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## FEDERALISM, DEMOCRACY AND HUMAN RIGHTS: SOME REFLECTIONS

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## JOURNAL OF THE INDIAN LAW INSTITUTE

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# **FEDERALISM, DEMOCRACY AND HUMAN RIGHTS: SOME REFLECTIONS**

*Mahendra P. Singh\**

## **I Preliminary**

FEDERALISM AND regional autonomy took roots, grew and flourished in countries having democracy and respect for human rights. They have not taken roots, grown or flourished in non-democratic countries or in countries that do not respect human rights. Thus, it may be stated that federalism has led to democracy and respect for human rights and where federalism and regional autonomy have taken roots, democracy and respect for human rights were ensured. Both federalism and regional autonomy, it may be noted, are based as much on the idea of self-rule and autonomy of the individual as democracy and respect for human rights. In the following pages an attempt is being made to briefly explain and support that position.<sup>1</sup>

## **II Federalism**

Despite the vast literature on the subject, the concept of federalism remains elusive. As the framers of the Constitution of the United States invented modern federalism, political theorists have generally tended to define the concept of federalism with reference to the federal features of that Constitution. But just like the framers of the Constitution of the United States, framers of several other constitutions have also responded to their federal situations that did not demand exactly the same kind of constitution as that of the United States. Consequently, the Constitution of the United States may be the first but is not the only federal constitution in the world. As these constitutions differ from one another as well as from the Constitution of the United States, any concept of federalism must take account of that difference. Political theorists have,

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1. This is an edited version of the concluding observations made by the author at the three day "International Seminar on Federalism and Regionalism" held from 12 to 14 Nov 2003 at Puebla, Mexico.

therefore, been searching for the essence of federalism that distinguishes a federal from a non-federal constitution. In one of the early searches taking the Constitution of the United States as model, Dicey laid down two preconditions for the creation of a federation: (1) existence of a body of countries "so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants an impress of common nationality" and (2) the inhabitants of these countries "must desire union and must not desire unity."<sup>2</sup> Further, focusing on the Constitution of the United States, Dicey found "three leading characteristics of a completely developed federalism - the supremacy of the constitution - the distribution among bodies with limited and co-ordinate authority of the different powers of government - the authority of the courts to act as interpreters of the constitution."<sup>3</sup> According to him these features did not exist to the same extent in the constitutions of Canada and Switzerland as in the Constitution of the United States, yet the former fell as much in the category of federal constitutions as the latter.<sup>4</sup>

Later, showing substantial agreement with Dicey and basing, like him, his analysis on the Constitution of the United States, Wheare famously found the essence of federalism in the "federal principle" which he defined as "the method of dividing powers [between the general and regional governments] so that the general and regional governments are each, within a sphere, co-ordinate and independent."<sup>5</sup> Realizing, however, that an exception to that principle existed even in the Constitution of the United States until 1913 and that a few other constitutions also incorporated that principle with similar exceptions, he conceded that the predominance of the federal principle and not a religious adherence to it was enough to classify a constitution as federal.<sup>6</sup> Examining the difference between the provisions of a constitution and their operation in practice he also drew the difference between a federal constitution and a federal government and found that only three constitutions - of US, Switzerland and Australia - and only four governments - foregoing three and of Canada - were federal. Others were either quasi-federal, confederation or unitary but not federal. He included the Indian Constitution and government in the category of quasi-federal.<sup>7</sup>

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2. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 141 (10th ed., 1959).

3. *Id.* at 144.

4. *Id.* at 165-71.

5. K.C. Wheare, *Federal Government* 10 (4th ed., 1963). For his agreement with Dicey see *supra* note 2 at 14.

6. *Id.* at 14.

7. *Id.* at 27-28.

Even though Wheare's analysis of federalism is highly convincing and widely noted, not everyone agrees with him. Among others, Birch saw the movement from dual to cooperative federalism in all the countries classified by Wheare as federal, which became the hallmark of all the federal constitutions adopted since World War II.<sup>8</sup> Many others now recognize that federalism is "not one single idea but a whole intricate and varied network of interrelated ideas and concepts – of contract, of partnership, of equity, of trusts, of sovereignty, of constitution, of state, of international law."<sup>9</sup> Derived from the Latin word *foedus*, federal means covenant. "Based on the idea of covenant, which is 'synonymous [with the] ideas of promise, commitment, undertaking, or obligation, vowing, . . . we come upon a vital bonding device of civilization . . . involv[ing] the idea of cooperation, reciprocity, mutuality, and . . . the recognition of entities.'<sup>10</sup> In Elazar's view "a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing which must prevail among partners, namely one that both recognizes the integrity of each partner and seeks to foster a special kind of unity among them."<sup>11</sup> Rosenn reduces the essential characteristics of federalism to two: "(1) constitutional division of powers between the central and regional levels of government, and (2) entrenched regional representation in the central government."<sup>12</sup> In the Indian context, Austin says: " 'Federalism' is an idea and a set of practices, the variety of which depends upon the goals of the citizenry and its leaders, the consequent definition of the term, and the conditions present in the would-be federation."<sup>13</sup>

