WHY AND HOW FEDERALISM MATTERS IN ELIMINATION OF DISPARITIES AND PROMOTION OF EQUAL OPPORTUNITIES FOR POSITIVE RIGHTS, LIBERTIES AND WELFARE?*

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Abstract

Multiplicity of power devices in federalism produces potentialities of differentiations and disparities. But federalism's commitment to justice and democracy imposes obligation upon power holders to act with a sense of responsibility to avoid disparities in access to positive rights and welfare. The features of economic and social asymmetry are to be tackled by the benevolent goal of equal liberty of all. Effective utilization of the centrally sponsored welfare schemes by the states, fiscal federalism's focus on development of backward states and equitable apportionment of inter-state water by using the principle of non-disparity do expand equal rights. The question of diversity of jurisdiction versus rights can neither be dealt mechanically nor in obstructing the way of social justice and multiculturalism. Cooperative federalism in the matter of combating organized crimes or in rectifying state inaction tends to create an atmosphere supportive of rights. Asymmetry by special status is prone for egalitarian influence.

I Introduction

BY VIRTUE of the fact that in federal systems the power divided is power controlled, there is inherent inclination to regulate the abuse of power and protect liberty.[1] But along with power, responsibility is also divided and competence to fulfill the responsibility, especially towards people's welfare, is also divided. Some of

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1. James Bryce, I *The American Commonwealth* 350-53 (London: Macmilan & Co. 1919). The potentiality of federalism, rule of law and separation of powers as the basis for judicial review to uphold fundamental rights guaranteed in part III of the Constitution is recognized in *State of West Bengal* v. *Committee for Protection of Democratic Rights*, AIR 2010 SC 1476 para 44. Proudhan views that federalism is the best compromise between liberty and authority. Proudhan Pierre Joseph, *The Principle of Federation* 38 (Toronto: University of Toronto Press, 1979); Madison considered it as an instrument to protect minorities against the majority rule. Hamilton, Madison and Jay, *The Federalist Papers* (1787-8)esp. nos. 10 and 51; For the proposition that federalism is a constitutional arrangement for division of powers between two layers of government, see William Riker, *Federalism: Origin, Operation and Significance* 11 (Boston: Little, Brown & Co., 1964) ; Michael Burgess, *Comparative Federalism: Theory and Practice* 12-3 (London: Routlege, 2006); Jan Erk, *Explaining Federalism* 3-5 (London: Routlege, 2008).

the nationally planned constitutional, legislative or administrative schemes offering benefits to people but administered through federal units are not given equal effect in all the states.[2] As a result, levels of human development index reflecting access to or attainment in the fields of education, health, poverty-eradication, women's protection and child care vary from state to state.[3] Living standards in various states do not reach levels of dignity; and in some states, they fall far below the satisfactory level. This is in addition to the economic-geographic differences amidst states in the matter of natural resources and arising from past efforts or inactions. Unless a meaningful coordination is evolved amidst the bearers of responsibility, the chance of doing good may be missed. Added to this, a multicultural asymmetric federalism tends to pose the problem of preference of interests of local communities whether linguistic, ethnic, regional or religious, at the cost of minorities.[4] The extreme approaches of secession and persecution of non-locals resulting in internal displacements, migrations and human right violations have threatened security, unity and stability which federalism fondly aspires for. Flexibility in formation of new states by redrawing the internal political map through democratic process has often raised the issue of right of self-determination of the champions of new state *vis-à-vis* the majority voice. The post-reorganization tasks of harmonization, regional balancing and protection of equitable principles in the matter of service conditions of public servants are not satisfactorily done resulting in disparities. The requirements of equitable access to natural resources like inter-state river and continuation of ecological balance cast a burden of environmental protection upon the polity as a whole transcending the federal borders. Globalization has altered the traditional understanding about federalism as a set of autonomous and coordinating governmental systems, and moved towards creating constellation of centres of powers and withdrawal from welfare policy. Its impact on unequal socio-economic

2. See for example the facts of *Peoples Union for Civil Liberties* v. *Union of India*, AIR 2008 SC 495 where the extent of use of centrally provided funds under Janani Suraksha Yojana by various states ranged from 1.2 per cent in Arunachal Pradesh to 111.7 per cent in Andhra Pradesh whereas in some union territories it is 0 per cent and the national average being 71 per cent. In the matter of utilization of funds under MGNREGA also variation is considerable, and the poorer states have not adequately made use of the funds. See Pinaki Chakraborty, 'Implementation of Employment Guarantee: A Preliminary Appraisal'*Economic and Political Weekly* Feb 17, 2007 at 548. The position relating to implementation of Sarva Shiksha Abhiyan scheme in primary and compulsory education also reflects disparities as noted by VII *MM Punchchi Commission on Centre-State Relations* Ch. 4 (2010).

3. According to the UNDP Report of Human Development Index for Indian States, HDI varies from 0.442 in Orissa to 0.625 in Kerala, the national average being 0.504.

4. In the matter of public employment, state policy of residence based discrimination by the states is prohibited under art. 16. Language based discrimination in access to employment is also invalidated by the Supreme court in *V N Sunanda Reddy* v. *State of Andhra Pradesh,* 1995 Supp (2) SCC 235.

factors of the federal units has exacerbated the differences. Lop-sided development and regional imbalances amidst various states exhibiting large scale disparities has not augured well for welfare system, and has seriously contested the claim of equality. Federalism as a scheme and tool of democracy has not resolved these problems, although it has attained great success in keeping the unity of vast and ethno-linguistically diverse country intact.[5]

However, along with the ascendance of values of fundamental human rights and welfare, which the Indian polity is experiencing in an admirable way, federalism ought to assume the role of supporting effectuation of these values brushing aside the dismal distractions. Looking to federalism's social, cultural and economic responsibilities rather than exclusively to its political or legalistic dimensions, a question arises, whether part III and part IV of the Constitution of India are sufficiently orienting towards satisfactory application of federalism towards a better human rights system? In the backdrop of proliferation of positive rights of life and varieties of affirmative social justice action, the latter of which is continuously politicized, whether differential regional positions are to be silently digested as logical outcome or peculiarities of diversity of jurisdictions or whether the larger principle of equality shall ensure a minimum standard of positive rights? Or whether Central Government's 'monopoly' in the matter of identifying the beneficiaries, especially the scheduled castes and scheduled tribes, suffocates state's discretion? When the equality argument is itself on slippery slope sometimes,[6] whether the fraternity principle can help in augmenting the moral worthiness of the system? Whether the inbuilt coercive mechanism of centre-state relations or the benevolence of cooperative federalism has helped the cause of human rights? In brief, is federalism working towards equal opportunities for well-being of all citizens and towards elimination of disparities in access to good things? These are some of the questions taken for discussion in this paper. The paper focuses on the Indian position by analyzing the conceptual understanding of federalism, relevant constitutional text, decisional law, reports of commissions on centre-state relations, literature on comparative federalism and constitutional development. It argues that the situation prevalent for protection of equal human rights and welfare in all the federal units shall be fair without producing an impression that to be born and to reside in a state is a curse by itself; on the contrary, to have domicile of any part of the country should be a blessing. An integrated reading of all the parts of the Constitution and coherence of the legal system as a whole would be required for the purpose.

5. Harihar Bhattacharyya, *Federalism in Asia* 12 (London: Routlege, 2010).

6. *Transport and Dock Workers Union* v. *Mumbai Port Trust* (2011) 2 SCC 575.

II Federalism, human rights and welfare

The purpose of formation of state is to uphold the just law that recognizes equal liberties and welfare of all.[7] Federalism, as a type of state, is an enduring expression of the principle of constitutionalism[8] that retains the unity of federal units and effectuates the constitutional goals through mutual cooperation and coordination amidst central and state governments. Going beyond accident of history, it is a grand design to comprehend the advantages of self-government at regional level and of military strength and vast market or strong economy at the national level.[9] Without effacing local patriotism and social identities of territorial character, but by stimulating all the political participants towards democratic functioning and experimenting, conceptually it exhibits an article of faith in distributing blessings of liberty equally amidst all. However, lack of uniformity in legislation and administration, tendency of factionalism and fear of disunity threaten the idea of equal liberties of all.[10] The social and cultural dimensions of federalism were reflected in the accommodation of the factors of common ancestry, common language, local spirit and common religion in various federal units and its political and economic dimensions emphasized on strong political system with vast domestic market and economic activities.[11] Tocqueville regarded that independence of the government of each state in its sphere provided an opportunity to respond to the local social conditions and reflect or conserve the regional culture.[12] It is a fact of American

7. "Athah dharmartha phalaya rajyaya namah" (My salutation to the State, which ensures acquiring of wealth and fulfillment of desires without violating Dharma), according to Acharya Somadeva, Nitivakyamrita (1000AD) cited in M Rama Jois, *Raja Dharma with Lessons on Rajaniti* 5 (New Delhi: Universal Publishing Co, 2011).

8. C. Rossiter (Ed.), *The Federalist Papers* xii (New York: The New American Library, 1961).

9. James Bryce lists the advantages of federalism: national government without loss of state administration; comfortable for developing a vast territory with different backgrounds; promoting art of self-government at the local level; scope for regional experimentation; collectivity of force and vastness of market. James Bryce, I *The American Commonwealth* 350-53 (London: Macmillan & C0. 1919).

10. *Ibid.* Harold Laski argued that federalism produced weak governments incapable of addressing the questions of industrialization and mass democracy, and hence made federalism an obsolescent institution. Harold J Laski, 'The Obsolescence of Federalism' 3*New Republic* 367-69 (1939).

11. As Donald Elazar viewed, "Federalizing involves both the creation and maintenance of unity and the diffusion of power in the name of diversity", D. Elazar, *Exploring Federalism* 64 (Alabama: The University of Alabama, 1987); AV, Dicey's view of federalism that it emerges from desire for union of states without desire for unity also reflects this proposition. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 141 (London: Macmillan & Co., 1950); Ronald Watt regarded that while federalism was not a panacea, it made the developing countries to combine through the representative institutions, the benefits of both unity and diversity. Ronald Watts, *New Federations: Experiments with the Commonwealth* 353 (Oxford: Clarendon Press, 1966).

12. Alex de Tocqueville, *Democracy in America*, 61 and 80.

history that diversity of colonial states had been brought under the common umbrella of federation after understanding the weaknesses of confederation and determining to have a bigger say for the majority of the national will.[13] The aspiration for fair living standard and equal conditions in all the federating units kept America above the challenges of civil war. Convergence of the triumph of racial equality with maintenance of national unity in America conveys a message that the idea of equal human rights forms prerequisite of federalism. The remarkable way in which American federalism became dynamic and adaptive to accommodate the needs of New Deal, desegregation and clean environment exhibits the intensive concern of federalism for human rights and welfare.[14] Canada could flourish as a stable federal system by ensuring equality, language rights and ethnic rights.[15] Her commitment to promote equal opportunities and reduce disparities is constitutionally ordained.[16] Sidgwick's analysis that federalism is a transitional stage where society's dissolution of diversities, narrow local patriotism and discriminations gradually occurs, and is a movement towards an egalitarian order focuses on political society's ultimate aim of promoting human rights.[17] Going a step ahead, Livingston observed, "The essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected."[18] William Riker who believed in federalism as a constitutional bargain, viewed that federalism had no unique virtues, moral or otherwise, apart from providing interstices in the social order in which personal liberties could thrive and minority rights get protected.[19] Thus, orientation towards human rights is inherent and implicit in federalism.

The legalistic approach of K C Wheare that federalism is a form of government where the orders of government are coordinate and independent focused on constitutional division of competences between centre and the states.[20] While the Wheare approach was not averse to liberties, by looking only from the angle of

13. The Declaration of War of Independence, the Confederation articles and the Constitution's commitment stated in terms of We the People of the United States to bring blessings of liberty to all makes this point clear.

