



Institut für Föderalismus
Institut du Fédéralisme
Institute of Federalism

IFF Working Paper Online No 49

SUMMER UNIVERSITY 40th ANNIVERSARY

CONFERENCE: Federalism and Democratic Backsliding: Current Perspectives

Conference Proceedings

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August 2025

Citation: Fiseha A., McCulloch A., Steytler N., Keil S., Oleschak-Pillai R., Federalism and Democratic Backsliding: Current Perspectives, Conference Proceedings, IFF Working Paper Online No 49., Fribourg, August 2025.
<https://doi.org/10.51363/unifr.diff.2025.49>

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The IFF Working Paper Online series and other publications of the Institute of Federalism, Fribourg are available on the IFF website www.unifr.ch/federalism/en/research/.

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DOI: <https://doi.org/10.51363/unifr.diff.2025.49>

ISSN: 2813-5261 (Online)

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Abstract

The second panel of the IFF's 2024 Summer University Conference explored the relationship between federalism and democratic backsliding from theoretical perspectives and with concrete examples. The panel examined how democratic backsliding impacts the practice of federalism and dealt with questions of prioritisation of processes of democratisation or federalisation. Case studies include Myanmar, India, and Ethiopia. While some of the papers generally point to the negative effects of democratic backsliding on the practice of federalism, others take a more nuanced view of the relationship between federalism and democratic backsliding.

Keywords

Federalism, democracy, democratic backsliding, democratisation, power-sharing, India, Myanmar, Ethiopia, constitutionalism

A) Foreword

In August 2024, the Institute of Federalism (IFF) of the University of Fribourg in Switzerland organised its 30th Summer University on Federalism, Decentralisation and Conflict Resolution. To celebrate this milestone, a two-day conference was integrated into the Summer University, which dealt with the question: **Is Federalism Still a Viable Governance Tool in Times of Crisis?** The conference consisted of three thematic panels: Federalism and Conflict, Federalism and Democratic Backsliding, and Federalism and Resource Tensions. Their proceedings are being published as a three-part series. The summary of the first panel has already been published¹, this second instalment covers Federalism and Democratic Backsliding, while the third is currently in publication.

¹ <https://folia.unifr.ch/unifr/documents/330495>

B) Introduction

Democracy and federalism are generally considered to be complementary. However, some democratic federations are undergoing changes that impact the democratic features we are familiar with. At the Summer University 2024 Conference Panel on Federalism and Democratic Backsliding, we examined the relationship between democratic backsliding and federalism. This required us to establish a shared understanding of what democratic backsliding actually denotes, and also terms like power-sharing and federalism. In her seminal article on Democratic Backsliding, *Nancy Bermeo* asks the questions, what kinds of concrete actions transform a regime from one type to another, and which techniques of transformation are most common in the process of democratic backsliding. She outlines six trajectories of the process of democratic backsliding, of which she finds three to be in decline (coups d'état, executive coups by elected leaders, and blatant election-day vote fraud) and another three to be continuing or on the rise, namely promissory coups, executive aggrandizement, and strategic manipulation of elections (Bermeo, 2016). The case studies dealt with on the panel indicate one or more of the trajectories outlined by Bermeo and share some common features. However, they also highlighted how the relationship between democracy and federalism is contextual.

The first chapter by *Assefa Fiseha* sets the stage for examining the relationship between federalism and democratic backsliding. He points to the rise of Cold-war style coups in Africa, thus reversing the trend that Bermeo identified in 2016, and warns that “a retreat from federalism and democracy is not the answer, a renegotiated social contract is”. In the second chapter, *Allison McCulloch* points to the necessity for inclusion of the “Others” in processes of power-sharing that requires scaling down from the state level of analysis to a more nuanced level of who participates in power-sharing arrangements. She outlines why paying attention to the “Others” is important for understanding the state of democracy in that these show the democratic gaps in the original peace-deal, can play the role of warning indicators of impending backsliding, and may be evidence of “enclaves of exclusion” in otherwise seemingly inclusive societies. *Nico Steytler* uses the sub-national level as a unit of analysis to examine the role of subnational governments as the “cornerstone of democracy”. His chapter outlines the paradox of subnational governance, in that subnational units, which generally clamour to have more power, for example in the form of taxing powers, prefer not to tax and rather be dependent on handouts from the centre, thus undermining democratic accountability. In the fourth chapter, *Soeren Keil* uses comparative examples to point towards the complexity of the processes of federalisation and democratisation. He highlights that democratisation and federalisation are driven by distinct logics, and raises a policy-relevant question: should there be a reconsideration of sequencing? If so, which should come first, and what should the timeline look like? In the final chapter, *Rekha Oleschak-Pillai* examines the case of India to highlight democratic backsliding in the form of executive aggrandizement at the centre, specifically examining the dismantling of federal principles and weakening of state's rights.