Federalism in general is a form of government in which sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous regional governments. Usually, federal constitutions allocate powers to large geographically defined units, such as states, provinces, cantons or *laender*, but some of them also allocate governmental powers to smaller subdivisions such as federal districts, counties, municipalities and village units. Even on the

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8. See, A.H. Birch, *Federalism, Finance and Social Legislation in Canada, Australia, and the United States* (1955). Also see, M.J.C. Vile, *The Structure of American Federalism* (1961).

9. S.R. Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* 5 (1978) cited in P. Chen, "Federalism and Rights: A Neglected Relationship" 40 *South Texas Law Review*, 845, 850 foot note 22 (1999).

10. *Id.* at 850

11. D.J. Elazar, *Constitutionalizing Globalization* 3 (1998) cited in Chen, *ibid.*

12. K.S. Rosenn, "Federalism in the Americas in Comparative Perspective" 26 *University of Miami Inter-American Law Review* 1, 3 (1994).

13. G. Austin, *Working a Democratic Constitution. The Indian Experience* 555 (1999).

distribution of powers between the general and the regional governments there is little agreement. The guiding principle that the former should exercise powers dealing with national affairs, and the latter should exercise powers dealing with local affairs – does not provide much guidance. “Today the more appropriate metaphor for constitutional allocations of most powers is not a layer cake but a marble cake.”<sup>14</sup> Comparing the text and working of six federal constitutions in the Americas, Rosenn concludes:<sup>15</sup>

There is no magical formula for federalism. There are myriad ways to allocate powers within federal systems. One need only make sure that certain essential powers are given to the central government, such as common defense, foreign affairs, and the regulation of interstate and international commerce, and that both the federal and regional governments have concurrent or joint powers to tax and to spend. Whether the federal government or the states have the residual powers does not seem critical. Indeed, the experiences of all six countries suggest that their constitutional texts do little to explain the historical evolution of these federalist systems. Regardless of how powers are allocated, federal systems will experience tension between demands for greater state autonomy and demands for greater centralization.

The framers of the Constitution of India knew well that federalism was not a definite concept and lacked a stable meaning. Believing that each federation had responded to its own situation and India had unique problems not confronted by other federations in the history, they “produced a new kind of federalism to meet India’s peculiar needs.”<sup>16</sup> They started their deliberations under the pre-independence constraints which envisaged a central government with enumerated powers leaving the residue to the states.<sup>17</sup> But soon after the decision for independence was announced they freed themselves from those constraints and decided to have “a federal structure with a strong centre.”<sup>18</sup> At the same time they rejected the proposal for a unitary structure in which regional units would function only as agents and delegates of the centre.<sup>19</sup> At the end

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14. Rosenn, *supra* note 12 at 11.

15. *Id.* at 25. The six constitutions compared are: United States, Canada, Argentina, Brazil, Venezuela and Mexico.

16. G. Austin, *The Indian Constitution: Cornerstone of a Nation* 186 (1966).

17. See, “Statement by the Cabinet Mission and Viceroy May 16, 1946” paras 15(i) to (iv) in B. Shiva Rao (ed.), *The Framing of India’s Constitution* vol. 1, 209 at 213 (1996).

18. *Id.*, Shiva Rao, vol. 2 at 553 and 607.

19. *Id.* at 608-9 and also at 533 and 539.

of their deliberations they produced a constitution which does not use the expression "federal", "federalism" or "federation" anywhere. They "refused to adhere to any theory or dogma about federalism"<sup>20</sup> and acknowledged that the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances."<sup>21</sup> Since the commencement of the Constitution, debate continues whether the Constitution of India is federal. As has already been noted, while Wheare classified the Constitution of India as quasi-federal, most Indian constitutionalists claimed that it was federal with some modifications to suit the needs of the country.<sup>22</sup> When after about twelve years of the working of the Constitution the issue first came before the Supreme Court, it did not say that the Constitution was not federal but said that it was "not true to any traditional pattern of federation."<sup>23</sup> Although in 1973 in the famous *Kesavananda v. State of Kerala*,<sup>24</sup> federalism was included among the basic features of the Constitution which could not be changed even by an amendment of the Constitution, in subsequent cases involving specifically the centre-state relations, the court doubted whether the Constitution was federal.<sup>25</sup> With the turn of events in the political realities since 1989, as will be noted below, the court has since 1994 again returned to federalism as one of the basic features of the Constitution.<sup>26</sup> Despite these developments, the constitutional text of India makes the states dependent on the centre in several respects. Dissatisfaction expressed by the states in this regard has been examined at the national level more than once. But every time the federal arrangements as provided in the Constitution have been endorsed with suggestions to ensure greater say and autonomy to the states in the

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20. *Supra* note 16.

