script as the Parliament by la provide.

XV In 2024, the budget of Sabah shows a surplus of RM 35.82 million. (The New Strait Times dated (<https://www.nst.com.my/news/nation/2023/11/982301/sabah-2024-budget-surplus-rm3587-million>) sighted on 15.1.24

XVI <https://www.malaymail.com/news/malaysia/2023/11/29/payment-of-special-grants-to-sabah-sarawak-completed-says-pm-anwar/104863> (sighted on 15.1.24).

XVII *Bumitputra* includes the Malays and indigenous peoples, including Orang Asli, Dayak, Anak Negeri,

XVIII <https://www.cia.gov/the-world-factbook/about/archives/2021/field/ethnic-groups/> (sighted on 15/1/24)

XIX *Staatvolk* was coined by Brendan O’Leary in 2001 to refer to a federation dominated by one ethnic groups who considered it as their own state. The Malaysian federation with the Malay domination is a major example. (see Bakar 2007: 68-76); and O’Leary 2001 for details on the term *staatvolk*.

XX Nepal and Myanmar are federations but not discussed because, the federation in Nepal is still fledgling and struggling to sustain itself while Myanmar is a precarious case being under military rule over the last two years.

XXI It is widely believed among some parties and opinion makers that the 1963 Agreement on the basis of which they joined the Malaysian federation has increasingly been violated giving birth to and sustaining what is called ‘state nationalism’ in these States.

XXII One instance is of course Pakistan which does not allow federal asymmetry although this could meet the grievances of many small ethnic identity communities who profess Islam, but their ethnic identity demands far-outweigh their faith.

XXIII It is ironic that in the evolving discourse of federalism in the Post-Cold War era the idea of ‘asymmetric federalism’ is yet to be seriously considered when the countries being discussed exhibit varied levels of diversity and the clamor for autonomy. In an otherwise scholarly collection of essays on the subject titled “Emerging Federal Structures in the Post-Cold War Era edited by S Keil and S. Kropp (Palgrave Macmillan 2022) the term ‘asymmetric federalism’ has occurred in the Index for once.

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