C) Federalism and Democratic Backsliding, *Assefa Fiseha*²

This short piece aims to locate the link between federalism and democracy and the latest developments that show backsliding from both federalism and democracy (IDEA, 2023).³ It is not only that democracy is in decline, but alternative authoritarian regional powers are emerging and working in coalition. How does this impact federalism? This is a central issue, and the retreat from federalism in some countries may have its roots in the emerging new trend.

Federalism and democracy are distinct concepts, but they complement and reinforce one another, however, on occasions, both could be in a state of tension. Most federations have two chambers, and the second chamber's mandate and composition may be favourable to federalism and minorities, but majorities may see it as an antithesis to the principle of one person, one vote. The federal idea requires that minorities have enough safeguards and protection against the tyranny of the majority. The process of adoption of the federal constitution and the procedures for amendment may provide safeguards to minorities and less populated states, at times requiring the approval by a majority of the population and a majority of the states. Some federal constitutions provide veto power to subnational units when the federal law/policy-making process affects their autonomy. Some federations also provide consociational power sharing arrangements at the federal level (in the executive as well as the legislature, which could be on an equal or proportional basis). Its aim is to have a more inclusive decision-making process, which is critical for deeply divided societies as it enhances the sense of belonging to the system. In this sense, federalism moderates the dangers of the tyranny of the majority. Federalism is not against majority rule but takes into account the interests of minorities and subnational units. It is a delicate compromise, but the end goal is to ensure unity and peace while accommodating diversity.

For quite some time now, there has been some retreat from the federal idea, which has also had an impact on democracy and minority rights. The rise of populist right-wing political parties and figures, with their ambition to strengthen central authority (a kind of ambition to return to the old nation state), weakens systems of checks and balances. The imposition of their will on subnational autonomy, along with their anti-immigrant and anti-diversity rhetoric and policy, is posing a threat to the gains made with respect to federalism, democracy, and ethno-national minority rights (Gagnon, 2021; Khaitan, 2020).⁴ Spain, in response to the attempted referendum on whether Catalonia must stay in the union or secede, imposed central rule and jailed political leaders from the subnational unit since 2017. A new far-right party even aims to end the autonomy. India under Narendra Modi is not only centralizing its federation but has also withdrawn a seven-decade promise (since 1947-2019) of autonomy to its restive Muslim dominated Jammu and Kashmir region. Unlike its predecessors that envisaged India as a diverse, secular, and multiethnic democracy, the Bharatiya Janata Party (BJP), following its electoral victory in 2014 under Modi, is pushing for centralization under a Hindu majoritarian cultural nation that could frustrate India's gains made so far (Swenden, 2022). Secular and autonomous institutions that have evolved since 1949 are now falling into the hands of the far-right BJP, which in turn is dominated by the Rashtriya Swayamsevak Sangh (RSS), an even more far-right organization. Under Hindu nationalism, secularism has come

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³ Freedom House reports show seventeen years of democratic decline.

⁴ Populism comes in many ways. Often come with thin ideology and claim the elites in power do not represent the people and aim to bring strong leaders that claim to represent natives to power. They claim mainstream parties have outlived their purpose and institutions have become unresponsive and want to do away the system of checks and balances and judicial autonomy leading to totalitarian system and pushing non-natives.

under attack, and India's minorities are treated as second-class citizens. It is hoped that the latest electoral results in India, which force the BJP to form a coalition government, will serve as a check to its ambitious plan.

In the West, the rhetoric about the failure of multiculturalism has been on the rise, interestingly from leaders and countries that half-heartedly adopted such policies (Kymlicka, 2012). In Africa, concerns are growing that, alongside the global recession of constitutional democracy (Balkin, 2018), democratic momentum is stalling and signs of reversal are on the rise (Fombad, 2024). The hope that the third wave and the global triumph of liberal constitutionalism will ensure political stability, peace, and respect for human rights, ending Africa's age-old autocracy, is declining. After a few years of what looked like progress, there is now a resurgence of authoritarianism. The recent rise of military coups in Mali, Sudan, Niger, Burkina Faso, Chad, Democratic Republic of Congo (DRC) and Gabon show reversal to the pre-Cold War era, not the entrenchment of constitutionalism. The ongoing brutal wars and conflicts in Ethiopia, Sudan, South Sudan, Libya, DRC, and Central African Republic, among others, demonstrate the lack of inclusive governance and breakdown of political institutions and distrust between the centre and subnational units. Parties to the conflict are resorting to violence instead of peaceful resolution of conflicts using constitutional avenues. The changes to constitutions and some progresses seen during the early 1990s have not provided a solid foundation for political stability and constitutionalism. Conflict and war continue to threaten national and regional peace, in addition to the rise of the refugee crisis that is impacting the continent and beyond. South Africa, Ghana, Botswana, Senegal, Nigeria, and Kenya are considered exceptions to this trend.