21. Statement by Ambedkar while moving the Constitution for adoption in the Assembly, *Constituent Assembly Debates*, vol. VII, 34.

22. See, e.g., M.P. Singh, *V. N. Shukla's Constitution of India* A-28ff (10th ed., 2001); H.M. Seervai, *Constitutional Law of India* 283ff. (4th ed., 1991); Austin, *supra* note 16 at 186ff.; *contra*. P.K. Tripathi, "Federalism: The Reality and the Myth" 3 *Journal of Bar Council of India* 251 (1974). For a bibliographical account of readings on Indian federalism, see, B. Arora, "Federalism and Inter-governmental Relations in India: A Bibliographical Essay" in S. Bhatnagar & P. Kumar (eds.), *Some Issues in Contemporary Indian Politics* 43 (1997). Also see, D. V. Verney, "Understanding India as a Federation: Liberal Principles, Conservative Tradition and Socialist Ideology, in B.D. Dua & M.P. Singh, *Indian Federalism in the New Millennium* 27 (2003). For a refreshing analysis also see, L. Sáez, *Federalism without a Centre* (2002).

23. *State of West Bengal v. Union of India*, AIR 1963 SC 1241 at 1252.

24. AIR 1973 SC 1461.

25. See, e.g., *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, 1382 and *Karnataka State v. Union of India*, AIR 1978 SC 68, 89, 111, 151 and 160.

26. See, *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

working of these arrangements.<sup>27</sup> Generally the constitutional amendments have enhanced the powers of the centre rather than that of the states. Two amendments of the Constitution in 1992 have also introduced a third level of local governments in the federal structure at the village and municipal levels requiring the states to ensure the democratic functioning of these governments and to share some of their powers with them.<sup>28</sup>

The working of the federal arrangements in India took a big turn in 1967 when the monopoly of one party rule at the centre and the states started crumbling with splits within the party and emergence of several regional parties in different states. This process continued, though sometimes with reversals, until in 1977 a combination of different parties formed a government at the centre and in several states. After the reversal of the process between 1980 to 1988, since 1989 either a minority government consisting of a combination of different political groups or of one political party supported by other parties from outside or a coalition of several national and regional parties has been in office at the centre. The latest elections concluded for the 14<sup>th</sup> Lok Sabha (lower house of national Parliament) in April-May 2004 have not changed the situation in any way though the government has changed. The current scene, which is not likely to change in the near future, is that a coalition of several parties is ruling at the centre while some of these parties and parties in opposition are ruling in different states. These political developments and future projections have deeply changed the character of Indian federalism. Now no party can claim a hold on people and the state at the all India level and rule in a centralized or unified fashion under one common leadership. Every party knows that its base is limited and that it must take into account not only the opposition but also the regional parties that are either supporting it in the formation and running of the government at the centre or are maintaining a neutral stand. Simultaneously the growth of regional parties proves that one party or ideology cannot rule a country of India's size and diversity centrally in all matters based on uniform policies and planning set by it. People of different regions of the country have different needs and aspirations

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27. See, e.g., *ARC Report on Centre-state Relationships* (1969); *Report, Commission Centre-State Relations* (1988); and *Review of the Constitution: Report of the National Commission to Review the Working of the Constitution* (2002, <http://lawmin.nic.in/ncrwc/finalreport.htm>). For an analysis of the last report see, M.P. Singh & B.D. Dua, "Indian Federalism and NCRWC Report, 2002: Quest for a Federation without Federalism?" in B.D. Dua & M.P. Singh (eds.), *supra* note 22 at 287ff.

28. See the Constitution (Seventy-third) Amendment Act, 1992 introducing *Panchayats* and the Constitution (Seventy-fourth) Amendment Act, 1992 introducing municipalities.

that require regional and local policies for their satisfaction and fulfilment.