14. Stephen Breyer, 'Does Federalism Make a Difference?' 651*Public Law* 660-61 (1999).

15. The division of powers approach, implied and express bill of rights approach and the Charter of 1982 have built national standard for protection of civil liberties. See Peter W Hogg, *Constitutional Law of Canada* 796 (Toronto: Carswell, 3rd ed. 1992).

16. S. 36 of Canadian Charter of Rights and Freedoms, 1982.

17. H. Sidgwick, *Elements of Politics* 518-19 (London: Macmillan & Co., 1891).

18. W.S. Livingston, 'A Note on the nature of Federalism' 67 *Political Science Quarterly*, Mar. 83-4 (1952).

19. William H Riker, *Federalism: Origin, Operation and Significance* 2 (Boston: Little, Brown & Co., 1964).

20. K.C. Wheare, *Federal Government* 10 (Oxford: Oxford University Press, 4th ed. 1963).

power relations, it missed a holistic discourse. Practically, neither the federal government is limited to its sphere, nor the state governments are independent of federal government's grants and huge assistances. As Alfred Birch said, intergovernmental cooperation and grants altered the very characterization of federalism, especially in the context of welfare era.[21] The factor of interdependence of the central and regional authorities or the element of diversification of society within the federal state has been highlighted as the feature of federalism by Vile and Livingston.[22] Linking federalism with constitutionalism, Carl Friedrich considers federalism as moulding the relation between the inclusive community and the component communities as a system of regularized restraint upon the exercise of governmental power so as to make power and responsibility correlative with the structure of a composite and dynamic community, its interests and needs. According to him, federalism, as an irresistible march of constitutionalism, is expected to serve much larger purposes beyond static pattern of division of powers. Constitutions with strong commitment to fundamental human rights and welfare use federalism as a tool to achieve these goals. However, constitutionalism does not insist on 'empire of uniformity'[23] but envisages responding to the challenges of divided society.[24] By considering federalism as a part of the basic feature of the Constitution[25] and supremacy of the Constitution as a key to the success of federalism, Indian judiciary has laid emphasis on normative character of federalism's functioning towards equal rights and welfare in addition to mutual checks and balances of powers.[26]

A discourse on distinction between symmetrical and asymmetrical federalism by scholars like Charles Tarlton and Ivo Duchacek has explored the social and

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21 A.H. Birch, *Federalism, Finance and Social Legislation in Canada, Australia and the United States* 305 (Oxford: Clarendon Press, 1955).

22 Vile, *The Structure of American Federalism* 198-99 (1961); Livingston, *Federalism and Constitutional Change* 4 (1956).

23 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* Ch.2 (Cambridge: Cambridge University Press, 1995) cited by Nico Krisch, *Beyond Constitutionalism: The Pluralistic Structure of Post-national Law* 63 (Oxford: Oxford University Press, 2010).

24 Nico Krisch, *ibid.*

25 *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918; *Kuldip Nayar* v. *Union of India*, AIR 2006 SC 3127; *State of West Bengal* v. *Committee for Protection of Democratic Rights*, AIR 2010 SC 1476

26 *In Re Article 143 Special reference No. 1,* AIR 1965 SC 745, the Supreme Court observed, "...the essential characteristic of federalism is 'the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."

cultural dimensions of federalism and raised the issues of equal rights in the atmosphere of discriminations by states. According to Tarlton, symmetrical federalism connoted a political order where the federal demarcations are drawn independently of the underlying social structure.[27] Symmetry reflects the extent to which component states share in the conditions and thereby the concerns more or less common to the federal system as a whole.[28] When the harmonious pattern of states partake the general features of the federal nation, symmetry arises. Equal conditions may ideally arise there, although it may not be possible to ensure it in all circumstances. But socio-economic diversities as the forces operating in federalism do not keep the quality and level of federalism uniform throughout the system, and hence asymmetry arises. In asymmetrical federalism, political institutions correspond to the real social federalism beneath them. The outgrowth of social environment shapes the institutions with variable content.[29] Diversities find political expression through local governments of varying degrees and autonomy. Thus, each component will have its unique features distinguishable from other components. According to Michael Burgess, the preconditions of asymmetry include diversity of political traditions, social pluralism, territory–related differences or territoriality, socio-economic factors and demographic patterns.[30] Ivo Duchacek spoke of disparity of power ingredients in federalism arising from variety of factors such as inequality in size, population, economic development, climatic and geographic condition, social structure and predominance of urban or rural interests.[31] While these differences cannot be altogether eliminated, they have real or potential effect upon the working of federalism *vis-à-vis* human rights.[32] The problem of domination of a bigger state upon a smaller state, discriminatory policies of federal units to prefer the locals on

27. Charles d Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' 27*The Journal of Politics* 861 at 869.

28. *Id.* at 867; see for discussion, Michael Burgess, *Comparative Federalism: Theory and Practice* 212-3 (London: Routlege, 2006).

29. Richard Simeon, 'Regionalism and Canadian Political Institutions' in J Peter Meekison (ed), *Canadian Federalism: Myth or Reality?* (Toronto: Methuen, 3rd Ed. 1977) cited in Jan Erk, *Explaining Federalism* 5 (London: Routledge, 2008).

30. Michael Burgess, *supra* note 28.

31. Ivo D Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* 288 (New York: Holt, Reinhart & Winston, 1970).

32. Economic asymmetry amidst Indian States is highlighted as follows: In terms of area Rajasthan is 90 times bigger than smallest state Goa; in terms of population UP is 308 times bigger than the smallest state Sikkim; density of population varies from 13 in Arunachal Pradesh to 901 in West Bengal; in net state domestic product, Maharashtra is 284 times that of the lowest (Sikkim); per capita NSDP of Goa is Rs. 44, 613, which is nine times that of Bihar with Rs. 4813. See M. Govinda Rao and Nirvikar Singh, *Political Economy of Federalism in India* 71-5 (New Delhi: Oxford University Press, 2005).

linguistic, ethnic and regional consideration and negligence in implementing welfare projects are some of the causes of dissatisfaction. Equal representation of states in the federal second chamber is a solution to the problem. While this is not fully recognized in India, multi-party democracy and coalition politics have provided practical solution to the possibility of domination.[33] The factors of linguistic and ethnic differences, taken to the extreme levels of intolerance, may at times engender divisive tendencies. Tarlton theorizes that it is only centralization through its emphasis on shared goals, expectations and aspirations constituting the purpose of federalism that would neutralize secession-potentialities.[34] But this approach undermines the very purpose of federalism, although justifies superiority of the purpose of forming federalism. Instead, ensuring of equal human rights situation in all the states avoids the adverse effect of asymmetrical federalism. This means that 'sons of the soil', 'locals only' and 'our money, our people' approaches are to be seriously interrogated from this perspective. The contested relation between human rights and federalism in contexts of secession ought to be resolved by avoidance of mutual infliction of wounds, and by balancing between freedom and responsibility and between national unity and fair regional autonomy.[35] In fact, the essence of multiculturalism lies in equal rights of different cultural communities and their people, and this has great significance for multicultural federalism. According to Will Kymlicka, federations are best form of togetherness in multicultural or multinational federalism, and contribute for continuance of cultural diversity, protection of minority and self government at different levels.[36] Recognition of special rights of indigenous or tribal communities within the federal unit is a logical extension of the substantive equality approach. The fact that there is a marked tendency even in *de jure* asymmetrical federalism, for example that of India in the context of special provisions for Jammu

33. See for discussion *Kuldip Nayar* v.*Union of India*, AIR 2006 SC 3127.

34. See for discussion Michael Burgess, *Supra* note 28 at 221.

35. According to Andreas Follesdal, "Human rights norms might put a federation at risk by fuelling secessionist movements and the complex web of centre and sub-unit authority in federations is thought to more likely to violate human rights. Central authorities might more easily ignore citizens' human rights with impunity, and sub-units may enjoy immunity from mistreatment of their citizens, contrary to human right requirements. So the forces that seek secession might be further fuelled by both human rights and federal arrangement……" Andreas Follesdal, ' Human Rights, Democracy and Federalism – Part of the Problem or Part of the Solution? Securing Stability in the European Union and the People's republic of China' 17 *Current Politics and Economics of Asia* 211at 213 (2008).

36. Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* 94 (Oxford: Oxford University Press, 2001) cited in Dimitrios Karmis, ""Togetherness" in multinational federal democracies' in Michael Burgess and Alain G Gagnon (ed), *Federal Democracies*46 (London: Routledge, 2010).

and Kashmir,[37] towards the concept of equal human rights and welfare vindicates that for a viable and stable federalism, whether in symmetrical or asymmetrical conditions, protection of equal human rights and welfare becomes crucial.

The discourse on economic federalism also unravels the need for ensuring equality in access to economic goods and services in the working of federalism. Regarding formulation and implementation of welfare policy, the central and state governments have joint responsibility. The politico-economic incentive of each is to get people's admiration for their programmes and consequent political support.[38] While centralized plans, funding and pooling of resources have necessitated a key role on the part of the Central Government, decentralization in the distributive function is compelled because of the need to overcome geographic distance connected to the point of beneficiary's access.[39] The incentive argument persuades both the levels of government to be efficient in their respective levels, a factor that is enabled by proper coordination and collaboration in their efforts. Competitions also arise between the two levels of government, and amidst governments of local jurisdiction to convince the people about their best service and excellent providing of the benefit.[40] The spillover of such positive competitive spirit will be strengthening the welfare policy.[41] For example, efforts of participating states and the Central Government in avoidance of pollution of an inter-state river synergize the collaborative exercise. On the contrary, hostile competition in the matter of sharing of inter-state river water resource exhibited through long drawn water dispute or exercising control over a dam that benefits another state will have the externality of friction loss. Similarly, the incentive argument involved in economics of 'locals only' rule is to be judged by comprehensively looking to the effect of 'exclusion' and 'inclusive' protection arising from the policy. In the background of the problem of inter-state migration of labour in search of better economic opportunities, the positive competition to retain the labour in their respective habitats by augmenting the opportunities will have welcome result. The programmes relating to rural employment guarantee, compulsory primary education to all children and health and medical benefits have necessitated the active participation of beneficiaries in effectuation and social auditing of the centrally sponsored schemes.[42] This is a new

37. See *infra* for discussion

38. M. Govinda Rao and Nirvikar Singh, *supra* note 32 at 24.

39. *Id.* at 25.

40. *Id.* at 27.

41. *Id.* at 29.

42. According to the Commission on Centre-State Relations, (MM Punchchi Commission 2010 vol. 7 para 4.14.03) "Social audit is a unique approach through which the people work alongside their government in the designing of policies, schemes and legislations. Further, the people's voice in the execution and implementation of them also becomes a pre-requisite and an indispensable component."

experiment in connecting the federal structure to the people and local self-governing institutions. This role of the third force at the local level is crucial for equal access to positive rights because of its ability to inform about the local needs and persuade for activist help. This can be termed as one form of collaborative federalism, which goes beyond mere cooperation.[43] It envisages participation of federal units in the process of planning the programme, involvement of *Panchayat Raj* in implementation of it and people's role as beneficiaries and social auditors.

With a new thinking in constitutional theory that for constitutional law power centres are several in the post-national[44] era, and that internationalization, ethnic pluralism and political compromises have replaced monolithic constitutionalism, federalism's conceptual base has also undergone big change.[45] The resolution of tension between sovereign claims of the federal and group level invoked issues of communitarian identity and protection of human rights in constitutional jurisprudence.[46] Application of international human rights principles in domestic law, accommodation of new formation of sub-national units and recognition of special rights of indigenous communities, the poor and the vulnerable within the framework of human rights and welfarism ought to be considered as giving fresh inputs for the functioning of federalism.[47] This brings the rights discourse close to the functioning of federalism.

Another course through which federalism is connected to human rights is because of their common link with democracy. In spreading roots of autonomy and good governance, federalism relies on democracy, for which human rights are prerequisite. As M P Singh views, "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."[48]

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43. Here, "the federal and provincial governments work collaboratively to attain policy goals, and there is no coercion on part of the federal government." *Id*., para 4.12.02 (b).

