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CHIEF PATRON'S MESSAGE

"Constitution is not a mere lawyers document, it is a vehicle of life, and its spirit is always the spirit of age."

—B.R. Ambedkar

I am delighted to present the Second Issue of Third Volume of RGNUL Student Research Review (RSRR) in its triennial year.

The present edition of RSRR aims to provide a platform to students, academicians and legal practitioners to express their original thought on the contemporary legal issues. I sincerely believe that it would help in providing momentum to quality legal research.

This edition of the journal contains articles covering different aspects relating to "Constitutionalism: Revisiting the Grundnorm". Constitutional law is concerned with the role and powers of the institutions within the State and with the relationship between the citizen and the State. The Constitution is a living, dynamic organism which at any point in time will reflect the moral and political values of the people it governs, and accordingly, the law of the Constitution must be appreciated within the socio-political context in which it operates. Therefore, the present issue of the journal aspires a detailed discussion on the Constitution of India involving an understanding of a variety of historical, legal, philosophical and political factors which have, over the years, shaped the organisation of the State.

I, on behalf of the students and faculty of RGNUL Punjab, express my deep gratitude to all the distinguished members of the Peer Review Board who have devoted their valuable time in reviewing the papers and providing their valuable insights. I would like to appreciate the efforts made by the Faculty Editor and the entire student-run Editorial Board. This issue of the RSRR, I hope, will be a trendsetter. I wish the journal all the best.

Professor (Dr.) Paramjit S. Jaswal
Chief Patron
RGNUL Student Research Review

PATRON'S MESSAGE

It is a matter of satisfaction that the present issue of RGNUL Student Research Review (RSRR) is continuing commendable success in the quest to promote legal education over a period now. The objective of RSRR is sharing of knowledge on current legal issues and to enhance the understanding of these issues through extensive research.

The current issue of the journal is on Constitutionalism: Revisiting the Grundnorm and it has received extensive participation and exchange of thought amongst the developing legal minds. The Constitution of India is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens. Further, it lays down the national goals which form the basic edifice on which the nation rests upon. Keeping in mind the significance of legal research in Constitutional Law, RGNUL has always promoted the culture of academic deliberation and writing in its students.

RGNUL Student Research Review has achieved an unprecedented success by achieving new heights in quality of scrutiny involved in review and time bound delivery. Further, I would appreciate the hard work by students in making this journal internationally renowned,which has received contributions from across the India. The same fact is highlighted by the fact that Eastern Book Company, Publishers i.e., one of the premium publishing house of our country has agreed to publish the journal from this edition.

I would like to express my gratitude to all professionals and academicians who have joined to this initiative as a part of Peer Review Board and shared their enormous experience to the success of this journal. Further I would like to appreciate the efforts made by Prof. (Dr.) AnandPawar, the Faculty Editor for providing guidance to the Student Editors. I congratulate the Editorial Board of RSRR and all the young scholars who took out time from their academics for this outstanding initiative and wish them success in all their future endeavors.

Prof. (Dr.) G.I.S. Sandhu
Patron
RGNUL Student Research Review

FOREWORD

It gives me immense pleasure to write the foreword for the third edition of the RGNUL Student Research Review (RSRR). I would like to take the opportunity to appreciate the efforts made by the students of RGNUL in the form of an Editorial Board for the successful completion of this edition. RSRR has inspired the young and innovative students to undertake legal research and articulate it in a comprehensible form. In the course of running the Review, the editors have not only learnt editing skills but also managerial skills.

The support of our peer-reviewers who are the leading academicians of this country, practicing advocates and other legal luminaries has been invaluable to us and I humbly thank them for the time they took out to review the articles that were submitted for consideration. I would like to take this opportunity to thank our contributors for their excellent work. I also convey my deep regards to EBC Publishers for agreeing to publish the journal for wider circulation of the excellent work undertaken through this academic endeavor.

The Issue two of the third edition begins with the guest article from Mr. Rahul Satyan, Principal Associate, Cyril Amarchand Mangaldas & Ms. Krithika Ramesh, Associate, AZB & Partners. They have very succinctly dealt with the issue of strikes and industrial action. Furthermore, the contributors have provided articles on a wide spectrum of topics, discussing the grey area in the Doctrine of Pleasure, inception and exigency of the essential Religious Practices Test and an analysis of State in Part III of the Indian Constitution.