This new political scenario in India on the one hand places India in the category of federal governments even if its Constitution is doubted to be federal. On the other hand it takes India closer to the goals set by the constitution makers that the Constitution must ensure unity of the nation consistent with the regional autonomy which they thought lay in cooperative federalism.<sup>29</sup> The current projection of the political future seems to be going in the direction of cooperative federalism in the true sense. As under the original scheme of the Constitution, which remains unchanged in its text, the states had to depend on the centre for a number of matters the position of the centre still remains dominant. But as the centre's dominance has been subjected to the practical politics of the day, the centre and the states have to constantly negotiate with each other. Neither of them can survive without seeking cooperation from the other. "Cooperative federalism," says Austin, "produces a strong central, or general, government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies. Indian federalism has demonstrated this."<sup>30</sup> Many of the irritating features of the Indian federalism including over centralization of decision making and interference in state politics through the device of central rule are becoming matters of the bygone days. A robust federal arrangement, which establishes the right balance between the centripetal and centrifugal forces, seems to be emerging with these political developments. It goes well with India's diversity and the need for unity. Any country that has this kind of diversity – and hardly any country at this moment is free from diversity and plurality – must develop a robust federal structure ensuring enough scope for national unity consistent with regional autonomy, which cannot be fixed forever but has to be a flexible and dynamic process.<sup>31</sup>

Federalism, as will be noticed below, also safeguards against tyranny by preventing concentration of power and providing countervailing centers of power; encourages participation in government at local levels, promoting greater citizen involvement with the tasks of governance; leads to development of new and imaginative solutions to societal problems because local units are free to act as laboratories for experimentation; it simplifies the process of dealing with linguistic, ethnic, religious, or cultural diversity, facilitating governance of large

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29. Austin, *supra* note 13 at 6 and 16 at 186ff.

30. *Supra* note 16 at 187.

31. For a cautious approach on decentralization see J.M. Serna de la Garza, "Constitutional Federalism in Latin America" 30 *California Western Int'l Law Journal* 277, 301 (2000).

regions and pluralistic societies; and promotes administrative efficiency by utilizing national uniform regulations, taxation and expenditures for national concerns, while allowing local legislatures to tailor regulations, taxation and expenditures to regional and local concerns. Sometimes, as will be explained below, state or regional governments in federalism are more likely to threaten the individual rights and guarantees of minorities than the central government because the former are more homogeneous and cohesive than the latter. The danger of national disintegration and instability also continues in federalism. By and large the successful federal governments, including the new ones like India, have not succumbed to these negative aspects of federalism.

### III Democracy

Democracy is as much, if not more, elusive as federalism.<sup>32</sup> Unlike federalism, which does not carry any special appeal in the governance of a society, democracy holds the highest place amongst the forms of government. It is the yardstick for good government. Therefore, every government claims itself as democratic. Accordingly, as about federalism so also about democracy debate continues as to what is it? One need not enter into that debate because the purpose is served by taking its most accepted view. Originating in the classical Greek city-states, and meaning the direct rule of the demos – the citizen body – by show of hands in all matters of general concern, in the large size states of today, democracy has become indirect or representative. As representation is sought through election, the criteria for democracy are: (i) whether the election is free in the sense that it is held frequently and periodically, whether every citizen has the right to vote, whether candidates and parties are free to campaign against the government of the day, whether the voter is protected against intimidation by the secrecy of the ballot; (ii) whether the election provides an effective choice, *i.e.*, the choice of the electors is not limited to a single party and whether a majority vote against the government in power leads to a change of government; (iii) whether the elected body of representatives has the right of legislation, the right to vote taxes and control the budget, and the right to publicly question, discuss, criticize, and oppose government measures without being subject to threats of interference or arrest. Over and above these formal criteria, which ensure right representation of the people and decision-making by the majority of them, democracy is based on a belief in the value of the individual who is entitled to certain basic rights not to be taken away even by a majority decision. Such rights are normally enumerated in the

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32. For a brief but not so recent variants of democracy see, C.B. Macpherson, *The Real World of Democracy* (1972).

constitution or are otherwise recognized as part of it. The modern democracies are, therefore, called constitutional democracies because the majority decisions are subject to the constitutional limitation.<sup>33</sup> Any violation of these limitations makes the majority decision invalid and can be so declared by an independent court or tribunal resort to which is generally ensured by the constitution. The extent of exercise of such power by the court or tribunal is not free from controversy yet it is universally recognized that it is not inconsistent with democracy. Any system that fails to satisfy the foregoing criteria may not be called democracy.

Since the concern for democracy here is limited to establishing a relationship between federalism and democracy, it is not necessary to go into all nuances of democracy. From an assessment of the working of different constitutions it can be concluded that while democracy may succeed both in federal as well as in unitary governments federalism cannot succeed without democracy. Several European unitary constitutions and governments, including those of France and England have mature democracy. But no example is known of federal government, past or present, without democracy. All federal governments around the world such as of the United States, Canada, Switzerland, and Australia are also mature democracies. But no constitution such as of several Latin American countries or of the erstwhile Soviet Union could establish a federal government for want of democracy. Therefore, the conclusion that federalism cannot come into existence or succeed in its operation without democracy is inescapable.