Dominant and hegemonic parties that are common in Africa are also exposed to elite capture and stand against the regulation of power, frustrating the ambition to limit power, essential to federalism. The allocation of competencies between the federal government and the subnational units can only be effective if both entities respect the limits to their power as defined in the constitution (political constitutionalism) and if the entity that exceeds faces legal consequences through the system of constitutional review (traditional constitutionalism). Unchecked dominant parties have been shying away from democracy and remain a challenge to federalism and constitutionalism.

Perhaps the worst form of retreat from federalism and democracy is seen in Ethiopia. Ethiopia waged a full-blown war on Tigray and declared countless states of emergencies and military rules on its regional states in 2020-2024. Ethiopia has never been democratic, as a hegemonic authoritarian party controlled both federal and subnational institutions. This, combined with a centralized developmental state, has made the relationship between federalism and democracy problematic. Yet there was hope that when a new regime evolved from the same party in 2018, Ethiopia would move to democracy. Latest developments indicate the opposite. The chairman of the party liquidated the former coalition and affiliate parties and established a single national party under the name Prosperity Party (PP). This is ironic as no less than one-fourth of Ethiopia's one hundred twenty million people have been exposed to poverty. The party 'President' can now hire and fire party members throughout the country, and as the party and state are fused with no autonomous institutions, it has, in effect, made Ethiopia a unitary state. As if this were not enough, the centre has placed nearly all subnational units under emergency, suspending civilian institutions and letting the army and security rule the regional states. In Nigeria and Kenya, the losers at the federal level are more or less compensated as they have been able to win majority seats in the states, and politics have become less explosive. In Ethiopia, alienation at both levels is reinforcing a sense of isolation and separatism, and this has made the centre explosive.

Authoritarian one-party rule is not conducive to federalism in Ethiopia. There is a strong link between federalism and democracy. Federations assume continued engagement of citizens and states in the decision-making process; it is a voluntary consent. Non-centralization and multiple centres of power are also its features. The foedus, along with intergovernmental relations, also implies open political bargaining and avoidance of violence. Seen from this framework, Ethiopia's trouble remains very clear. A power originally designed to guarantee self-governance was significantly curtailed; first by democratic centralism, hegemonic party control, and centralized policy-making under the EPRDF; and later by extreme centralization, martial law, deinstitutionalization, and violence under the PP. Two other factors further complicate Ethiopia's political context. The extreme centralization of power at the centre and the brute use of force to deal with political issues was an incubator for the ethnonational-based liberation fronts that emerged in the early 1970s. In addition, the failure to conduct dialogue and make compromises to resolve political issues characterizes modern Ethiopian politics, and this has become the new normal under the PP. An entrenched, territorially based, and politically mobilized cleavage is the outcome.

To state whether the federal system works, it must first be implemented. We noted how the intrinsic features of federalism, the will to implement the federal pact, and the use of intergovernmental platforms to resolve disagreements about the division of power have been disregarded. In Ethiopia, the will to keep the federation going – the federal spirit, the foedus – is missing. Instead of adapting the federation to new developments through interpretation, negotiation, or amendment, the regimes resort to unilateral action, and the frequent use of force has resulted in conflict and civil war. Resorting to bargaining and negotiation rather than violence and the use of force is an integral element of federalism. There is no federalism without foedus. It refers to the commitment to implement federalism as outlined in the pact by both levels of government. Resorting to force or unilateral action goes against the federal will.

Overall, Ethiopia's case shows a disconnect between the political system's capacity to deliver and the demands placed upon it. Six decades of political mobilization for self-government and inclusion by ethno-national groups confronts an authoritarian and imperial centre that, despite change of regimes and actors, continues to recycle marginalization and centralization, and by doing so, Ethiopia has institutionalized fragility, instead of institutionalizing its political system. Contestations between the centre and subnational units have resulted in devastating wars as centrifugal forces push for inclusion, resource sharing, and self-government. Federalism's potential to manage and balance unity and diversity has been limited by the authoritarian imperial centre and the regime's excessive use of violence to crush political demands. Federalism has not failed but has been betrayed in serving as a venue for intergovernmental bargaining and negotiated reforms.