44. The term is picked up by J Habermas and others to decouple political processes from nation-state. The shift from one political organization to a constellation of centres is commented upon by Michael Zurn. See Michael Zurn, 'The State in the Postnational Constellation – Societal Denationalization and Multi-Level Governance' ARENA Working Papers, WP99/35 cited by Nico Krisch, *supra* note 23 at 5-6.

45. Nico Krisch, *id.* at 6-14.

46. *Id.* at 64-65.

47. P Ishwara Bhat, 'Constitutional Pluralism in response to Multicultural Reality: A Comparative Reflection on the Indian and Japanese Approaches to Ethnic Minorities' to be published in *DD Basu Memorial Volume* NUJS 2012

48. Mahendra P Singh, 'Federalism, Democracy and Human Rights: Some Reflections with Special Reference to India' 47 *JILI* 445-46 (2005).

Thus, federalism has been conceptually rich and has undergone the process of re-invention and radical change to respond from time to time, to the challenges of ensuring equal liberties and welfare rights to the people. The constitution makers in India responded to the wide ranging and complex problems that challenged the nation, and produced a distinct type to meet the peculiar needs of India on these matters.[49] The considerations of social federalism and arguments of economic federalism are to be looked from the perspective of these constitutional goals. The practical functioning of Indian constitutional law on this matter needs to be surveyed now.

III Elimination of disparities as the key principle and policy: federalism's goal

Choice of equality and social justice as the major theme of the Constitution has set a responsibility on federalism to work for its success. Abstinence from discrimination and ameliorating of the left-behind are the two major obligations flowing from this theme. Part III and part IV contemplate both of these tasks. According to article 38(2), "The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different area or engaged in different vocation." This envisages an all-round and inclusive development of the society as a whole. It reflects clear ideology of socialism, distributive justice and pragmatic goal for economic federalism. Achieving of this objective through implementation of the directive principles in article 39 (b) and (c) becomes systematic.[50] Saving of laws implementing these directives from the challenges based on article 14 and 19 as per article 31C adds strength to the state effort. Since such economic reform laws are enacted and implemented by both central and state governments, federalism's concerted efforts towards elimination of disparities go a long way in the direction of socio-economic justice.

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49 National Commission to Review the Working of the Constitution 2002: 2.8.4 "Federalism, as a political choice, was an inevitable necessity in view of the vast size of the country and its diverse regional, linguistic, ethnic, cultural patterns. But the federalism that the wise founders conceived was not the conventional or the ideal concept of federalism. …The depth, range, diversity and complexity of its (India's) problems could baffle any pre-set political pattern or theoretical solutions or off-the-shelf-solutions as obvious political choices. The pattern was indeed sui-generis."

50 Art. 39 The State shall, in particular, direct its policy towards securing (b)that the ownership and control of the material resources of the community are so distributed as to sub serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

Article 38 (2) is comparable to section 36 (1) of the Canada Act 1982**,** which says, "Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (*a*) promoting equal opportunities for the well-being of Canadians; (*b*) furthering economic development to reduce disparity in opportunities; and (*c*) providing essential public services of reasonable quality to all Canadians." It is significant that asymmetrical features of economic system are taken up for remediating through constitutional means of federalism. Although it is an ought-proposition,[51] it is a valuable policy of linking federalism with human rights and welfare.

Many of the directive principles of state policy aim at elimination of economic and social disparities and aim at labour welfare, public health, environmental protection and better standard of living. The legislative competence to enact law or exercise executive power in these matters is shared by both the union and the states. In view of the conversion of some of the directives into fundamental rights due to judicial interpretation,[52] all the layers of government have additional responsibility in this sphere. According to the Punchchi Commission, integrated approach relating to various positive rights (health, education, food and employment) by multiple participants of federalism and proper devolution of powers and responsibilities on relevant criteria promote good governance and better delivery system of public goods and services.[53] The access to positive rights relating to basic necessities of life is critical for dignity of life and constitutes the criterion for human development index.

Human Development Index reflecting various states' attainment in providing people's access to health, education and income in the year 2011 indicate as follows: Only few states record high achievement – Kerala (0.625), Punjab (0.569), Himachal Pradesh (0.558), Maharashtra (0.549), Haryana (0.545) and Tamil Nadu (0.544) while the national average being 0.504; Achievement of position just above the national average is made by Uttarakhand (0.515), Gujarat (0.514), West Bengal (0.509), Karnataka (0.508). Andhra Pradesh (0.485), Assam (0.474), Rajasthan and Uttar Pradesh (0.468), and Jharkhand (0.464) lag behind the national average. Seriously falling short of national average are the States of Madhya Pradesh (0.451),

51. Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 3rd ed., 1992).

52. *M.C. Mehta* v. *Union of India,*AIR 1987 SC 1086; *Kishen Pattanayak* v. *State of Orissa,* AIR 1989 SC 677; *People's Union for Civil Liberties* v. *Union of India* (food petition) 2000 (5) SCALE 30; *Consumer Education Research Centre* v. *Union of India,* AIR 1995 SC 922; *J.P. Unnikrishnan* v. *State of AP,* AIR 1993 SC 2178

53 *Supra* note 42, para 4.2.

Chhattisgarh (0.449), Bihar (0.447) and Odisha (0.442). The difference between Kerala and Odisha in HDI is 0.183. The life expectancy in Kerala is 74 and in Madhya Pradesh, Chhattisgarh and Jharkhand it is 58 whereas national average is 63.

While so many reasons can be attributed to the above disparities,[54] unequal implementation of centrally sponsored schemes by the states have added to the unsatisfactory position. With reference to implementation of health, rural employment and primary education schemes, this proposition can be demonstrated as follows:

A typical set of facts about different degree of implementation of centrally sponsored health scheme in various states can be found in *Peoples Union for Civil Liberties* v. *Union of India*.[55] The Janani Suraksha Yojana, a modified scheme of National Maternity Benefit Scheme provided for 100 % central funding of cash assistance to institutional deliveries and monthly allowance of Rs 1000 for six months to the BPL (below poverty line) pregnant women, and the scheme was to be handled by the states. In the year 2006-7, the percentage of eligible beneficiaries covered under the scheme in various states varied from 154 per cent and 138 per cent in Andhra Pradesh and Rajasthan respectively (due to additional coverage by the states) to 6.7 per cent and 3.5 per cent in Uttar Pradesh and Haryana respectively.[56] While 71 per cent of the central fund was utilized, the extent of utilization of funds by the states varied from 111.7 per cent in Andhra Pradesh to 1.2 per cent in Arunachal Pradesh. Some of the union territories had not at all used the amount in spite of the presence of entitled persons. The apex court directed the Union of India and all the state governments and the union territories to continue with the NMBS and ensure that all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery; to file affidavits furnishing the details about the number of eligible women and extent of disbursement of money; and to ensure that the benefits of the scheme reach the intended beneficiaries. The instances of these types might be many, and the adverse impact of failure of cooperative federalism upon positive rights is serious.

The National Rural Employment Guarantee Act, 2005 is a dynamic piece of statute, which makes extensive use of centre-state partnership both in administration and financing of the employment schemes for generating income to the rural people

54 *Nandini Sundar* v. *State of Chhattisgarh* (2011) 7 SCC 547 lists various reasons such as entrenched feudal structure, nexus between political elite, commercial interest and bureaucracy, deficient public infrastructure and stratified social structure for the disparities.

55 AIR 2008 SC 495.

56 J&K 114 per cent, Assam 100 per cent, Orissa, MP, Mizoram (86-75 per cent), Chhattisgarh, Uttaranchal, WB and Tamil Nadu (50-45 per cent), Karnataka, Kerala, Bihar, Punjab and Gujarat (28-20 per cent), Maharashtra, Manipur, Tripura and Goa (18-15 per cent) and Sikkim, Meghalaya, HP and UP (9 - 6.7 per cent).

and for eco-friendly developmental activities beneficial to the village life. The essential policy of providing a minimum 100 days of employment in unskilled manual labour in each year in accordance with the scheme contemplates Central Government's notification, state government's obligation and *panchayat's* identification of the beneficiary.[57] The Central Employment Guarantee Council constituted under section 10, which is an advisory, monitoring and supervisory body has a composition including representatives of both the central and state governments. While the district and intermediate *panchayats* have the power and responsibility of implementing the schemes, identification of the developmental work, listing of the beneficiaries and social auditing of the implementation of the scheme are done by the *grama sabha*.[58] The Central Government's National Employment Guarantee Fund bears the expenses relating to payment of wages to unskilled labour and three fourth of the material costs of the scheme in addition to administrative expenses. The state governments are to bear the payment of unemployment allowance and one fourth of the material costs in addition to state council's administrative expenses.[59] While the legal framework promises for equitable development and meaningful participation, in actual working of the law difficulties have arisen resulting in disparities. Pinaki Chakraborty is of the view that as a demand-driven scheme NREGA has fallen short of the demands of some states and that fund utilization ratio had a skewed position.[60] While in Andhra Pradesh and Gujarat, the fund utilization ratio was satisfactory, in Maharashtra, Karnataka, Bihar and Jharkhand the enrolment of BPL householders was low. The Punchchi Commission has greatly emphasized the importance of social audit, public private partnership and full support from the local officers and people in making NREGA an effective tool.[61] While the framework of the law contemplates a closely intertwined approach of federal participants, failure to effectively use federalism comes in the way of positive rights.

A very high degree of collaborative approach of federalism can be noticed in the context of right to education in recent times. With the transfer of legislative subject on education into concurrent list by 42nd constitutional amendment, doors were opened for centre-state cooperation.[62] An effort to universalize decentralized primary education was initiated by launching a centrally sponsored scheme, Sarva Siskshan Abhiyan. The scheme involved rationalizing and reforming of the administration of primary education, better arrangement for learning, community

57 S. 3.

58 Ss. 14 -17.

59 S. 22.

60 Pinaki Chakraborty, 'Implementation of Employment Guarantee: A Preliminary Appraisal'*Economic and Political Weekly* 548 (Feb. 17, 2007).

61 *Supra* note 42, ch. 4.

62 Entry 25 list III.

ownership and intervention, inclusion and participation of SC/ST, minority and other disadvantaged groups of children, emphasis on girls' education, funding of school expenses by central and state governments starting with 85:15 share of responsibility and gradually ending with 50:50 burden. About the scheme's working, the Comptroller and Auditor General had found that there was diversion of funds and poor supervision. After the incorporation of article 21A,[63] the need for more concerted and full-fledged efforts was felt, and the Right to Education Act, 2009 was passed. According to section 7(1) of the Act, the central and state governments shall have concurrent responsibility for providing funds for carrying out the provisions of the Act. The Central Government shall provide to the state governments, as grants-in-aid revenues, such percentage of expenses as it may determine from time to time in consultation with the state governments. The pattern of funding is flexible and negotiable, as a result of which the efficacy of right to education is challenged when the central funding is inadequate.[64] Developing of national curriculum, evolving and enforcing standards for teacher training, and providing of technical support and resources for innovations are the responsibilities entrusted upon the Central Government. Norms and standards to be complied with for recognition are laid down in the Act, which the Central Government may alter from time to time.[65] Qualifications for appointment and conditions of service of teachers, duties of teachers and teacher-pupil ratio are to be laid down by the Central Government.[66] The National Advisory Council and state advisory councils constituted by respective governments for advising about implementation of the legislation are contemplated.[67] The Central Government may issue to the appropriate government such guidelines for the implementation of the provisions of the Act as it deems fit. From the perspective of federalism, the shared financial responsibility, decentralization of policy and programme and implementation of the Act require proper coordination. The Punchchi Commission expressed fear about imbalance of power created among three tiers of government and resulting unaccountability to the child.[68] Sole power of framing national curriculum in the hands of Central Government without consulting the state governments is also adversely commented by the commission. While upholding constitutional validity of the RTEA on the issue of reservation of 25 per cent of seats to children belonging to weaker sections

63. Art. 21A states, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

64. The reduction of central funding from 75 to 65 and then to 50 is criticized. See *supra* note 42, ch 4, 4.7.05 .

65. S. 19 of RTEA 2009.

66. *Id.*, ss. 23- 25.