Two other conclusions can also be arrived at though they are not as conclusive as the one stated above. One of them is that democracy may in due course lead to the establishment of a federal government under a quasi-federal or even under a unitary constitution. Canada is the prominent example of the former and the recent developments in the United Kingdom creating separate Parliament for Scotland and legislative assembly for Wales and Northern Ireland are example of the latter.<sup>34</sup> The other conclusion is that though without democracy federalism is impossible, federalism also supports and strengthens democracy. Exercise of democracy not at one but rather at two or sometimes at three levels of government makes people more democracy oriented. They learn to participate in government and decision-making. A deeper democratic

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33. See, generally, C.J. Friedrich, *Constitutional Government and Democracy* (Indian edition, 1966, reprint 1974).

34. For the developments in the United Kingdom see, e.g., B. Hadfield, "The Devolved United Kingdom" (*mimeo.* Paper read in the Seminar on Federalism and Regionalism held on 12-14 Nov. 2003 at Puebla, Mexico). Also see E. Barendt, *An Introduction to Constitutional Law* 51ff (1998).

spirit reflected in the following statement of Chen also develops with federalism:<sup>35</sup>

Just as the essence of the federal form of government is the notion of divided governmental authority, so the essence of a federal society is one in which the people in the society possess and exhibit divided loyalties. This, in turn, compels them to recognize that others in the society also possess divided loyalties. The result, I believe, is the flowering of such values as humility, sharing, tolerance, trust, respect—in a word, balance. In a society with strong elements of diversity and even conflict, there is a greater chance of reconciliation if these values are present.

As democracy is about self-rule and participation of each and every individual in the decision making process, it implies taking into account every individual and his views about the running of a society. Federalism is also based on the recognition and respect of the diversity of the people within the society. Such recognition and respect promotes an essential aspect of democracy.

Federalism is not merely about the distribution of powers between the central and regional governments. Behind such a distribution is a vision of securing and ensuring the creation of a particular form of political institution which reflects and acknowledges diversity. Federalism, as an ideology, holds that the ideal organisation of human affairs is best reflected in the celebration of diversity through unity. “Underlying the political agenda of federalists is the presumption of the worth and validity of diversity.”<sup>36</sup> Democracy, says Friedrich, “far from clashing with federalism, now is seen to require it whenever a composite community exhibits more than one level of communal existence in terms of distinctive values, interests and beliefs.”<sup>37</sup>

Support for these propositions can be found in the developments in Indian federalism as well as democracy. Federalism is not, but democracy is one of the three strands of the seamless web of the Indian Constitution.<sup>38</sup> Democracy is fully ensured and institutionalized in the Constitution. Unlike federalism it has always been recognized as one of the basic features of the Constitution ever since the Supreme Court read

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35. Chen, *supra* note 9 at 859-60.

36. *Id.* at 852.

37. *Supra* note 33 at 197.

38. The three strands of seamless web is a discovery by Austin, *supra* note 13 at 6. He summarizes these strands as: “protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the mass of Indians.”

the concept of basic features into it.<sup>39</sup> The Constitution embodies all that was necessary and desirable to establish and operate democracy. In spite of India's widespread poverty and illiteracy at the time of making the Constitution and even now the Constitution provides for universal adult franchise for the purpose of electing the national Parliament and state assemblies.<sup>40</sup> Although the right to vote is not a fundamental or common law right, it is a constitutional right.<sup>41</sup> The elections to the representative houses of Parliament and state assemblies are held every five years.<sup>42</sup> The people also elect the head of the state, the President of India, indirectly every five years.<sup>43</sup> Now with the introduction of the third tier of the government, elections after every five years have been made obligatory even for municipalities and village panchayats.<sup>44</sup> To ensure free and fair elections the conduct, superintendence, direction and control of all elections except the elections at the third tier have been entrusted to the Election Commission whose autonomy and independence is fully guaranteed in the Constitution and the laws relating to elections.<sup>45</sup> Provision for an independent election commission in each state for conducting elections to municipalities and panchayats is also made.<sup>46</sup> Subject to certain conditions like citizenship, age, character and solvency of the individual everyone is entitled to be a candidate for any elective position.<sup>47</sup> The laws relating to elections ensure secrecy of ballot and fair and free electioneering. During the election process courts cannot interfere in election matters but they can do so after the election process is over.<sup>48</sup> The democratic process including elections is reinforced by fundamental rights, among others, to equality and liberty and their enforcement in courts guaranteed in the Constitution.<sup>49</sup> Although all elections in every respect may not have always been ideal,

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39. See, *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 and other later cases on the basic features, particularly, *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 412.

40. See the Constitution, arts. 325-26.

41. See, *People's Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363.

42. *Supra* note 40, arts. 83 and 172. Elections may be held before the expiry of five years in case the elected house is dissolved before that period. They may also be extended during emergency for one year at a time but not beyond six months after the end of emergency.