We would appreciate any further improvements in the journal as may be suggested by the contributors.

Prof (Dr.) Anand Pawar
Faculty Editor

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STRIKES & INDUSTRIAL ACTION – CONSTITUTIONAL FREEDOM OR ANTITRUST VIOLATIONS?

Rahul Satyan& Krithika Ramesh[*]

1. INTRODUCTION

On March 7, 2017, the Supreme Court of India ("**Supreme Court**") passed what is arguably the first substantive order under the Competition Act, 2002 ("**Competition Act**"). This order, in *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of W.B. Film & Television*[1] ("**West Bengal Artists case**") upheld an appeal by the Competition Commission of India ("**CCI**") against an order of the Competition Appellate Tribunal ("**COMPAT**") which had held that the act of boycott by an artists' association was not a violation of the Competition Act. The Supreme Court however overturned the COMPAT's verdict and upheld the earlier order of the CCI terming such an act as an anti-competition act. In its order, the Supreme Court, *inter alia*, adjudicated the issue of industrial action by trade unions, and whether they were subject to scrutiny under the Competition Act. This article seeks to dwell on this issue of interface between industrial action and antitrust law in light of the decision of the Supreme Court in *West Bengal Artists case*[2]. The article will also explore whether, and in which circumstances do such acts of collective bargaining can be adjudicated as antitrust violations.

As a nation, India has always proudly embraced its socialist roots. The Constitution of India ("**Constitution**"), in its Preamble, proclaims India to be a *"sovereign, socialist, secular, democratic republic"*. Social justice is an integral part of the Indian political and legal landscape. Industrial action is seen by many as an enabler of social justice in this landscape – whereby a class of persons with less bargaining power can demand and extract social and economic concessions from the economic strata which controls the means of production. However, the very fundamentals of a socialist economy were shaken in 1993 when liberalisation brought with it, to a certain extent, the freedom to take commercial decisions as one saw fit. There were in-built safeguards, of course, but by and large, the Indian industrial space evolved a compromise between sheer free-market 'laissez faire' and the command-and-control pre-liberalised economy. Collective bargaining by unions and associations was an integral part of that compromise. What the government refused to do (for example fix anything more than a minimum wage), the unions stepped in to do by means of collective bargaining. Industrial law took note of the changing ground realities

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[1] (2017) 5 SCC 17.

[2] (2017) 5 SCC 17.

and changed accordingly. However, the means of industrial action, such as strikes, lock-outs, go-slows etc. continued to keep their place. Boycotts and collective refusals to deal were part and parcel of this landscape. The government and industry struggled to balance the legitimate rights of labour, with the pressing need for industrial efficiency. However, the coming into force of the Competition Act added another layer to this complex equation.

Under the Competition Act, any collective acts by an association of persons or enterprises which had the effect of fixing prices, limiting production, dividing markets or manipulating a bidding process is deemed to cause an Appreciable Adverse Effect on Competition ("**AAEC**") in India, and is thus a violation of the Competition Act. In case after case, the CCI and the COMPAT have come down heavily upon trade associations which have been seen to be boycotting certain enterprises or partaking in acts which limit production. This article seeks to explore the line that divides the constitutional freedom (if not the absolute right) to take part in industrial action against the restraining force contained in the Competition Act. Lastly, the new 'gig' economy proliferating in recent times has placed additional levels of complexity in this debate. In an economic reality where traditional "employment" (the *sine qua non* of protection under labour law) is weakening and being rapidly replaced with independent "gigs", the line dividing the freedom given to industrial action and the restrictions placed by the Competition Actis growing even narrower. This article seeks to explore this new economic reality on the anvil of Indian antitrust law.

2. ANATOMY OF "STRIKE" UNDER LABOUR LAW

Article 19(1)(c) of the Constitution lays down that *"all citizens shall have the right to form associations or unions or co-operative societies"* subject to certain reasonable restrictions such as the operation of any law which places any restrictions in the interest of public order, morality, or the sovereignty or integrity of India. Accordingly, all citizens of India may form a union, association or co-operative society, subject to reasonable restrictions. It would appear that this right to form unions and associations is restricted to natural persons, since companies and other juristic persons are not considered as "citizens", and thus the right of companies to form associations is not a fundamental right, such as the one given to the workmen of an industry to form, say, a trade union. However, such unions are not restricted to workmen alone; employers' unions many also be formed to earn a profit.