Experts think the costs of maintaining unity and territorial integrity of the country have become so high at times, resulting in ethnic cleansing and genocide. They question whether maintaining such unity is worth the price, as the centre continues to be the main source of insecurity and massive violations of human rights. They think the stakes at the centre are too high and need to be diffused. They insist on significant transfer of power and resources to the states along confederal lines and making the stakes at the centre less explosive.

These developments should serve 'as an important warning that in many cases where the central state opted to remove or threaten regional state autonomy – cases in point include East Timor, Eritrea (1960s), Kosovo, Montenegro, and Sudan (South Sudan) – regions affected have since gained their independence' (Gagnon, 2021). Thus, a retreat from federalism and democracy is not the answer; a renegotiated social contract is.

D) Don't forget the Others, *Allison McCulloch*⁵

Forms of power-sharing, including federalism and consociationalism, serve as important tools of conflict resolution in some of the world's most divided places. They are also critical devices for advancing democracy and ensuring the inclusion of previously marginalized communities in political life (Hartzell and Hoddie, 2020). The underlying logic is that sharing power between majority and minority groups provides groups with the security and self-sufficiency to jointly address contentious issues and encourages them to govern with a "spirit of accommodation" (Lijphart, 1968). Ostensibly, then, power-sharing forms of government should be well placed to resist democratic backsliding, shoring up support for democracy from a wide range of constituencies. Power-sharing forms of governments might therefore be well-placed to serve as bulwark against democratic backsliding.

Part of the challenge of studying the relationship between power-sharing and democratic backsliding is definitional. Prevailing concepts of democratic backsliding understand it as the decline of democratic quality in a political regime, or to use Bermeo's definition, "the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy" (Bermeo 2016). This typically positions the level of analysis at the level of the state. Not only might this obscure variation at the subunit level (e.g., the existence of democratic or authoritarian enclaves within the state), but also misses the impact on marginalized communities, those often referred to as 'Others' or as 'minorities within minorities' in power-sharing systems. Others, because they are either too small, too territorially dispersed, or because they do not identify with the dominant ethnic cleavage, often face exclusion in the adoption, maintenance, and reform of power-sharing systems (see, for example, Stojanović, 2018; Agarín et al, 2018).

Turning an analytical lens to focus on how 'Others' fare under power-sharing rules offers three insights for further nuancing our understanding of backsliding:

1. It helps to expose so-called democratic gaps in the original agreement. Others are often treated as though they will not 'make or break' a peace deal, as their disruptive potential is often quite small. Yet, the series of court challenges at the European Court of Human Rights, regarding the inability of Others to compete in presidential elections or to serve in the upper house of Bosnia and Herzegovina, demonstrates how this original oversight redounds to the democratic quality of the system.
2. The treatment faced by Others can serve as early warning signs of impending backsliding. Marginalized communities are often an early focal point for wider attempts to crack down on rights, especially for gender and sexual minorities, and migrant/newcomer communities. How a government treats vulnerable populations is indicative of its commitment to democracy.
3. A focus on Others can also highlight 'enclaves of exclusion' in otherwise inclusive systems. The allocation of competences within a federation can create differential rights. It is common practice to allocate health care, for example, to the subnational units in a federation. As part of this, however, women's access to reproductive rights and to maternal health provisions might look very different in the different units, creating uneven access to public services (McCulloch 2017).

⁵ Professor of Political Science, Brandon University, Canada

In sum, a more robust analytical focus on the performance of power-sharing systems, attuned to the fate of Others, can help to capture movement towards democratization as well as instances of backsliding more effectively.

E) The role of subnational governments as the “cornerstone of democracy,” *Nico Steytler*⁶

The focus on democratic backsliding is usually on the central or federal governments. The role of subnational governments (SNGs) in this regard is often neglected. Three questions are thus posed:

1. Can SNGs perform a ‘cornerstone-of-democracy’ role? Is it building a democratic ethos from the bottom up? And if so, how? And why?
2. Alternatively, are SNGs contributing to the backsliding on democracy. If so, how? And why?
3. How can SNGs’ role as the ‘cornerstone-of-democracy’ be enhanced, and democratic backsliding resisted?