67. *Id.*, ss. 33-34.

68. *Supra* note 42, ch.4, 4.7.04.

and disadvantaged classes in the neighbourhood, the Supreme Court incidentally looked into the matter of state government's collaborative role.[69] In spite of the SSA and other measures, the sad reality is that while 94 per cent children aged 6-14 are in schools in Himachal Pradesh, Kerala and Tamil Nadu, only 70 per cent are enrolled in Bihar, where only 63 per cent enrolment is occurring from girls. The literacy rate varies from 93.91 per cent in Kerala to 63.62 per cent in Bihar. In literacy percentage, three states have exceeded 90 per cent; eleven states range between 80 and 90 per cent; thirteen states range between 70 and 80; and six states range between 60 and 70. On the whole, disparity amidst states in the matter of education is glaring. In other federal systems like America, realizing the need for extensive federal support to primary and secondary education was realized, and federal laws like Elementary and Secondary Education Act, 1965 and the No Child Left Behind Act, 2000 provided for extensive financial and other technical support for universalizing the education. The collaborative approach of federalism under the RTE 2009 has a great responsibility in eliminating disparity in access to education.

The constitutional arrangement for fiscal federalism contemplates inter-government transfer of funds through the working of Finance Commission and Planning Commission. Horizontal equity amidst states through filling the 'need-revenue' gap has been the general approach of the Finance Commission. Criteria for tax devolution recommended by Finance Commission include factors like population, per capita state domestic product in its inverse or distance form, area, other indicators of backwardness and tax efforts. The relative weights to these factors given by the Thirteenth Finance Commission are: population 25 percent; area 10 percent; fiscal capacity distance 47.5 per cent; fiscal discipline 17.5 per cent.[70] As a result, the shares of Bihar and Haryana are respectively 19.44 and 1.02 per cents.[71] The successive commissions have assigned higher weight to backwardness in tax devolution. The Punchchi Commission observed,[72] "We are in favour of Finance Commission adopting more sophisticated methods to assess the needs of backward States and providing them with higher transfers. Performance–linked incentive grants are likely to be more effective in addressing the problems of backward States." Regarding plan transfers, the Planning Commission has formulated a formula: 30 per cent of funds available for distribution to be kept apart for the special category states; 70 per cent of the funds to be distributed amidst major states with following

69 *Society for Unaided Private School of Rajasthan* v. *Union of India*, 2012 (4) SCALE 272.

70 The corresponding weights in the Twelfth Finance Commission are: population 25 per cent; per capita income distance 50 per cent; area 10 per cent; tax efforts and fiscal discipline 7.5 per cent each.

71 The shares of Sikkim 18.05, Arunachal Pradesh 14.24, Mizoram 13.77 Manipur 12.92, Maharashtra 1.36, Gujarat 1.48 and Punjab 1.92 per cents.

72 Vol. III, 6. 7. 02.

weights assigned to the factors: population 60 per cent; per capita SDP 25 per cent; fiscal management and special problems of the state 7.5 per cent respectively.[73] The Punchchi Commission expressed serious concern about prevailing regional imbalances in spite of the past efforts and suggested for area specific programmes.[74] With the substantive increase in the centrally sponsored schemes, there is inroad into the funds for the development of backward states, and increased financial responsibility of states, which can be made good by private sector's expansion and positive role.[75] But with profiles of bad governance and corruption, there is less progress on these lines. The need for proper coordination between Finance Commission and Planning Commission and avoidance of political bias has been emphasized by various commissions and writers in order to promote equitable development of all the regions and elimination of imbalances.[76] Hence, fiscal federalism holds key for equal access to positive rights.

Natural disasters are extraordinary circumstances that severely challenge access to basic human rights to life, safety, shelter, health and rehabilitation. Federalism has the responsibility of coordinating the efforts of central and state government in this regard. This invites the central and state governments to jointly undertake relief, rehabilitation, preparation, mitigation and response measures. While the concerned state government has basic responsibility for undertaking these measures in the event of a disaster, in severe circumstances the Central Government provides logistic and financial support to the state governments by deploying aircrafts and boats, specialist teams of armed forces, central paramilitary forces and personnel of National Disaster Response Force (NDRF); by arranging for relief materials and essential commodities including medical stores; restoring critical infrastructure facilities including communication network; and providing such other assistance as may be required by the affected states to meet the situation effectively.[77] The National Commission to review the Working of the Constitution recommended for incorporation of a new entry into list III of seventh schedule on the subject 'management of disasters-natural and man-made and calamities'.[78] In *Kishen Pattanayak*,[79] the Supreme Court asked the State of Orissa to coordinate with the

73 M. Govinda Rao and Nirvikar Singh, *supra* note 32 at 205.

74 *Supra* note 72, ch. 6.

75 *Id.* at 7.5.05.

76 *Id.* at 6.5.02; I *Sarkaria Commission Report* at 252-258; I *Administrative Reforms Commission Report*; M. Govinda Rao and Nirvikar Singh, *supra* note 32 at 213; K.L. Bhatia, *Federalism and Friction in Centre-State Relation* 131-40 (New Delhi: Deep & Deep Publications, 2001); Ranbir Singh and A Lakshminath, *Fiscal Federalism – Constitutional Conspectus* 159-60 (Nagpur: Wadhwa & Co., 2005).

77 *Available at*: http://ndmindia.nic.in/UNDP-020811.pdf (visited on 16 June 2012).

78 Vol I 8.1.14.

79 *Kishen Pattanayak* v. *State of Orissa,* also see *People's Union for Civil Liberties* v. *Union of India*, *supra* note 52.

Food Corporation of India to avoid starvation deaths in circumstance of continuous drought. National Human Rights Commission called for the cooperation of central and state governments to combat drought in Orissa.[80] Thus, horizontal equity and vertical patronage synergize the federalism's competence to expand rights. That exhibits dynamism of constitutional structure and judicial perception.

IV Access to inter-state river water and application of part III and IV

Recognition of right to water as an aspect of right to life has sensitized the inter-state water dispute law in multiple ways. In *Tamil Nadu Cauvery Neerappasana VVNUP Sangham* v. *Union of India*,[81] the Supreme Court gave a remedy to the petitioner society under article 32 by mandating the Union Government to constitute an inter-state water tribunal and refer the long standing inter-state Cauvery water dispute to it in view of long pendency of the petition and failure of reconciliation efforts for about twenty years. Although explicit recognition of right to water as a fundamental right was not made, reference was made to the interests of farmers and the need for equitable solution. The potentiality of part III and IV arguments can be traced in the judgment. In *Narmada Bachao Andholan* v. *Union of India*,[82] after referring to the UN Resolution 1977, the Supreme Court observed, "Water is the basic need for the survival of human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none." But the court balanced this right with the rights of dam-related evictees to have effective rehabilitation, and imposed obligation upon all the participating states to bear the responsibility of rehabilitation. In *Atma Linga Reddy* v. *Union of India*,[83] the petitioner's argument for remedy under articles 21 and 32 in the context of Krishna water dispute pending before the tribunal was dismissed hoping to have proper focus on the issue by the tribunal. The indirect impact of right to water operated towards that direction. Another point to be noticed is the possible impact of article 38 upon the substantive law on principles of water sharing among the various claimants. The doctrine of equitable apportionment and the Helsinki rules have some components of this provision. But explicit application of it will have more rigorous step in elimination of disparities.

Disparity in access to inter-state water, resulting in unequal economic development, had triggered the issue of invoking fundamental right to life in

80 5*Human Rights Newsletter* No.3, Mar. 1998.

81 AIR 1990 SC 1316.

82 (2000) 10 SCC 664 para 268.

83 AIR 2009 SC 436.

persuading for the policy of interlinking of rivers. In 2002, based on earlier grand ideas of Sir Arthur Cotton and Sir CP Ramaswamy Iyer to have garland of canals, and APJ Abdul Kalam's speech highlighting the need of networking of rivers in order to deal with the paradoxical phenomenon of flood in some part of the country and drought in some other part during the same time, a PIL was filed by an advocate seeking court's order directing the Central Government for appropriate action in this regard. The Supreme Court admitted the petition and served notice to the Central Government.[84] The government constituted a task force, to start the preparatory works.[85] In 2012, the Supreme Court found broad consensus amidst central and state governments on the issue and directed the Central Government to constitute a task force and produce feasibility reports, detailed project reports and financial implications.[86] The apex court got dissatisfied with the extent of progress in preparatory work for networking of rivers, and directed the Central Government to constitute a special committee and to have its meeting at least once in two months; to have biannual scrutiny by the Cabinet followed by expeditious action; to take up the 'Ken-Betwa' project for implementation because of sufficient preparatory work and consensus of states; and to fix definite time-frame for completion of preparatory works and implementation of the projects.

The apex court referred to the report of the National Council for Applied Economic Research and observed, "The report clearly opines that interlinking of river projects will prove fruitful for the nation as a whole and would serve a greater purpose by allowing higher returns from the agricultural sector for the benefit of the entire economy. This would also result in providing of varied benefits like control of floods, providing water to drought-prone states, providing water to a larger part of agricultural land and even power generation. Besides inuring to the benefit of the country, it will also help other countries like Nepal *etc*., thus uplifting India's international role. Importantly, they also point out to a very important facet of interlinking of rivers, *i.e*., it may result in reduction of some diseases due to the supply of safe drinking water and thus serve a greater purpose for humanity."[87] The hope for elimination of disparities in the matter of access to cluster of positive rights is implicit in the report.

V Burden of part III and IV and the federalism-based diversity

Casting upon all the power holders of federal system, the burden to protect fundamental rights and enforce the directive principles of state policy has greatly

84 *Networking of Rivers, In re*, Sep. 16, 2002 (2012) 4 SCC 78.

85 *Networking of Rivers, In re*, May 5, 2003 (2012) 4 SCC 77.

86 *Networking of Rivers, In re* (2012) 4 SCC 51.

87 *Id.* at 64 para 48.

added to the efficacy of these values. Definition of "the State" in articles 12 and 36 is comprehensive enough to include all the entities of the federation, and has avoided the complicated process of 'incorporation' as in the United States, where federalism had initially obstructed the claim for fundamental rights against states.[88] Because of the individual character of each entity qualifying as 'the State', the diversity arising from different legal policies of various entities is to be considered as a logical consequence of federalism. Hence, equality argument has inherent limitation against federalism-based diversity. As was observed in *State of MP* v. *GC Mandawar*,[89] "Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Article 14 can have no application." The case was related to non-application of central DA to state employees, and the Supreme Court rightly rejected the claim as not justified under article 14 as the sources of power and money were different and laws were different. Perhaps, illogicality arises when federalism-based diversity is overstretched.

Federalism-based diversity was tolerated as justification for different legal mechanisms under land revenue recovery laws of various states, which were relied upon by the central law like Income Tax Act for the purpose of recovery. Both in *Purushottam Govindji*[90] and *Ebrahim*[91] cases the constitution bench of the Supreme Court upheld the differentiations as not violating article 14. While some states had not provided for arrest for recovery of tax arrears, other states had prescribed different periods of detention ranging from three months to two years. Some provided hearing opportunity, and some others insisted on the factor of willful default. The apex court's view was influenced by presumption of constitutionality and the decision in *AK Gopalan*.[92] Both the decisions would not withstand the present day scrutiny of fairness of legal procedure. In his reluctant concurrence, Chandrasekhara Aiyar J in *Govindji* expressed dissatisfaction about different

88 *Barron* v. *The Mayor and City of Baltimore*, 32 US (7 Pet.) 243, 8 L Ed 672 (1833); *Butchers' Benevolent Association* v. *Crescent City Livestock Landing and Slaughterhouse Co.*, 83 US (16 Wall) 36, 21 L Ed 394 (1873); *Hurtado* v. *California,* 10 US 516, 28 L Ed 232 (1884); gradually selective incorporation took place in *Gitlow* v. *New York*, 262 US 380, 47 S Ct. 655 (1925), *Powell* v. *Alabama*, 287 US 45 (1932), *Wolf* v. *Colorado*, 338 US 25 (1949), *Mapp* v. *Ohio*, 367 US 643 (1961), *Gideon* v. *Wainwright*, 372 US 335 (1963) *etc.*

89 AIR 1954 SC 493.

90 *Purushottam Govindji Halai* v. *B M Desai, Addl. Collector, Bombay*, AIR 1956 SC 20.