A union is formed for many reasons, but primarily to provide a forum for collective bargaining. The Supreme Court in *All India Bank Employees' Assn.* v. *National Industrial Tribunal* [3], laid down the rights of trade union members which are encompassed within the fundamental right to freedom of speech and

[3] AIR 1962 SC 171.

expression under Article 19(1)(c). These included the right of the members of the union to meet, to move from place to place, to discuss their problems and propagate their views, and to hold property. However, the Supreme Court also went on to hold that that Article 19(1)(c) does not account for a right pertaining to the achievement of all the objectives for which the trade union was formed. Accordingly, industrial actions such as "strikes" have not been granted constitutional protection.

However, while the right to strike has not been designated a fundamental right under the Constitution, the courts have recognised strikes as a mode of redress for resolving the grievances of workers. Justice T.C. Menon in *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.* v. *Collector*[4], said that the workers in a democratic state have the right to resort to strikes in order to express their grievances or to make certain demands. Thus, a strike is a necessary safety valve for industrial relations. Further, the right to strike is the very essence of the principle of collective bargaining.

In *Labour Disputes and Collective Bargaining*, Ludwig Teller laid down that a "strike" was a dispute between an employer and his workers in the course of which there is a concerted suspension of employment. In a similar vein, the Industrial Disputes Act, 1947 ("**ID Act**") defines a "strike"to mean "a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment."

2.1. "Workmen" employed in an "industry"

For the act to become an industrial strike within the meaning of the ID Act, the establishment under which the striking workmen are employed must be an "industry". Section 2(s) of the ID Act makes it clear that unless the person concerned is employed in an activity which is an "industry", he will not be a 'workman'. Once it is established that the activity in question is an "industry" as defined in Section 2(j), the question then arises, as to whether the persons concerned are employed in such industry. The term "employed in an industry" is wide enough to cover operations that are incidental to the main "industry". The plain letter of the definition under the ID Act makes it clear that not only the persons who are actually employed in an "industry", but also those who have been discharged, dismissed or retrenched in connection with or as a consequence of an industrial dispute; and whose dismissal, discharge or retrenchment has led to that dispute, would fall within its ambit. Further, for an employee in an "industry" to be a "workman" under the definition, the employee must be employed to do any of the following:

[4] 1982 Lab IC 367.

- Manual labour;
- Unskilled work;
- Skilled work;
- Technical work;
- Operational work;
- Clerical work; and
- Supervisory work

2.2. Converted refusal to work

For an industrial action to be a "strike", the concerted quitting, cessation, or discontinuance of work is an essential ingredient. Further, a mere cessation of work will not be seen as a "strike" unless it can additionally be shown that such cessation of work was a "concerted" action for the purpose of enforcing an industrial demand. Interestingly, in order to establish such concerted action, there need not be any formal agreement; the same may be deduced from acts and conduct.

2.3. Relationship of employment

Unless there is a contract of employment between the striking persons and the industry in question, there can be no strike as understood in the ID Act. The identifying mark of an employer-employee relationship is that the employee should be under the supervision of the employer in respect of the details of the work. To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing that work is to be done, but also of controlling the manner of doing his work. In *Short* v. *J&W Henderson Ltd.*[5], a case decided by the House of Lords under the Workmen's Compensation Act, Lord Thankerton recapitulated with approval the four indicia of contract of service derived by Lord Clark J from the authorities referred to by him in the judgment under appeal, viz:

- the master's power of selection of his servant;
- payment of wages or other remuneration;
- the master's right to control the method of doing the work; and
- the master's right of suspension or dismissal;

and further observed that "modern industrial conditions have so much affected the freedom of master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if

[5] (1946) 62 TLR 427.

and when an appropriate occasion arises, it will be incumbent on this house to reconsider and to restate these indicia". Broadly speaking, there are three tests for discerning the contract of employment', viz:

- The 'Traditional' or 'Control' Test: The traditional control test refers to the control of an employee as to not only what he must do, but also as how and when he must do.
- The 'Organisation' or 'Integration' Test: This test focusses on whether the employee forms part of the organisation. An evolution from the traditional "control test", this test was evolved in *Morren* v. *Swinton and Pendlebury Borough Council*[6], where Lord Parker pointed out that when one is dealing with a professional man or a man of some particular skill and experience, there can be no question of an employer telling him how to work, therefore an absence of control and direction in that sense can be of little use as a test;
- The 'Mixed' or 'Multiple' Test: In *Argent* v. *Minister of Social Security*[7], Roskill J. suggested that all the relevant factors must be borne in mind and one has to look at the totality of evidence and then apply them to the statute.