SNGs advancing democracy

SNGs can advance democracy across the different levels of government in federal systems by bolstering a general democratic ethos. First, they can show that representative democracy works and subnational legislatures can and do reflect regional/local preferences. Secondly, subnational democracy can be inclusive. Local elected governments are, by their sheer numbers, more representative of voters than at national and provincial levels. Moreover, local councils can be more inclusive of the various components of their communities. In terms of the Indian Constitution, a third of representatives in the panchayat and municipal corporations must be women. Thirdly, SNGs can make participatory democracy work; through practice, they can establish a political social culture which encourages citizens to demand participatory opportunities also in respect of national and provincial governments. Fourthly, SNGs are essential in building a multi-party democratic ethos. The election of opposition parties to some of the SNGs is inevitable, thus requiring an ethos of tolerating multiple centres of power, an essential key ingredient of federalism. Political tolerance, developed and practiced at subnational level, is a crucial factor in ensuring that a change in the regime also occurs at the national level.

SNGs and democratic backsliding

SNGs, however, may also facilitate democratic backsliding. First, at the hands of the central government, which may allow for limited scope for subnational democratic governance, which undermines democracy itself. When subnational powers are centralized, SNGs no longer really matter, and democratic governance becomes less relevant. If local governments are administrators, and not decision-makers, democratic interest wanes. Secondly, strong hierarchical political parties can also undermine local democratic governance by depriving SNGs of any scope for local decision-making. If a ruling party instructs subnational governments under its control on what to do, local political interest also wanes. Thirdly, authoritarian national regimes are, of course, the antithesis of local democracy; often, no or irregular local elections are held.

⁶ Emeritus Professor of Law, University of the Western Cape

However, the limited or poor use by SNGs of the scope for democratic governance is also a contributing factor to democratic backsliding; they are then not active players and defenders of democracy. First, SNGs may not be contesting the autonomous space from encroachment by the central or federal government or central party dominance, thus contributing to making subnational governance unattractive or irrelevant. Secondly, their reluctance to tax their constituencies diminishes taxpayer accountability. They become comfortable with their transfer addiction. With limited democratic accountability, SNGs may be prone to the moral hazard of spending other persons' money. In Kenya, the 47 counties have reasonable functional competences, but the limited taxing powers (only a property tax and an entertainment tax) make them dependent on transfers (an equitable share of a minimum of 15% of the national budget). However, the Council of Governors, in seeking a larger revenue base, demanded a higher percentage of the revenue raised nationally, from 15% to 45%. They showed little interest in increasing their own tax base and hence increasing political accountability. In South Africa, the provinces are also dependent on transfers for 97% of their revenue, yet there are no concerted efforts to increase their taxing powers beyond gambling taxes and motor vehicle licences. Thirdly, where elected politicians become unresponsive to local demands, not listening to local concerns, communities bypass democratic institutions and take to the streets, which often turns violent. Fourthly, inefficiency, mismanagement, and corruption in SNGs erode the trust among communities that they govern in the latter's best interest. The effect is that SNGs get delegitimized; communities then prefer the ostensible more efficient and less corrupt central government.

How can federalism or decentralization help minimize democratic backsliding?

From the above analysis, the following remedial actions should be explored: First, the institutions of SNGs must be active participants in democracy by protecting their autonomy and ensuring free and fair elections. Secondly, the practice of democracy must show its value to residents; that SNGs are responsive governments; that they embrace the principle of no representation without taxation; that they deliver clean and efficient administrations and service delivery. The argument is that democracy is not only the responsibility of the central or federal government; SNGs have a particular responsibility to establish a democratic ethos from bottom up. They can and should be the cornerstone of democracy.

F) The dangers of democratization and federalization as simultaneous processes in post-conflict societies, *Soeren Keil*⁷

In this paper, I aim to explore the complexities and challenges of implementing democratization and federalization processes simultaneously in post-conflict societies. The topic is deeply linked to ideas discussed in the works of scholars like Arthur Benz, particularly in “Federal Democracies at Work” (Benz, 2020) and “Federal Democracies” (Benz & Sonnicksen, 2021).

Federalism and Democracy: Theoretical Foundations

Arthur Benz delves into the intricate relationship between federalism and democracy, framing it within what is called the ‘coupling framework.’ This framework addresses the varying degrees of integration between federal and democratic structures. According to Benz’s work, federalism and democracy are sometimes ‘tightly coupled,’ meaning that the institutions of federalism (such as territorial autonomy and decentralization) work closely with democratic processes (like elections and decision-making based on majority rule). However, they can also be ‘loosely coupled’ or even ‘decoupled,’ leading to significant tensions (Benz & Sonnicksen, 2017).