91 *Collector of Malabar* v.*Erimmal Ebrahim Haji*, AIR 1957 SC 688.

92 *A K Gopalan* v. *State of Madras*, AIR 1950 SC 27.

consequences of non-payment of tax under the same central law occurring in different states. There was no basis to assume that people of some state are more prone to make prompt payment, some others deserve exoneration in spite of default and defaulters deserve milder or harsh punishments in some other states. He wished, "Speaking broadly, for the enforcement of the levy of a central tax like the Income-tax there should be uniformity of procedure and identity of consequences from non-payment. The machinery for recovery might be different between the several States but the defaulting assessees must be put on the same footing as regards the penalties."[93] The difficulties arising from application of asymmetrical laws to effectuate symmetrical legal obligation are clear in these pronouncements.

Reorganization of states has often given rise to anomaly of continuing for historic and geographic reasons different laws on the same subject in the new state. In *Bhaiyalal*,[94] such diversity of laws was upheld on those grounds as emanating from a central law, *viz.*, the State Reorganization Act. In fact, section 119 of the SRA is a temporary measure for continuation of the existing laws until the new state makes a harmonizing law that brings uniformity amidst all regions.[95] When the reasons for diverse laws do not continue, there arises the problem of discrimination. In *Sri Admar Mutt* case,[96] although continuation of old Madras law on Hindu endowment in South Kanara only, whereas in other parts of Karnataka different law on the subject prevailed, was not nullified on grounds of discrimination but justified on the basis of *Bhaiyalal* and other cases, the Supreme Court was dissatisfied about the state inaction for 23 years, and imposed a condition upon the state government to pass homogenous law in near future. The Supreme Court observed,[97] "We do hope that the Government of Karnataka will act promptly and move an appropriate legislation, say, within a year or so. A comprehensive legislation which will apply to all temples and Mutts in Karnataka, which are equally situated in the context of the levy of fee, may perhaps afford a satisfactory solution to the problem."

After a period of 27 years, the government enacted a comprehensive legislation, which was struck down by the Karnataka High Court as violating equality as it had excluded religious denominations and mutts from its purview.[98] Not only the

93 *Supra* note 90 at 28.

94 *Bhaiyalal Shukla* v. *State of Madhya Pradesh*, 1962 (Supp) 2 SCR 257; also see *Anant Prasad* v. *State of Andhra Pradesh*, 1963 (Supp) 1 SCR 844 .

95 *State of Madhya Pradesh* v. *Bhopal Sugar Industries Ltd* (1964) 6 SCR 846; also see *Vishwesha Thirtha Swamiar* v. *State of Mysore* (1972) 1 SCR 137.

96 *Shri Swamiji of Shri Admar Mutt* v. *The Hindu Religious and Charitable Endowments Dept.*, AIR 1980 SC 1.

97 *Ibid.*

98 *Sri Sahasralingeshwara Temple, Uppinangadi* v. *State of Karnataka*, ILR 2006 KAR 4386.

callousness in harmonizing the law, but the utter disregard in treating the employees of the public sector of erstwhile state also has given rise to serious problems. The requirement of fair and equitable treatment of employees of the merged region was not complied in *State of Maharashtra* v. *Chandrakanth Kulkarni*[99] when the government of new state did not protect the seniority and opportunity of promotion, and the Supreme Court gave a remedy to set right the inequity. Missing of names of public servants in the allocation list, and subsequent termination orders and non-protection of the service condition of the employee from the merged regions have also been litigated upon.[100] In *Kapila Hingorani*,[101] bifurcation of a public corporation of erstwhile Bihar into two new public corporations led to negligent treatment and non-payment of salary of large number of public servants of Jharkhand PSU for a long time. The untold sufferings of the employees were dealt and remedied by the Supreme Court in a PIL. In *Sau Kusum* v. *State of Maharashtra*[102] the post-reorganization scenario was that some of the castes/tribes which were erstwhile OBC were not recognized so in the OBC list of the new state. The Supreme Court ordered for verification of such caste's claim for OBC status. The requirement of special protection to be accorded to the backward areas of states merged into new state has been sometimes dealt through constitutional amendments.[103]

Regarding access to professional educational institutions, the practice of preference of locals or fee disparity rule was started with *DP Joshi* v. *State of Madhya Bharat*,[104] and continues with some variation or limitation even today. The justification has been on the basis of principle of reasonable classification where the host state incurs expenses and expects service of the professionals to the benefit of residents of that state ('our money our people'). Going a step ahead, in *N. Vasundhara* v. *State of Mysore*[105] the requirement of domicile in the state for a period of ten years for candidates claiming admission to medical colleges was upheld as not violating right

99 AIR 1981 SC 1990.

100 *Teja Singh* v. *Union Territory of Chandigarh*, AIR 1984 SC 299; *Paiara Lal* v. *State of Punjab*, AIR 1997 SC 3420.

101 *Kapila Hingorani* v. *State of Bihar*, AIR 2009 SC (supp) 106.

102 AIR 2009 SC 1081.

103 Arts. 371 and 371A to 371H provide for special provisions identifying backward areas, equitable allocation of funds, and equitable arrangement for professional educational institutions; for protection of religious practices, customary law and land ownership of indigenous communities; and for protection of the interests of people residing in backward areas in the matter of recruitment to public service.

104 AIR 1955 SC 334; followed in *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858; *Unnikrishnan supra* note 52. Modified to accommodate the claim of other state candidates to the extent of 15 per cent in *TMA Pai Foundation* v. *State of Karnataka*, AIR 1995 SC 2431.

105 AIR 1971 SC 1439.

to equality. There is extension of application of the rule even to private professional colleges. In *Pradeep Jain* and *Dinesh Kumar* cases,[106] the extent of domicile-based reservation was subjected to limitation. Compartmentalization within the state is also not permitted.[107] The thrust of development is to balance between regional interest and all-India claim.

The adverse impact of formalistic approach of federalism-based diversity upon the rule against double jeopardy is an eye opener. Most of the Indian cases on article 20(2) involved application of different statutes of the same level of government providing for different dimensions of the criminal act or the same statute providing for punishments to different offences or different types of legal actions *viz*., disciplinary action and punishment through criminal prosecution.[108] Since many of the criminal laws and procedures fall under concurrent subject, and central laws generally govern the matter, the scope for application of article 20 (2) *vis-à-vis* federalism has not arisen. But there is recognition of the proposition that rule against double jeopardy is not applicable against double prosecution and punishment arising from diversity of jurisdiction. The problematic character of this proposition can be seen in few US cases. In *Bartkus* v. *Illinois*[109] the federal court had acquitted the petitioner from the charge of robbery and the Illinois court convicted him for an offence under its law on the same facts. The Supreme Court by 5:4 declined to hold the state conviction as violating the due process clause. Frankfurter J speaking for the majority reasoned that federal prosecution of a comparatively minor offence could not prevent the state prosecution of a grave infraction of state law. Even though such a result might be painful, according to him, courts should exercise greatest self-restraint in interfering with it. Black J in dissent, surveyed the universal abhorrence of double jeopardy, and looking from the perspective of the accused, found the state prosecution unjustified. He observed, "If double punishment is what is feared, it hurts no less for two "sovereigns" to inflict it than for one."[110] Federalism provided no justification for obliterating the ancient safeguard. Brennan J in his dissent viewed that while cooperation between

106 *Pradeep Jain* v. *Union of India*, AIR 1984 SC 1420; *Dinesh Kumar* v. *Motilal Nehru Medical College*, AIR 1985 SC 1059; AIR 1986 SC 1877.

107 *State of UP* v. *Pradeep Tandon*, AIR 1975 SC 563; *Nidamarti Mahesh Kumar* v. *State of Maharashtra*, AIR 1986 SC 1362.

108 *Dipesh Chandak* v. *Union of India*, AIR 2997 SC 4708; *State of Rajasthan* v. *Hat Singh* AIR 2003 SC 791; *State of Bihar* v. *Murad Ali Khan*, AIR 1989 SC 1; *State of Bombay* v. *S. L. Apte,* (1961) 3 SCR 107 : (AIR 1961 SC 578); *V K Agarwal* v. *Vasantji Bhagawanji Bhatia*, AIR 1988 SC 1106; *Leo Roy Frey* v. *Supdt. District Jail, Amritsar*, AIR 1958 SC 119;*Maqbool Husain* v. *State of Bombay,* AIR 1953 SC 325.

109 359 US 121.

110 *Id.* at 158.

federal and state authorities helped in carrying out the endless fight against crime, nevertheless, "Cooperation in order to permit the Federal Government to harass the accused so as to deny him his protection under the Fifth Amendment is not to be tolerated as a legitimate requirement of federalism."[111] In contrast, the majority in *Abbate* v. *US*,[112] citing the earlier cases viewed that since two sovereignties derived power from different sources and denounced the act as crime offending the peace and dignity of both, each might punish independently. It is submitted, the minority view is justified as it avoids jettisoning of intimate notion of justice by mechanical jurisprudence of diversity.

The above developments point out the evil effect of treating the entities of 'the State' only as disparate power holders and without responsibility of ensuring equality of consequence through overt, prompt and equitable act even when it is most needed. The present approach is a formalistic one where over-stretching of federalism-based diversity and callous approach of the reorganized states fails to give sufficient attention to the content and importance of rights. It is a shocking consequence to abandon the historically evolved sound rule against the harassing practice of repeated prosecution for the same offence to accommodate a contestable rule of double sovereignty.

VI Legislative competence in the matter of giving effect to the provisions of part III: the implications

According to article 35 (a):

> Notwithstanding anything in this Constitution, Parliament shall have, and the Legislature of a State shall not have, power to make laws - (i) with respect to any of the matters which under clause (3) of Article 16, Article 33 and Article 34 may be provided for by Parliament; and (ii) for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

The purpose underlying this clause was explained by B R Ambedkar,[113] "The object of this is that Fundamental Rights, both as to their nature and as to the punishment involved in the infringement thereof, shall be uniform throughout India. Therefore, if that object is to be achieved, namely, that Fundamental Rights shall be

111 *Id.* at 169.

112 359 US 187187.

113 VII *Constituent Assembly Debates*, 9th Dec. 1948, Book No.2 at 957.

uniform and the punishments involved in the breach of Fundamental Rights also shall be uniform, then, that power must be exercised only by the Parliament, so that there may be uniformity." There are also provisions in articles 22 (4), 22 (7), 32 (3), 33, and 34 which authorize the Parliament to make laws for purposes such as providing of procedural safeguards in case of preventive detention; conferment of writ jurisdiction to any court for enforcement of fundamental rights; limitation on extent of fundamental rights enjoyable by members of armed forces or forces charged with the maintenance of public order *etc.*; and restriction on enjoyment of fundamental rights in an area when martial law is in operation. Breach of constitutional provision is declared as offence in the context of practice of "untouchability", which is abolished under article 17 and in the situation of traffic in human beings and *begar* and other forms of forced labour which are prohibited under article 23 (1). The nature of these legislative subjects is such that nationally chosen standards shall govern these areas without dilutions, and quality of rights available in these matters anywhere in India will be the same. These are the spheres where society cannot afford to have experimentations by the federal units influenced by regional considerations and hurried decisions. In all other spheres, subject to the application of seventh schedule and article 246, respective governments have power of regulation within the permissible limits mentioned in part III.