43. *Id.*, arts. 54-56.

44. *Id.*, arts. 243-E and 243-U.

45. *Id.*, art. 324.

46. *Id.*, art. 243-K and 243-ZA.

47. *Id.*, arts. 58, 84, 173, 243-F and 243-V.

48. *Id.*, art. 329.

49. *Id.*, part III, arts. 12-35.

by and large their orderly conduct and fairness have been acknowledged world over.

Federalism and federal tendencies in India have grown in proportion to the growth and strength of its democracy. Monopoly of one party rule at the central and state levels until 1967 did not let federalism grow fast enough. As people within the party started exercising their democratic rights and split it at the state level, the states started asserting their autonomy. Though because of the strong hold of one party at the centre, for sometime the states could not enjoy enough autonomy, the state claims for greater autonomy started getting desired recognition with the establishment of minority governments since 1989 and coalitions since 1989 at the centre. The 1975-77 Emergency, which throttled democracy, also throttled federalism. Even though formally the state governments continued to be in office, the centre wielded its powers as if it were a unitary Constitution.<sup>50</sup> Since the first break of one party rule at the centre in 1977, emergency provisions have never been invoked and even the provision under which the centre is authorized to take over the government of a state and which the centre used frequently and often to punish non-party governments, has not been invoked during the last few years, especially because of multi-party government at the centre and the growing federal tendencies for greater autonomy for the states. Such take over was both anti-democratic and anti-federal. Its non-use speaks as much for democracy as for federalism.

With increasing federal tendencies since 1989 democracy has also gained in strength. Besides increased intra and inter party democracy, the introduction of third level of governments in 1992 has taken the democratic process to the grassroots level in which people of the smallest geographical unit of the society determine and elect their representatives and govern through them. The Constitution has ensured participation of all sections of the society in the democratic governance of the country by making special provisions for ensuring representation of excluded, weaker and minority sections of the society in Parliament and state assemblies.<sup>51</sup> At the third level of government the Constitution also makes similar arrangement for women.<sup>52</sup> These provisions help bringing into democratic process those who would have otherwise remained outside or would have taken much longer to enter and effectively participate in it. Effort is on to ensure adequate representation of women in Parliament and state assemblies.

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50. The Constitution, ofcourse authorizes such an arrangement during the Emergency: see, arts. 352-54.

51. *Id.*, arts. 330-34.

52. *Id.*, arts. 243-D and 243-T.

These developments in India reasonably help in appreciating the validity of the propositions that have been expressed above that democracy is a precondition for the success of federalism and that federalism promotes democracy.<sup>53</sup>

#### IV Human Rights

The relationship between federalism and human rights is not as clear as the relationship between federalism and democracy or between democracy and human rights. Apparently realization of human rights should not depend upon the federal or unitary form of government and equally good or bad human rights record could exist in both. Therefore, it could be said that no link exists between federalism and human rights. But in fact that is not the case. All the successful federal governments that have been mentioned above, namely, United States, Canada, Australia and Switzerland also have good human rights record. But as has been noted above they are also democratic governments. It is difficult to say whether their good human rights record is because of democracy or because of federalism. It has been noted above that democracy is a precondition for federalism but the reverse of it is not true. It is also notable that all modern democracies have a good human rights record even though it may not have been the case in the past. The explanation for the past bad human rights record could either be that the phenomenon of human rights is itself of recent origin *vis-à-vis* democracy or that democracy itself had either temporarily broken down or had not taken its roots sufficiently. In that case a link between democracy and human rights stands established. But no such link gets established between federalism and human rights except through the medium of democracy which, as has been noted above, is an essential condition for federalism. The link between human rights and democracy and between democracy and federalism, however, establishes a link between federalism and human rights too. It may be stated that federalism is dependent on democracy and democracy is dependent on human rights so no federalism can exist without human rights. Thus one can arrive at the proposition supported by facts that all federal governments also have good human rights record. But can one also establish the reverse of it that federalism also helps in respecting the human rights?

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53. On this, among others, see N. Mukarji and B. Arora, "Conclusion: Restructuring Federal Democracy" in N. Mukarji and B. Arora (eds.), *Federalism in India* 265ff.(1992). For an interesting note on Indian democracy see, A. Nandy, "Contending Stories in the Culture of Indian Politics: Traditions and Future of Democracy" in V. A. Pai Panandiker and A. Nandy (eds.), *Contemporary India* 297 (1999).