The primary challenge in post-conflict societies is that democratization and federalization are two processes with contrasting objectives. **Democratization**, on one hand, is about broadening political participation, establishing majority rule, and empowering citizens to elect their leaders. **Federalization**, on the other hand, focuses on decentralization and granting autonomy to subnational units (often those with a majority of specific ethnic groups) to ensure that their specific interests are protected. By doing so, federalization can become a tool of limiting choices by granting autonomy to specific groups, allowing them special decision rights through asymmetric provisions, or providing them with targeted veto rights, which may contradict majoritarian principles.

These processes can conflict with each other when introduced simultaneously, especially in fragile, post-conflict settings.

The Dangers of Simultaneous Democratization and Federalization

In societies emerging from conflict, both democratization and federalization face substantial hurdles. The tension between them often exacerbates divisions rather than resolving them. This tension is rooted in what Benz and Sonnicksen describe as the ‘complex relationships’ between federalism and democracy (Benz & Sonnicksen, 2017; Sonnicksen, 2024).

Federalization in post-conflict societies is often seen as a way to resolve demands for autonomy by different groups. By creating decentralized governance structures, federalism provides autonomy to regions and ethnic groups, which can help mitigate secessionist tendencies. However, democratization, which typically involves majority rule, may marginalize minority groups unless there are specific power-sharing mechanisms. This can worsen divisions, as seen in Iraq, where the 2005 federal constitution granted substantial autonomy to the Kurdish region, but democratization did not bring full inclusion (due specifically to the fact that the Sunni were marginalized in the constitutional process and thereafter) or stability. In Spain, democratization after the end of the Franco dictatorship resulted in substantial autonomy for the different historic communities,

⁷ Senior Teaching and Research Fellow, University of Passau

but discussions about Catalonia's Statute from 2010 onwards highlight the perils of majority rule that ultimately came to a showdown in the constitutional crisis in 2017.

The logics of democratization and federalization are often contradictory. Democratization emphasizes majority rule and the creation of a unified political sphere where different parties compete for power. In contrast, federalization emphasizes the autonomy of regional or ethnic groups, often leading to the fragmentation of the political landscape. This was evident in Bosnia and Herzegovina, where federalization after the 1995 Dayton Peace Agreement entrenched ethnic parties in their respective regions, which hindered democratic integration at the national level. Here, federalism did not promote democracy but reinforced division, as local leaders capitalized on regional autonomy to consolidate their power.⁸

Benz's coupling framework is useful in understanding how these two processes can either reinforce or undermine each other. In cases of 'tight coupling,' like Switzerland, federalism and democracy have worked together to produce stable governance. However, this is a rare case, as post-conflict societies often experience what Benz calls 'loose coupling' or 'decoupling,' where democratization and federalization proceed in parallel but do not integrate effectively. The example of Myanmar shows how democratization can dominate and overshadow federalization, as the push for elections and majority rule sidelined federal reform efforts in the short-lived democratization period of 2015 until February 2021. This imbalance culminated in a military coup, demonstrating how the failure of the NLD as the leading democratizing force to forge alliances with ethnic groups in promoting federalism and decentralization contributed to a return to military dictatorship and substantial violence across the country.

Conclusion and Policy Implications

Should democratization and federalization be implemented sequentially, rather than simultaneously, in post-conflict societies? I suggest that trying to introduce both at the same time may be too ambitious and risks deepening divisions. Instead, policy-makers might need to consider sequencing these processes, first stabilizing one aspect before introducing the other. In practice, this could mean that democratic institutions and the rule of law might need to be established first, before substantial processes of decentralization follow. Alternatively, post-war societies might be stabilized by focusing on autonomy first, i.e., by ensuring all groups receive a degree of self-rule that enables them to make major decisions affecting their own lives independently. Only then can country-wide elections and institution-building follow to ensure that there are large-scale democratization efforts. Neither sequence is without risk – the first will potentially alienate certain groups and spark secession movements or lead to new conflicts, as seen in the cases of Myanmar and Ethiopia, while the second approach might undermine democratization as a whole and lead to state capture by ethnic elites, as seen in Bosnia and to some extent also in Iraq.

What remains vital, therefore, are context-specific strategies and the need to carefully consider how federalism and democracy interact in fragile states.

⁸ Keil and Hulsey even ask the question, if democracy really matters in consociational systems, such as Bosnia (Keil & Hulsey, 2024).