The way in which Parliament has responded in this sphere needs to be examined in order to assess the efficacy of the constitutional scheme. Under article 16(3), Parliament alone is enabled to fix requirement of residence of job aspirants in a state or union territory in the matter of access to public employment in the concerned state or union territory or its local or other authority prior to such recruitment. This implies that states cannot discriminate on grounds of residence (article 16[2]). The purpose was to respect local sentiments or prevention of inroad by the people of more advanced state into less developed states.[114] The Public Employment (Requirement of Residence) Act, 1957 provided for Central Government's rules authorizing fixation of residential requirement for posts in subordinate services in State of Andhra Pradesh, Himachal Pradesh, Manipur and Tripura for a period of fifteen years. There is discontinuance of the law thereafter. Within the state also, region-based discrimination is repeatedly held as unconstitutional.[115] The overall approach is not to allow residence based discrimination, and keep all-India access to public employment on the basis of merit open.[116] In view of the problematic

114 M Hidayatullah CJI in *A. V. S. Narsimha Rao* v. *State of A.P.,* AIR 1970 SC 422 para 5.

115 *A. V. S. Narsimha Rao, ibid*, *State of Maharashtra* v. *Rajkumar,* AIR 1982 SC 1301; *Kailash Chand Sharma* v. *State of Rajasthan,* AIR 2002 SC 2877; *Sreedhara S.* v. *State of Karnataka,* AIR 2002 SC 2459.

116 For a discussion, see P Ishwara Bhat, *Law and Social Transformation* ch. 9 (Lucknow: Eastern Book Co., 2009).

character of region-based discriminations projecting 'sons of the soil' theory, federalism has worked for equal opportunity concept in this sphere. Since there are reservation policies operating for the benefit of SC/ST, OBC, the present legal position has no disadvantages. The preventive detention laws enacted by the Parliament have fixed maximum period of preventive detention and provide for procedural safeguards. Article 32 (3) is not yet used to empower any court to confer remedies in case of violation of fundamental rights within its jurisdiction. There has been demand that empowering of district courts at least to issue *habeas corpus* writ will better protect personal liberty and lessen the docket burden of the Supreme Court and high courts.

On the offences relating to "untouchability", Parliament has enacted Untouchability (Offences) Act, 1955 renamed as Protection of Civil Rights Act in 1976 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Cooperative federalism has been employed for the successful application of the laws in this sphere. The amendment made in 1976 to the former statute provided for active role of the state government to take such measures as may be necessary for ensuring that the rights arising from abolition of "untouchability" are made available to, and are availed of by, the persons subjected to disability arising out of the "untouchability" (section 15A). Such measures include legal aid, investigation and prosecution, periodic survey, and identification of problematic area. Under the Act of 1989, the state governments have to constitute special court at the district level for the purpose and appoint the public prosecutors (sections 14 and 15). According to section 21, "Subject to such rules as the Central Government may make in this behalf, the State Government shall take such measures as may be necessary for the effective implementation of this Act." Such measures include legal aid, rehabilitation of victims, travel costs of witnesses, identification of problem-prone areas and surveying the implementation of the law. Under both the laws, state governments are authorized to impose collective fine.

The approach of cooperative federalism is conspicuous in Immoral Traffic Prevention Act, 1956 enacted for the enforcement of fundamental right under article 23 (1). In addition to unified administrative and judicial structure for the enforcement of criminal law, the participation of both the layers of government is expressly contemplated. Under section 7(3), the state government may notify some areas wherein prostitution is prohibited. State government has the power to appoint special officers and to constitute advisory body consisting of five social workers (including women) for the enforcement of the Act. Where inter-state trafficking and sexual exploitation is committed, attracting the jurisdiction of more than one state, Central Government may appoint police officers for the purpose of investigation (section 13). Both the layers of government have the power of appointing authority for the purposes of effectively preventing and combating the offence of trafficking in

persons (sections 13A and 13B). States are competent to establish protective homes and to supervise the protective homes kept by private persons or authorities with state permission. Rule making power of the state governments touches upon vital and wide areas, whereas the Central Government's power of making rules is confined to the composition and functioning of Central Government's authority, and generally for the enforcement of the Act. Regarding the Bonded Labour System (Abolition) Act, 1976 the role of the Central Government has been that of norm creation. The responsibilities of the state and district administration and the role of vigilance committee[117] have been contemplated. The Central Government has extended financial assistance to state governments for implementation of the Act.[118]

It is clear from the above that the socially offensive private acts impinging the fundamental rights are dealt by an integrated approach of cooperative federalism whereas the Central Government has gone for studied non-intervention and commitment to the larger concept of equal opportunity at the national level to avoid 'sons of the soil' theory. On rest of the matters, the question of competence for making laws regulating part III is controlled by article 246, thus providing additional tool for constitutional challenges.

VII Social justice policies of the states and federalism

Authorizing of "the State" in articles 15 (3), (4), (5), 16 (4) (4A) (4B) to make special provision in favour of the disadvantaged class has given rise to diversity in affirmative action policies and opportunity to experiment in response to the necessity of local circumstances subject to the requirement of fair means in identification of beneficiaries and reasonable cap. This gives a fair chance to the sub-national units to rationally formulate the reservation policy as a means to the end of social justice. Numerous state backward classes commissions in various states constituted from time to time have contributed towards this end. Political and social processes influence the course of state policy in this sphere of policy-based interest. The scope for politicization cannot be ruled out here. But the existing arrangement and policy link democratic decentralization and diversity with social justice.

However, the discretion of states to rectify the imbalances in the application of affirmative action policy is sometimes constrained. An apt example that illustrates this point is the case of *E V Chinnaiah* v. *State of Andhra Pradesh*.[119] The question involved here was the constitutionality of an AP Act which provided for grouping

117 Which shall be a body consisting of officials and members belonging to SC/ST, social workers and non-official agencies.

118 In the 8th, 9th and 10th Plan Period, the central financial assistances for rehabilitation of freed bonded labour have been Rs.40.51 crores, 24.50 crores and 90.28 crores.

119 (2005) 1SCC 394.

of castes within scheduled castes into four sub-categories for proportionate distribution of the scheduled castes quota. The Supreme Court nullified the Act on the grounds (a) that state legislature had no legislative competence to disturb the list promulgated by the President, which could be altered only by Parliament; and (b) that micro-classification goes against the equality principle. It is submitted that the state law had neither deleted nor added any caste into the list but provided only for a scheme of distribution of quota on the basis of recommendation by an expert committee.[120] The dilatory and cumbersome process of getting a remedy from Parliament reflects the defect of over-centralization, and obstructs diversity oriented social justice. The goal of economic justice underlying articles 31A, 31B and 31C is poised for promotion by centre-state cooperation, either by demanding prior consent of the President or incorporation of the state legislation into the ninth schedule. In the course of agrarian reforms formulated in various states under the inspiration of five year plans, getting such cooperation has been without much practical difficulty in view of the political importance of the subject, and has been very vital for economic justice.[121]

Some of the special provisions from article 371 to 371H, which were inserted in the contexts of reorganizing of states or formation of states, have clear focus on social justice policies and avoidance of regional imbalances, and entrust the responsibility upon the respective states to ensure them. Equitable development of Vidarbha, Marathawada, Saurashtra and Kutch by formation of different development boards and equitable allocation of funds and equitable arrangements providing adequate facilities for technical education are contemplated in article 371. Under article 371D, through presidential order the State Government of Andhra Pradesh may be required to organize class or classes of posts in civil service under the state into different local cadres, specify direct recruitment for them and provide for preference or reservation in favour of candidates who have resided or studied in respective local areas. In the tribal areas of Nagaland and Mizoram, protection of the land, resources, customs, traditions and religious or social practices of the indigenous communities from the interference of central laws is contemplated. Good governance and better representation of tribal people in local self governing agencies in Assam, Manipur, Sikkim and Arunachal Pradesh are also specially contemplated.[122] Thus, constitutional text provides for various methods of promoting social justice, and except the problematic case of *E V Chinnaiah*, the constitutional development uses federalism as a tool in this regard.

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120 For a discussion see *supra* note 116 at 496-500.

121 P Ishwara Bhat, *Fundamental Rights: A Study of their Interrelationship* 523 (Kolkata: Eastern Law House, 2004); P Ishwara Bhat, 'Limits of the Ninth Schedule's openness' 19 *Cochin University Law Review* 232 (1995).

122 Arts. 371B, 371C, 371F, 371G, and 371H.

VIII Multiculturalism and federalism

Tolerance of all cultures and language communities on the footing of equality integrates federalism with human rights. But regional chauvinism triggered by asymmetry has disturbed the constitutional expectation. In spite of prohibition of discrimination on grounds of residence in the matter of public employment, some states have espoused the policy of 'protective discrimination' as a method of providing job opportunities exclusively to the residents of that state by resort to language criterion. In fact, insisting on proficiency in local language at the threshold level of appointment is not favoured by the Sarkaria Commission and some high courts.[123] Giving a plus advantage to candidates who had studied in a regional language is regarded by the Supreme Court in *VN Sunanda Reddy*[124] case as unconstitutional. The Supreme Court found that addition of 40 marks to Telugu candidates would make them jump the queue and steal a march over more meritorious candidates, and did not satisfy the reasonable classification test. The interests of administrative efficiency could be satisfied by insisting on acquiring language proficiency after entry into service.

State policy on multilingual education has also been problematic in some circumstances, calling for judicial interference. Mandating all children to study regional language as one of the subjects at the primary and secondary levels of education is upheld in *EMSPA* and other cases.[125] But compelling the primary school children to learn in the mother tongue medium of instruction has been disapproved by Madras and Karnataka High Courts on grounds of right of parental choice.[126] Further, language based discriminations in opportunities of screening of films and displaying of sign boards have been matters of contention.[127] The judiciary has nullified such discriminatory practices and tried to ensure ambience of multiculturalism.

Protection of indigenous or tribal communities from exploitations is another issue addressed by cooperative federalism. Since the specific approach in this sphere is extending security, social justice and self-government, federalism serves all these factors. Regarding security of tribal land, which is critical for their economic life, both the central and state governments have enacted laws. state laws have protected

123 Para 20.1.33 of Report of the Commission on Centre State Relations (Justice Sarkaria Commission); *B V Krishna Murthy* v. *Commissioner*, ILR 1987 Kant 2640.

124 *V N Sunanda Reddy* v. *State of AP.*, AIR 1995 SC 914.

125 *English Medium Students Parents Association* v. *State of Karnataka* (1994) 1 SCC 550; *Usha Mehta* v. *State of Maharashtra* (2004) 6 SCC 264.

126 *Associated Management of Primary and Secondary Schools in Karnataka* v. *State of Karnataka* (2008) Kant L J 593 FB; *TN Tamil and English Schools Association* v. *State of TN* (2001) 1 MLJ 577.