As the human rights record is not necessarily better in the federal governments than in many unitary governments, logically it should be difficult to arrive at the conclusion that federalism alone ensures respect for human rights. However, in the evolution of constitutionalism, *i.e.*, of limited government, the notions of rights, separation of powers and federalism have emerged almost simultaneously or in that order without any notable time gap. As is well known the doctrine of separation of powers is accepted as a guarantee against the violation of liberty of the individual by the state because it prevents the concentration of all state power in one person or body. Federalism also performs the same function by dividing powers of the state between two, or sometimes three levels of governments. James Madison rightly emphasized this point in the making of the Constitution of the United States.<sup>54</sup> More recently Eric Barendt has said, "a federal constitution, like the separation of powers principle, reduces the risk of a concentration of power and the danger of arbitrary government."<sup>55</sup> If diffusion of powers assures respect for human rights then, it seems, division of powers between different levels of government is even a greater assurance of respect for human rights than separation of powers. The totality of powers gets divided not only between different wings of the same government but also between different governments conscious of their identity, independence and autonomy. Apparently this aspect does not seem to have been researched but some developments in the history of the United States support this proposition. The Bill of Rights in the U.S. Constitution was introduced as protection against the federal government, but soon it was realized that states rather than the federal government were violating human rights, especially in the form and as a consequence of slavery. The federal government ultimately had to engage in the civil war to abolish slavery and to ensure equal protection of laws to all, including the making of Civil Rights Acts. Of course for nearly a century after that the U.S. Supreme Court did not support these measures adequately, but from the end of World War II onwards it started giving expansive meaning to the bill of rights, particularly to the equal protection clause supported by the federal government in the implementation of that interpretation and finding means to enforce them through law. In the process the bill of rights, which was a guarantee against the federal government only, has become binding upon the states too. Today the U.S. scholars, who have studied the relationship between federalism and human rights, generally agree "that federalism has always played a

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54. See, Chen, *supra* note 9 at 861-62. Also see generally, C.H. McIlwain, *Constitutionalism: Ancient and Modern* (1940, 7th print, 1987).

55. E. Barendt, *supra* note 34 at 58.

significant role in the protection of rights through the structure of government created by it.”<sup>56</sup> From the state seeking protection of human rights against the federal government in the Constitution, the United States has moved to protecting those rights from violations by the states to extending the guarantee of those rights against the states and finally to an expansive interpretation and application of those rights by the states themselves.<sup>57</sup> It is not possible to give such a clear account of other federations of which Switzerland has a bill of rights, Canada has introduced only recently and Australia does not have yet. But support for the foregoing propositions can be seen in somewhat similar developments in India.

To begin with though the demand for a bill of rights against the colonial British government in India had little to do with federalism, in the ultimate blueprint for a constitution for India, federalism was definitely considered as a guarantee for the protection and autonomy of minorities.<sup>58</sup> Following this blueprint the objective resolution moved in the Constituent Assembly, which made and adopted the present Constitution of India, retaining the federal element as such also very specifically introduced provisions for a bill of rights along with special protection to minorities.<sup>59</sup> The introduction of the provision for the bill of rights was an assertion of a long-standing demand of the national leaders against the colonial rulers as well as an expression of their doubt whether federalism alone would adequately protect the rights of the people and particularly of the minorities. Therefore, as has been noted above, after the declaration of independence from British rule though the constitution makers agreed to change the character of federalism from weak to strong centre, they did not in any way dilute their stand on the bill of rights. It is felt that in this move they saw a better guarantee of rights in a strong centre equally bound by a bill of rights as the states. The bill of rights in India binds the states as much

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56. Chen, *supra* note 9 at 864.

57. *Id.* at 868.

58. The earliest mention of a bill of rights is found in the Constitution of India Bill 1895, which was repeated in the Commonwealth of India Bill, 1925 and subsequent documents. While the 1895 Bill envisaged a unitary government the 1925 Bill had introduced the federal element. A federal arrangement was envisaged in the Government of India Act, 1935 without a bill of rights. The federal aspect of the Act could, however, not come into operation. Finally, the Cabinet Mission Plan of 16 May 1946, which was the starting point for the present Constitution of India, envisaged a federal government in which the centre would have enumerated powers while the states would have the residue. Federal arrangement was considered as the guarantee for the protection of Muslim minority in India. For all these and other relevant documents and developments see, Shiva Rao, *supra* note 17, vol. I.