G) **India's descent into autocratic legalism: A federal perspective,** *Rekha Oleschak-Pillai*⁹

The Indian Republic has been feted as an example of democratic constitutionalism, with a vibrant political culture, and is generally seen as an example of a successful multinational federation, this in spite of the strong centralising bias present in the constitution. In the last 10 years, India has been descending into what can be termed as “autocratic legalism” (Scheppelle, 2018). The term autocratic legalism looks at the legal institutional framework and how law is used to dismantle democratic institutions. Scheppelle has also developed a concept she terms ‘counter constitutional revolutions’¹⁰ which she explains as “an alternative constitutional reality, forwarded by its advocates as a substitute for an existing constitutional arrangement”. In this paper, I examine the various facets of autocratic legalism as well as counter constitutional revolutions in India, looking at this through the lens of federalism. I find that both concepts of “autocratic legalism” and “counter constitutional revolutions” can be applied to the current state of Indian democracy. I also argue that in spite of some elements of contestatory federalism, the Indian federal polity is going through its weakest period.

Background: Federalism and Democracy in India

India's independence in 1947 and the adoption of the constitution in 1950 ushered in an era of democracy in a region that did not have a history of modern democracy and was marked more by divisions than by a sense of unity. One can identify four periods that are politically relevant in the context of federalism. The period post-independence till the 1960s, can be seen as the era of the one-party state, yet, this was also the time where the federal level (the Centre) tried its most to keep the states happy, as one historian has noted, the first Prime Minister, Jawaharlal Nehru wrote monthly letters to all the Chief Ministers (Guha, 2007). The post-1960s to mid-70s is when the rise of regional and national parties was seen as a threat to the dominance of the Indian National Congress, which was coming to an end. This was also the period when the elections to state legislative assemblies and the centre were delinked.¹¹ The period from the 1990s onwards, which has been the era of coalition governments, was seen as marking a pathway towards a more cooperative federalism as regional parties started playing a role in national politics and coalition governments were forced to adopt more social welfare legislation than ever before.

The current era, from 2014 onwards, which I term the “strongman state,” fundamentally breaks from the political culture and acceptance of constitutional morality in the post-independence era (with the exception of the imposition of a national emergency by Prime Minister Indira Gandhi

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¹⁰ In her words “A counter-constitution is an alternative constitutional reality, forwarded by its advocates as a substitute for an existing constitutional arrangement. It is “counter” in the sense that it opposes an existing constitutional order and “constitutional” in the sense that it offers itself as an alternative constituting framework for the governance of a particular community. Counter-constitutions challenge the previously taken-for-granted status of the official constitution which, precisely because of the challenge, can no longer claim obviousness. What made the prior constitution obvious (until that point)? And why did that obviousness begin to fail when it did? What influences the shape that a counter-constitution takes? These are questions we can examine when counter-constitutionalist challenges arise.” Scheppelle, 2023.

¹¹ There is a renewed attempt of having the state and federal elections at the same time. The BJP seems to favour this, in hope of political gains that will enable them to ride the wave of popularity at both central and state levels.

in 1975). Never before have governments challenged the liberal democratic and federal constitutional framework as the BJP, led by Prime Minister Modi, has done.

A counter-constitutional revolution in India?

The rise of the BJP and its allies backed by the “civil society movement” called the Hind Parivar, including the RSS and the Vishwa Hindu Parishad (VHP) have created narratives that question history, create at the same time a feeling of insecurity and discontent among the Hindus, framing the minorities, specifically the territorially scattered Muslim minority as a threat to the identity of a Hindu nation. Under this narrative, India lost its independence not through colonisation by the British but under the Muslim rulers from the 14th/15th centuries onwards. It gained independence not in 1947, but in 2014, when the BJP came to power. This narrative finds expression through newspapers, social media, and television.

The election of the BJP and Narendra Modi-led government from 2014 onwards has seen a renewed centralist agenda, which is defined by the mantra, one party, one nation, one language, thus creating the narrative of a uniform national identity, which is highly problematic in a multi-ethnic, multilingual country. All the above evidence the counter-constitutional revolution being moulded in India. From a federal perspective, the narratives introduced to create a uniform national identity are also reinforced by the creation of “big” national issues like “citizenship” or “national security considerations,” and simultaneously rendering state-specific issues to the sidelines.

Autocratic Legalism in India

The use of laws and institutions to disable democratic institutions or to change these to suit the interests of one group is a key component of autocratic legalism. In India, one finds several examples, of which I give an overview of just two. The first example concerns the legislation on electoral bonds, nothing more than a form of legalised political corruption, which was more recently, after a period of five years of existence and operation, classified as “unconstitutional” by the Indian Supreme Court (*Association for Democratic Reforms v. Union of India* 2024 INSC 113). The whole saga connected to electoral bonds is a topic of general political interest, especially as it constitutes also a tug of war between the judiciary and the executive.