In India, while earlier decisions heavily relied upon the test of "control and supervision", the modern version of the law has diluted its importance. The Supreme Court has also held that the definition of "worker" under the ID Act is sufficiently wider to cover part time workers such as tailors working in a part time job. They will also fall within the definition of "workman".

In sum, the treatment of strikes as a method of collective bargaining under labour law is primarily characterised by the following:

- The industrial action is a result of concerted action by workmen in an industry; and
- There workmen are bound to this industry by a contract of employment, i.e. they have no independent mode of action, and is, broadly speaking, subjected to significant control by the employer.

3. ANATOMY OF A VIOLATION UNDER THE COMPETITION ACT

The role and acts of trade associations have been adjudicated by the CCI on multiple occasions. Under Section 3(3) of the Competition Act, any agreement entered into between enterprises or association of enterprises, or persons or association of persons which are actual or potential competitors shall be presumed to cause an AAEC on competition in India if such agreement

[6] (1965) 1 WLR 576.
[7] (1968) 1 WLR 1749.

determines prices, limits production, shares markets or manipulates a bidding process. Such an arrangement is popularly referred to as "cartel", which is defined under the Competition Act as to include an association of producers, sellers, distributors, traders or service providers, who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or trade in goods or services.

A trade association, in that sense, is an antitrust powder keg. A group of competitors meeting regularly to discuss industry issues is a supposed ripe scenario for collusion and exchange of commercially sensitive information, such as details of prices and production. For antitrust regulators across the world, trade association meetings are low hanging fruit, and collective acts decided upon in trade association meetings have become causes of action for antitrust investigations. In *Builders Assn. of India* v. *Cement Manufacturers' Assn.*[8], the CCI determined that the exchange of commercially sensitive information between cement manufacturers through the platform of an industry association was akin to an anti-competitive agreement since it reduced the competitive uncertainty in the market for cement in India. The CCI concluded that the cement manufacturers were indulging in a cartel aimed at controlling production and raising prices, and went on to impose penalties amounting to about USD 1 billion, the highest antitrust penalty in India thus far.

However, trade associations do serve legitimate commercial purposes, such as collective representation to government and regulatory authorities, formulating and modernising industry standards, instituting safety and good conduct practices in the industry, etc. When commercially sensitive information is pooled for such purposes, with requisite "Chinese Walls" or informational barriers in place, antitrust authorities refrain from taking action. In *All India Tyre Dealers Federation* v. *Tyre Manufacturers*[9], the CCI assessed whether the sharing of information by certain tyre manufactures in the context of an anti-dumping investigation with common counsel was an exchange of information which qualified as an anti-competitive agreement within the meaning of Section 3(3) of the Competition Act. However, in this case, the CCI concluded that since the information collected and shared with the common counsel was for the purpose of legal proceedings, there was no arrangement which could be called a cartel. It is important to note that in this case, this information was not shared amongst or between the various tyre manufacturers.

Historically, across the world, trade associations have represented the cause of their constituent members to the requisite stakeholders. Such collective bargaining has taken a variety of forms and tactics. In India, trade association tactics such as boycotts and compulsory adherence to certain rules have been so ingrained, that they are rarely questioned. However, the CCI has

[8] 2012 SCC OnLine CCI 43.
[9] 2012 SCC OnLine CCI 66.

frequently seen such practices as contraventions of the Competition Act. Trade associations, especially nodal associations which have the power to approve or disapprove members, have a lot of economic power in any market. Accordingly, the CCI has seen such associations as dominant enterprises, and their actions as abuses of dominant position under Section 4 of the Competition Act. To take a few examples, in several cases dealing with pharmaceutical trade associations, such as *Santuka Associates (P) Ltd.* v. *All India Organisation of Chemists and Druggists Assn.*[10], the CCI came down on standard practices of such associations such as the requirements of no-objection certificates, fixing of dealer margins, etc. and designated them as anti-competitive practices. Further, the CCI has also come down hard on practices such as the collective boycott of third parties. In case after case, such as *Collective Boycott/refusal to deal by the Chemists & Druggists Assn., In re*[11] the CCI held that the prevalent practice of collective boycott of certain entities which did not follow certain diktats, by a pharmaceutical trade association was a violation of the provisions of the Competition Act and imposed penalties accordingly.