59. For the text of Resolution see, Shiva Rao, *id.*, vol. II at 3.

as it binds the centre. From the very beginning of the Constitution in January 1950, one finds more complaints of violation of rights against the states than against the centre. Most of the complaints against the centre relate to emergency or national security issues and a very few with respect to other issues. The violations of rights by the states could be effectively remedied because India has a single judiciary which can interpret and apply state laws as much as the central laws. As India does not have separate state constitutions, the same judiciary can also interpret and apply the Constitution. Even in such situation examples are not missing when the highest court at the state level, *i.e.*, the high court whose territorial jurisdiction with a few exceptions coincides with the state territory, condones even gross violations of rights by the states which in many cases have ultimately been corrected by the Supreme Court. There may be, as has already been noted, a few examples such as *A.D.M. Jablapur v. Shivakant Shukla*<sup>60</sup> related to emergency or national security where the high courts took more liberal view of the rights than the Supreme Court. But many examples could be found of high courts taking a narrow view of the rights in denying the remedies to the victims of those violations which in many cases were corrected by the Supreme Court. To take a few recent examples, the Supreme Court set aside a high court decision which justified a ban on the exhibition of a film because of fear of violence;<sup>61</sup> it also set aside a high court decision declining retrial in a mass murder case of clear miscarriage of justice against a minority community;<sup>62</sup> and it stayed a high court order that allowed criminal investigation against an author for allegedly making some derogatory remarks against a revered historical figure – Chhatrapati Shivaji.<sup>63</sup> Many more such examples can be found since the commencement of the Constitution until now. They go to support the idea that if the states in India were independent countries instead of being constituents of a federation they would have tolerated such violations of rights even if the rights were guaranteed in their constitutions. It is the federal arrangement which has remedied such violations. Similarly, as noted above, emergencies have become matters of past apparently because of developments towards robust federalism and, therefore, partly because of constitutional amendments and partly because of practical politics the repetition of *Shivakant Shukla* is foreclosed. Thus, the Indian situation reasonably establishes a link between federalism and protection of human rights.

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60. AIR 1976 SC 1207.

61. *S. Rangrajan v. P. Jagjivan Ram*, (1989) 2 SCC 574.

62. *Zahira v. State of Gujarat*, (2004) 4 SCC 158.

63. *The Hindu* May 21, 2004 at 11.

The growth of federalism in India also supports the other aspect of relationship between federalism and human rights. Human rights are primarily concerned with human dignity and autonomy. Realisation of increasing claim for autonomy at the regional or state level by people in different parts of the country is expected to create realization among people of different states that others also have a similar claim to autonomy as they do. Consequently they learn not only to respect the autonomy of each other as territorial units but also as groups and individuals. While initially there were violent fights between or among different groups for the realization of their autonomy, now it is sought through discussion and concessions. The increase in the number of states from within the same territory is proof of that. Once a person learns to respect the autonomy of others it will automatically improve the situation of human rights. Although occasional spurt of communal rights disproves this proposition, it is hoped that in course of time such happenings will also become a matter of past. Further, by conceding or recognizing opportunity to people to decide regionally or locally federalism assumes existence of power, liberty or rights in the people and the right to be different in some matters while similar in others.

Thus, though apparently one may have difficulty in seeing any link between federalism and human rights and may also come to the conclusion that federalism cannot prevent tyranny, it is to be stated firmly that tyranny and federalism cannot go together. A tyrannical federalism is a self-contradiction. A federal state must be democratic and a democratic state must respect human rights. Therefore, a federal state must also respect human rights. To express it as a syllogism: a federal state is a democratic state; a democratic state respects human rights; therefore all federal states respect human rights.

## V Conclusion

The idea of federalism, like many other ideas, may remain debatable, but the difference between a federal and a unitary government is undisputed. A federal government assumes that unlike the unitary government having a monopoly over all powers of the government, it must share the totality of the powers between a central and more than one regional governments. As regards the share of each government, some guidelines may be suggested but no hard and fast rules can be laid down in advance. It will depend upon the situation of each federating country. In the idea of sharing, the idea of negotiations and respect for each other's share is implicit. Both of these ideas relate federalism to democracy and human rights. Those who are willing to negotiate and respect each other's share must pass through some democratic process and assume that as much as one loves one's own share the other must

also be loving its own. This process and assumption is not a one-time affair but rather must continue all along in a federal arrangement. Those who cannot either pass through and continue with this process or who do not have the assumption and carry it forward cannot in the first instance create a federal government and even if they succeed in creating one, they cannot run it. The creation and running of the federal government is, therefore, dependent upon the democratic process and respect for human rights. Though democracy and human rights are conditions precedent for federalism, in course of time they themselves start getting sustenance and support from federalism. Federalism not only reduces the chances of derogation from them, but it also forecloses the possibility of returning to autocracy or tyranny.<sup>64</sup> So long as federalism survives tyranny has no scope for emergence. The two cannot co-exist. On the contrary as long as federalism flourishes democracy and respect for human rights also flourish.

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64. According to Friedrich, *supra* note 33 at 197 even: "Absolutist democracy is incompatible with federalism, because it does not permit an effective division of power." *Contra.*, Rosenn, *supra* note 12 at 49.