Another example is the Composition of the Election Commission, a constitutional body that is responsible for holding elections (both state-level and national elections). At the end of 2023, just before the national elections of 2024 were to be held, the system of nomination to the election commission was changed, with the ruling party now being able to decide on the Election Commissioners. A challenge is pending before the Supreme Court on the constitutionality of the legislation (*Jaya Thakur v Union of India* W.P.(C) No. 000014/2024).

Both these examples constitute *prima facie* control of democratic institutions by the present government, which gives it undue power over future elections and thus allows a current government to (theoretically) capture future elections. Since there are no term limits to the post of Prime Minister, the concentration of power in the current officeholder is not just a theoretical possibility but a real one.

Democratic Backsliding and demos-enabling or constraining Federalism?

The relationship between federalism and democracy has either been seen as demos-enabling or as demos-constraining. While demos-enabling is understood from the perspective of popular sovereignty, demos-constraining is understood in terms of second chambers (equal numbers of representatives of all states) and the like. Demos-enabling is also that federations have elections at all levels of government, thus leading to more possibilities of democratic participation. Also, political parties may come to power in state elections without having a national profile (several regional parties today are such state-based parties).

Democratic backsliding in India takes the form of executive aggrandizement (Khaitan, 2020), thus giving the executive a much larger role, and limiting the role of the other two branches of government, consequently limiting the horizontal separation of powers. At the same time, executive aggrandizement also impacts the vertical distribution of powers and specifically, infringes upon the competences allocated to states. Below, I outline some examples of such central executive aggrandizement.

The most blatant attack on state's rights is the dissolution, bifurcation of states. The Indian Constitution gives the federal level the power to create new states, change state boundaries, or demote states to centrally controlled Union Territories. In the past, the creation of states has been less fraught with controversy, as these were accommodative measures to allow for internal self-determination, mostly based on language, and in the more recent past, due to concerns of developmental neglect. The bifurcation of Jammu and Kashmir into two and demoting its status to Union Territory in 2019 took place immediately after the inauguration of the second term of the Modi government. The removal of autonomy and the sheer disregard for even a veneer of respect for the autonomy of Kashmir, even procedurally, has been a wake-up call for states with non-BJP governments.

The use of federal powers in the state of New Delhi to weaken the democratically elected state government is another example of dismantling or infringing upon states' rights. In 2023, the Supreme Court held that the Delhi government, and not the Centre, has control over the civil servants and day-to-day administration of the National Capital Territory of Delhi (Government of NCT of Delhi v Union of India, Civil Appeal No 2357 of 2017, Judgement 22 May 2023). However, the Centre was not to simply abide by the decision, with a Gazette Notification in September 2024, presidential powers were transferred to the Lieutenant Governor, allowing the central government appointee to exercise the powers usually reserved for the President and overriding the elected government of the state.

The central enactment of legislation on agriculture, which was then taken back after massive protests by farmers, is another example of encroachment into states' competences.

In small island Union Territories (UT) like Lakshwadeep and Andaman and Nicobar Islands, the federal level seems to be acting more like Australia with Nauru as its protectorate. Given the extremely fragile ecosystems of both these Union Territories, economic activity being pushed by the federal government is being resisted by the local population. In the ecologically fragile region of Ladakh, there have been growing demands for statehood, driven by local concerns that the influx of businesses, particularly in tourism and rare mineral mining, is causing environmental harm. The question, of course, arises whether such activities would have been allowed if these UTs were states with their own elected state governments.

The role of the governor has been generally disputed, and more so in recent months. The governor's main role is to sign off on state legislation, as argued by several states in recent months before the Supreme Court, this is blatantly being disregarded. The Governor's duty is towards the Constitution (as has previously been affirmed by the Supreme Court), but this seems to have taken a very different turn under the current government.

The federal level also antagonises the states in infringing upon states' competences, whether it is education or language policy, and seems to be using federal funds to push for more centralisation.

In my view, the weakening of fundamental rights protection through use of criminal law (infamous terrorism legislation against journalists, students, human rights and environmental activists) and the creeping saffronisation of institutions (judiciary, administration, police) constitutes one of the most dangerous threats to federalism, as these are instruments of state control, which equate any resistance to centralist tendencies as criminal activities.

So, is everyone taking this descent into "autocratic legalism" without any resistance? We see several examples of state governments challenging the Centre through outright protests as well as taking the federal government to Court. In the last years, state governments have filed cases against citizenship laws, fiscal decisions, the misuse of governors' powers and on the use of natural resources. Indian federalism is "constitutionally fragile" (Choudhry 2022). It of course remains to be seen whether the federal system can act as a check on democratic backsliding in India, currently, the outlook is not positive.

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