127 *Kapoor Investments* v. *State of Karnataka* ILR (1989) Kant 183.

tribal lands against alienations to non-tribal people. A central law, *viz.*, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, has elaborately provided for conferment of title to forest land occupied by them and obligated the states to recognize and protect their land rights, and not to evict them by applying Forest Act, 1980 or Wildlife Act, 1972. Protection of forests inhabited by indigenous communities against state-permitted deforestation for mining in the fifth schedule area is the major policy that emerged in the *Samata* case.[128] As K. Ramaswamy J observed, "The land on which they (tribals) live and till, assures them equality of status and dignity of persons and means to economic and social justice and potent weapon of economic empowerment in social democracy." The fifth and sixth schedules to the Constitution act as sanctuaries for indigenous communities where state law will be applicable after filtration and will not be unsettling the tribal traditions and customs. According to article 275(1) of the Constitution, there shall be paid out of Consolidated Fund of India grants-in-aid to the states to meet the expenses [capital and recurring] of developmental schemes undertaken by the state with the approval of Government of India for the purpose of promoting the welfare of scheduled tribes in that state and raising the levels of administration of scheduled areas in that state. In extending *panchayat* system into the scheduled areas, the central law, *viz.*, Panchayat Extension to Scheduled Area Act, 1996, has attempted to empower *grama sabha* to preserve the traditions, customs and cultural identity of the community; to plan for social and economic development; to restore land to tribals; to control over moneylenders, forest produce, natural resources; and to supervise mining and land acquisition proceeding. As viewed by the Punchchi Commission, "Equity and inclusiveness is fundamental to unity and development in multicultural societies. This is a function of decentralized governance and social justice which is part of the Constitutional Scheme."[129] While tribal family law is given protection from central or state reformative measures, judicial attempts to infuse finer values of human rights and feminism can be found in cases like *Madhu Kishwar*.[130]

In the matter of reform of personal laws, some states are enthusiastic initiators whereas others are late followers. Gradually, central law upgrading the levels of reforms has been the scenario in the long run.[131] Regarding protection of religious freedoms and secular structure of polity, division of powers under seventh schedule has not come in the way. In circumstance like Ayodhya dispute, the central law on

128 *Samata* v. *State of Andhra Pradesh* (1997) 8 SCC 191.

129 *Supra* note 42 at 103.

130 *Madhu Kishwar* v. *State of Bihar*, AIR 1996 SC 1864.

131 The amendment to the Hindu Succession Act 1956 providing for equal coparcenery rights to daughters has undergone this phenomenon.

the acquisition of disputed land related to place of worship was justified as within the legislative competence brushing aside the argument that public order was under state list.[132] Multicultural factors like language and ethnicity have also worked in the territorial formation and reorganization of states,[133] giving equal opportunity of governance. On the whole, principle of equality as the central idea of multiculturalism has tried to avert disparities. Federalism has largely supported this task.

IX Protection of rights by preventing and controlling crimes: federalism's role

Protection of public order, security of state, and tranquility is an essential prerequisite for protection of fundamental human rights. Protective role of the legal system *vis-à-vis* right to life and personal liberty is highlighted in the marginal note to article 21. For enjoyment of other rights also, these are essential elements. In extreme circumstances of wide spread communal riots (for example, as occurred after the Ayodhya event), imposition of President's rule under article 356 restores the fundamental rights.[134] Under article 355, "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provision of this Constitution." The mandates under articles 256 and 257 which operate upon every state to apply its executive power to comply with the central laws and existing laws and not to impede or prejudice the executive power of the union, and which provide for the Union Government's responsibility to issue directions to the states for those purposes meaningfully combine federalism and constitutionalism, and consequently benefit the cause of part III and part IV of the Constitution. The Union Government's power to issue directions to the states under article 339 (2) for drawing up and execution of the schemes for the welfare of the scheduled tribes in the state has the potentiality of promoting part III and part IV objectives. Similarly, President's power to issue directions under article 350-A for securing the facility for mother tongue instruction at primary stage of education is prone to promote educational, cultural and language rights. The post-emergency development towards

132 *M. Ismail Faruqui* v. *Union of India*, AIR 1995 SC 605.

133 According to B N Srikrishna, "The strident demands for protection of local languages and culture, and the demands for creating more states, even by dissecting those formed on the basis of common language and culture are creating problems that defy easy solution. The very concept and political theory of federalism is poised to be tested by fire in the current turbulent times." B N Srikrishna, 'Beyond Federalism' in *The Golden Thread: Essays in Honour of CD Deshmukh* 407 (India Institutional Centre, New Delhi 2011).

134 *S R Bommai* v. *Union of India* (1994) 3 SCC 1.

better protection of fundamental rights against suspension[135] during national emergency proclaimed under article 351 speaks about federalism's elevated concern for human rights.

Two recent important judgments of the Supreme Court touching upon the issue of centre-state relation on the aspect of law and order situation having impact upon human right can be examined here. The first one is *State of West Bengal* v. *Committee for Protection of Rights, WB*,[136] a case relating to competence of CBI to investigate without the consent of a state on crimes occurred in that state and the second one is *Nandini Sundar* v. *State of Chhattisgarh*[137] where centre-state coordination in combating Maoist violence went on faulty lines. The first case involved inaction of the state government in investigating carnage of political party members when they were returning after party meeting. No arrest had been made for a period of 4 months after filing of FIR nor had all the victims been identified by the state police. In a PIL, the high court felt that in the background of the case it had strong reservations about the impartiality and fairness in the investigation by the state police because of the political fallout and deemed it appropriate to hand over the investigation into the said incident to the CBI. The constitution bench of the Supreme Court, in appeal, examined the issues relating to distribution of legislative powers relating to police under entry 2A and 80 of list I and entry 2 of list II under the seventh schedule and found that the legislative power of the union to provide for the regular police force of one state to exercise power and jurisdiction in any area outside the state can only be exercised with the consent of the government of that particular state in which such area is situated. But the instant case involved judicial remedy under article 226, and the Supreme Court observed,[138] "The direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

135 Arts. 358 and 359 after 44th Amendment define the limits of suspension of fundamental rights.

136 AIR 2010 SC 1476.

137 *Supra* note 54.

138. *Supra* note 136 at 1496.

The Supreme Court referred to the *I R Coelho*[139] reasoning on common law basis and checks and balances within the Constitution in support of constitutionalism and highlighted about importance of judicial review in federal constitutional system. Pointing out the importance of article 21 to both the accused and victims, the Supreme Court observed, "The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State." The outcome of the case points out how federalism can be invoked through judicial remedy for the enforcement of human rights.

The second case was concerning the human right violation in engaging semi-literate tribal youths as special police officers (SPO) on meager salary and without adequate training and long term recruitment to combat the Naxalites (Maoists) in State of Chhattisgarh. Although it involved state task of maintenance of law and order, the Union Government's involvement was in the form of funding the local resistance to the Naxal operation.[140] The SPOs were appointed temporarily in large numbers (6500), hurriedly trained for two months, and were paid low wages (Rs 3000 per month) by using the central fund. Because of lack of training there were comparatively more deaths of SPOs in course of combat. The Union Government in its affidavit stated that its role was confined to funding and advising, and was part of assisting the states by partially reimbursing the salary of more than 70,000 SPOs appointed in various states. The Supreme Court raised serious objection to the callous approach of the union. It found that the jointly devised move against the Maoist insurgency made the young tribals the cannon fodders in the field of Dantewada and other districts. The Supreme Court ordered the state to desist from employing SPOs, to recall arms supplied to them and avoid any encouragement to private bodies like Salwa Judum or Koya commandos in anti-insurgency activities against left wing extremism. It also ordered the union to desist from funding the recruitment of SPOs for the purpose of engaging in counter-insurgency activities against Maoists/Naxalites. The case demonstrates the responsibility of the federal system to avoid human right violations and to involve in more positive and developmental activities to eliminate the reasons for insurgency.

Organized crimes like terrorism have posed serious challenges to the competence of federal system to counter them. The Central Government's competence to pass law like the Prevention of Terrorism Act, 2002 to protect security of state was

139 *I.R. Coelho (Dead) By Lrs* v. *State Of Tamil Nadu* (2007) 2 SCC 1.

140 This was in addition to Centre's role in package of developmental activities in rural and tribal areas to win the minds of peasantry, tribals and agricultural labours. See P Ishwara Bhat, *supra* note 116 at 162-63.

upheld in *People's Union for Civil Liberties* case,[141] brushing aside the argument that the law was for the purpose of maintaining public order. The successful functioning of NCTC body in America after 9/11, by acting as Directorate of National Intelligence to collect, collate and assess information, to coordinate with states and involve in intelligence operation without handling the power of arrest, search and seizure had provided for one model. After experiencing series of terrorist attacks, the Central Government in 2008 intended to establish a strong federal counter-terrorism agency by invoking Unlawful Activities Prevention Act, 1967. Under the Act, the Central Government has the power of notifying any association involving unlawful activities relating to cession or secession or disrupting the sovereignty and territorial integrity of the country as unlawful association for two years subject to tribunal's review; prohibit the use of its funds; notify its place of work as unlawful; and search and arrest persons involved in unlawful acts in any part of India except State of Jammu and Kashmir. However, application of this legislation for setting up a central agency to deal with terrorism has not been welcomed by some of the state governments in view of the possible political abuse of the Act by the Central Government. There has been determined résistance by the State Governments of Gujarat, West Bengal and Tamil Nadu to the central effort of forming NCTC under the Act of 1967. Justifying the need to set up an NCTC or a similar organization, Chidambaram, the Union Minister for Home Affairs called for the need "to move beyond looking upon counter-terrorism as a police operation and enlarge scope to make it a truly counter-terrorism organization that will mobilize all elements of national power."[142] But the impasse has continued calling for imaginative application of cooperative federalism to eliminate or mitigate terrorism and promote human rights.

X Special status to Jammu and Kashmir and part III and IV

The idea of one nation and two systems is reflecting a situation of constitutional pluralism, and is a big challenge in the task of elimination of disparities in rights. The development of rights and welfare system within the Constitution of Jammu and Kashmir, the gradual erosion of article 370 and judicial decisions sympathetic to egalitarian cause have made the asymmetric federalism largely to tend towards the equal liberties notion but without a satisfactory amount of stability.

141. *Peoples Union for Civil Liberties* v. *Union of India*, AIR 2004 SC 456; also see for similar approach, *Kartar singh* v. *State of Punjab* (1994)3 SCC 569; but in union territories or national capital territory the position is different as the dichotomy between the central and state government does not arise in relation to public order. The question of competence of Central Government to interfere with freedom of speech and assembly in the interest of public order in the national capital territory of Delhi was decided by the Supreme Court in *Re Ramlila Maidan Incident* case (2012) 5 SCC 1 in the affirmative. Since it was not a federal unit, the question of federalism was not seriously involved in the case.

142. *The Hindu* May 6, 2012.

Under section 10 of the J&K Constitution, the permanent residents of the state shall have all the rights guaranteed to them under the Constitution of India. The Constitution (Application to Jammu and Kashmir) Order, 1954 has listed articles 14 to 35 under the Constitution of India. Since amendments to the Indian Constitution are not applicable automatically upon J&K but depend upon presidential order for applicability, right to property is still a fundamental right and reservation related amendments (articles 15[5], 16[4A], 16[4B]) are not applicable in J&K. Article 35A of the J&K Order,1954 empowers the state to make special laws for the benefit of permanent residents in the matter of employment under the state, acquisition of immovable property in the state, settlement in the state and scholarship and other benefits provided by the state. In reality, the permanent resident status is a factor that excludes large section of the society from various economic and political rights. The ruling governments have rigidly applied the rule as an obsession. In *State of Jammu and Kashmir* v. *Susheela Sawhney*,[143] the full bench of the J&K High Court ruled that a daughter of permanent resident of J&K does not lose her status as a permanent resident of J&K on her marriage with a person who is not a permanent resident of J&K. Dissatisfied with the decision, the Government of J&K moved to pass a law reversing the position. The bill was passed in a record time of six minutes from the moment of introduction. But when women activists in the country and other organizations widely protested against the 'fraud' on the Constitution, the legislative council did not accept the bill. This speaks about influence of rest of the country and people of J&K upon legislative process in the matter of equal rights issue. According to AS Anand J, the special rights and privileges of permanent residents is not static and need may arise for its liberalization.[144] The government resorted to give permanent resident certificate to girls with an endorsement 'valid till marriage'. In *Hari Om* v. *State of J&K*,[145] a PIL, the high court directed the state not to make such endorsement. Government's effort of reissuing certificate after marriage was withdrawn after a contempt proceeding.[146] The question whether an adoption of person, who was not a permanent resident of J&K, made by a permanent resident could give the status of permanent resident was litigated in *Vijay Marchanda* case.[147] While the single bench decision recognized that adoption conferred upon the adopted the same rights and privileges in the family of the adopter equivalent to legitimate son, the division bench arrived at contrary conclusion. In *Bachan Lal Kalgotra* v. *State*

143. AIR 2003 J & K 83.

144. Justice Dr A S Anand, *The Constitution of Jammu and Kashmir: Its Developments and Comments* 214 (New Delhi: Universal Law Publishing Co., Sixth Ed, 2010).

145. PIL No 1002/2004& CMP No. 108/2004 cited in SK Sharma, *The Constitution of Jammu & Kashmir* 106(New Delhi: Universal Law Publishing Co., 2011).

146. *Hari Om* v. *SS Bleoria* (PIL No 2/2005).

147. *Vijay Marchanda* v. *State of Jammu and Kashmir*, AIR 1989 J&K 10.

of J&K[148] denial of permanent resident status of J&K to a large population (7 to 8 per cent of the J&K population) of West Pakistan refugees who immigrated into J&K in 1947 and who were given Indian citizenship was challenged as constitutionally invalid. The Supreme Court resorted to self-restraint and abstained from providing remedy in view of the peculiar constitutional position obtaining in the State of Jammu and Kashmir. The Supreme Court conceded that the position of the petitioner and those like him is anomalous. But it wished that the legislature of the State of Jammu and Kashmir might take action to amend the relevant enactments without having to amend the Jammu and Kashmir Constitution; and that in regard to admission to higher technical educational institutions, the government might make these persons eligible by issuing appropriate executive directions. It appealed to both the Union of India and the State of Jammu and Kashmir to give due consideration to the aggrieved.[149]

Even after a lapse of twenty five years from the date of judgment, the position has not improved. From this a serious drawback of asymmetric constitutional pluralism by abstaining from setting into service the normal federal mechanism towards elimination of discrimination and promotion of basic rights can be inferred. One fails to understand why a welfare state finds unable to amend the law on permanent residency to meet the people's democratic aspirations and contemporary challenges.[150] The judicial hesitation in *Bachan Lal Kagotra* does not match with the mainstream judicial activism in other spheres. Regarding the directive principles of state policy, the content of J&K Constitution reiterates the Indian Constitution's part IV with little modification. But in the matter of protection of rights of children, women and promotion of craft and cottage industry and of prosperity of rural masses, the J&K directive principles have better orientation and focus.[151]

Erosion of special status and gradual use of article 370 towards application of central laws and powers have been the features that have toned down the rigour of asymmetric federalism and promotion of equal rights. While Nehru spoke about general erosion of article 370, MC Chagla hoped about gradual disappearance of it.[152] Gulzari Lal Nanda considered it as 'tunnel in the wall' to increase the centre's

148. AIR 1987 SC 1169

149. *Id.* at 1171-72 para 5.

150. S K Sharma, *supra* note 145 at 134.

151. Right to healthy childhood, equal opportunities in education (s. 21); right of divorced or abandoned women to reasonable maintenance, right of women to full equality in all social, economic, political and legal matters, and special protection against discourtesy, defamation, hooliganism and other forms of misconduct (s. 22); and State's obligation to promote craft and cottage industry by modernization (s. 17) reflect better appreciation of vulnerable interests.

152. Union Minister of Education, M.C. Chagla's speech in Rajya Sabha, 24th Feb. 1964.

power.[153] Many central laws are made applicable to J&K through the article 370 orders.[154] The Sarkaria Commission found no limitation for use of the power of extension and consensus-based extension of the Indian Constitution and laws for the mutual advantage of the union and states.[155] A. S. Anand CJ has recognized the closer collaboration of the union and J&K over the years without affecting the internal autonomy of the state.[156]

XI Elimination of discrimination in trade and commerce

By prescribing that trade, commerce and intercourse throughout the territory of India shall be free, article 301 has aimed at removal of inter-state and intra-state barriers to trade in the federal system. As barriers to trade have basically discriminatory effect and obstruct free flow of goods,[157] the principles contained in part XIII of the Constitution, which reject such impediments, have great egalitarian content.[158] The approach of non-discrimination is clear in the express words of article 303 (1) which denies power on the part of the union and states "to make any law giving, or authorizing the giving of, any preference to one State over another, or making, or authorizing the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce." This provision rules out any scope for regional bias or parochial approach.[159] However, the Parliament is competent to make laws giving or authorizing preference or discrimination in order to deal with any situation of scarcity of goods in any part of the territory of India. Under article 304 (a) the state legislatures are prohibited from making any law that discriminates between goods manufactured or produced in the concerned state and goods imported from other states in the matter of imposition of tax. Further, the state laws on freedom of trade, commerce or intercourse with or within that state are required to be reasonable restrictions and in the public interest.[160] The factor of non-discrimination in the matter of

153. Report of the State Autonomy Committee 77 (1999) cited by S K Sharma, *supra* note 145 at 31.

154. As on 2009 Feb., 338 important central laws are made applicable. See S K Sharma, *id.* at 555-65.

155. *Report of the Commission on Centre-State Relations*, Part I, 88, (1988)

156. *J & K Cigarettes Co Ltd* v. *Union of India*, 1988 JKLR 985, 997.

157. In *Automobiles Transport Ltd.* v. *State of Rajasthan,* AIR 1962 SC 1406, it was observed by the Supreme Court: "All obstructions or impediments, whatever shape they may take, to the free flow or movement of trade or non-commercial intercourse offend Article 301 of the Constitution."

158. In WTO law also similar policy underlying 'National Treatment' clause is regarded as a pillar of equality and an instrument that ensures level playing field.

159. M.P. Singh, *V N Shukla's Constitution of India* 859 (Lucknow: Eastern Book Co., 11th Ed., 2008).

160. Art. 304 (b).

compensatory tax and other regulations on health and safety has been required under the decisional law.[161] Under article 302 also the laws made by the Parliament imposing restrictions on the freedom of trade, commerce or intercourse between one state and another or within any part of the territory of India are required to be in the public interest. The requirement of reasonableness of such restriction has been insisted as mandatory in *Prag Ice & Oils Ltd* case.[162] An attempt to use the federalism argument under article 301 to support the exploitative money lending practice is a challenge on constitutionality of a welfare law that intended to provide relief to the poor who had incurred indebtedness was defeated in *Fatehchand* case.[163] V.R. Krishna Iyer J in his judgment viewed that the conscience of the commerce clause in India is the promotion of an orderly society influenced by the principle of social justice underlying the directive principles of state policy. By holding that gambling and even state-run lotteries are also excluded from the lawful sphere of commerce because of their obnoxious nature, the possibility of invoking federalism for protection of *res extra commercium* has been driven out.[164] On the whole, the commerce clause jurisprudence has also made vital contribution to the values of part III and part IV of the Constitution.

XII Conclusions

Linking federalism to fundamental human rights, justice and to the goals of welfare is an apt and vital approach in constitutional jurisprudence. The success of Indian federalism in keeping the national unity intact should not make us complacent about its role *vis-à-vis* part III and part IV of the Constitution. Federalism greatly matters in elimination of disparities in access to people's rights and welfare. This brings it closer to the ethical objective of attaining justice. Michael Burgess made a succinct point when he said that the theoretical debate about federalism is essentially a moral debate because it is based upon underlying notion of justice.[165] It is by augmenting the moral worthiness of federalism through its greater commitment to justice in all its dimensions that federalism can serve the human society which has multiple diversities. While Michael Burgess made that observation in the context of

161. *G K Krishnan* v. *State of Tamil Nadu*, AIR 1975 SC 583; *State of Karnataka* v. *Hansa Corpn.*, AIR 1981 SC 463; *State of MP* v. *Bhailal Bhai* AIR 1964 SC 1006.

162. *Prag Ice & Oils Ltd.* v. *Union of India*, AIR 1978 SC 1864; According to D D Basu, the collective application of Arts. 14, 19 (1)(g), 245 and 301 have such impact. See D D Basu, *Commentary on the Constitution of India* 263 (Calcutta: S C Sarkar & Sons, 7th Edn. 1986).

163. *Fatehchand* v. *State of Maharashtra*, AIR 1977 SC 1825.

164. *State of Bombay* v. *RMD Chamarbaughwala,* AIR 1957 SC 699; *B. R. Enterprises* v. *State of U P* , AIR 1999 SC 1867.

165. Michael Burgess, *supra* note 28 at 288.

multicultural features of society,[166] it holds good in the matter of positive rights, social justice, control of crimes and asymmetric structure of the polity.

The conceptual discussion carried out in this paper rules out mutual incompatibility between federalism and human rights/welfare, but suggests a great amount of synergy emerging from their combination. Federalism is a multi-faceted concept having social, economic, multicultural dimensions, and defies a legalistic or too formal an approach to satisfy the requirement of basic rights and idea of welfare. Natural or community-made asymmetry needs to be tackled by employing the concept of equal liberty of all. Avoidance of lopsided development and effectuation of affirmative action programme elevates the whole society with components of rights, freedoms and welfare stimulated by justice.

Elimination of disparities is the *sine qua non* of welfare federalism. Concerted shouldering of the responsibility by the Central Government and state governments with all serious commitment is constitutionally expected. As the experiences in the context of CSS on health, rural employment and education teach, defective handling of them by any of the participants of federalism is bound to disappoint the society. With a plethora of CSS, the challenges on the part of all the layers of government including grass root democracy are significant, and require to be handled with a sense of purpose. Fiscal federalism has the benevolent policy of assisting the backward or the disadvantaged states. In the matter of natural disasters, federalism has more relied on collaborative and humanist methods. Regarding access to inter-state river water, constitutional development has gone beyond equitable apportionment and looking for a break- through by networking of rivers.

Federalism-based diversity in legal norms is not by itself bad, but is of course a logical necessity. However, overstretching of it beyond context and without looking to the consequence makes deep inroad to the system of liberties and welfare. A mechanical approach to a due process right like protection against double jeopardy prefers form over substance, inflicts injustice, and hence needs to be avoided. Exercise of legislative competence of Central Government in the matter of part III related laws has not ignored cooperative federalism; but has used as a tool for protection of rights. Unnecessary multiplicity and possible dilutions are avoided by upholding national policy against socially condemnable acts. Concurrent responsibility of the union and states in the matter of part IV objectives has added efficacy to enforcement strategy.

Social justice and multiculturalism are the two paramount values superimposed upon federalism. Both the federal government and state governments have leeway in moulding the social justice policy according to the respective needs of the nation or region. However, the judgment in *EV Chinnaiah* needs to be reconsidered to

166. *Ibid.*

enable the state policy to canalize the advantage of reservation to the most deserving beneficiaries. Federalism, by giving scope for regional, linguistic and ethnic chauvinism, has been problematic in some circumstances. The stern way in which such aberrations and disparities are dealt by application of right to equality is commendable. Equality's role in language right in education is also seminal.

Crime control is a function jointly shared by the central and the state governments. Federalism, as a tool of constitutionalism, has great potentiality in India to ensure rule of law. The availability of coercive mechanism in this regard could restore liberties in times of crisis. Judicial approach of confining it to rarest of rare cases augurs well. The role of central investigative agency in circumstances of state government's collusive conduct regarding inquiry into crimes, cooperative federalism in combating Naxal violence and collaboration for controlling terrorism are federalism's contribution to the cause of human rights. Asymmetric federalism in Jammu and Kashmir has been by and large toned down by constitutional development towards equal liberty principle.

On the whole, federalism matters immensely in the realm of human rights and welfare because of its basic concern for justice, welfare and cultural pluralism. Constitutional interpretation should prefer integrated reading of federalism with part III and part IV values. As a part of constitutional scheme, it is a purposive enterprise for desirable social transformation. The processes through which it has been contributing to these values have been through democratic and constitutional means. Mutual complementarities of these value processes should be properly appreciated in the course of constitutional interpretation in order to avoid uncomfortable results arising from the fallacy of disintegrated reading of the Constitution.[167]

167. Laurence H Tribe and Michael C Douf, *On Reading the Constitution* 21 (Massachussetts: Harvard University Press, 1991).