4. THE THIN RED LINE

The order of the Supreme Court in *West Bengal Artists case*[12] has shed fresh light on the dividing line between the rights of a trade union to collectively bargain, and the diktat of competition law that collective action by a person or enterprise or collection of persons or enterprises is an anti-competitive act.

In *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of W.B. Film and Television*[13] (**"West Bengal Artists case"**) the Supreme Court upheld an appeal by the CCI against an order of the COMPAT in a case of alleged cartelisation by members of a film and television artists' trade union in the state of West Bengal. Arguably the Supreme Court's first substantive order under the Competition Act, it arose out of a complaint that the holder of a rights to dub and telecast the serial "Mahabharata" in Bengali was unable to do so due to the opposition and pressure from two associations, namely the Eastern India Motion Picture Association (**"EIMPA"**) and the Committee of Artists and Technicians of West Bengal Film and Television Investors (**"Co-ordination Committee"**). The Co-ordination Committee is a joint platform comprising the Federation of Cine Technicians and Workers of Eastern India, and West Bengal Motion Pictures Artists Forum. As a result of this opposition, it was alleged that one of the two television channels which had formally contracted to broadcast the serial refrained from doing so. Upon the complaint, the investigative branch of the CCI, the office of the Director General (**"DG"**), initiated an investigation and concluded that the joint action

[10] 2013 SCC OnLine CCI 16.
[11] 2014 SCC OnLine CCI 135.
[12] (2017) 5 SCC 17.
[13] (2017) 5 SCC 17.

by the persons who were the members of the Co-ordination Committee, to restrict the telecast amounted to an anti-competitive agreement within the meaning of Section 3(3)(b) of the Competition Act.

In response to the DGs conclusion, the Co-ordination Committee argued that they were merely a *trade union of artists and technicians* of West Bengal and, as such, were not an "enterprise". Accordingly, it was argued their acts were merely industrial action protected under Article 19(1)(a) of the Constitution of India.

Interestingly, the CCI, while agreeing with the findings of the DG that, by their conduct, the Co-ordination Committee and EIMPA had restricted the telecast of the dubbed television serial, held that the two associations were not 'enterprises' for the purpose of the Competition Act. However, the CCI held, this only absolved them from adjudication under Section 4 of the Competition Act, which deals with unilateral conduct, and not for concerted conduct under Section 3 of the Competition Act. Accordingly, the CCI went on to hold that by restricting the telecast of the serial, the Co-ordination Committee and EIMPA has violated the provisions of Section 3(3)(b) of the Competition Act.

Upon appeal, the COMPAT held that the members of the two trade unions, being artists, technicians, etc., were not competitors in the market for "telecasting of dubbed serials on the television in West Bengal" (which would ideally be direct to home/cable operators). Further, since one of the two channels continued to telecast the serial despite the industrial action by the trade unions, there was no evidence to suggest that the industrial action in question actually limited or controlled the production, supply, markets, technical development and investment or provision of services. Accordingly, the COMPAT allowed the appeal and held that the Co-ordination Committee was not guilty of a contravention under Section 3(3)(b) of the Competition Act.

The Supreme Court, before whom this order of the COMPAT was challenged, took a divergent view. It held that that the Co-ordination Committee did not act as pure trade unionists. Any entity engaging in an economic activity constitutes an enterprise within the meaning of Section 3 of the Competition Act. The constituent members of the Co-ordination Committee, as per the Supreme Court, were 'enterprises' which were engaged in the production, distribution and exhibition of films. Accordingly, by engaging in concerted action which boycotted a fellow competitor and deprived consumers from exercising their choice and hindered competition in the market by barring dubbed television serials from exhibition on television channels in West Bengal, the Supreme Court held that the Co-ordination Committee had violated the provisions of Section 3(3)(b) of the Competition Act.

In sum, the argument of the unions that there were pure trade unionists engaged in collective bargaining was shot down by the Supreme Court because the members of the union were enterprises engaged in economic activity.

Hence, these were more aptly characterised as 'trade associations' and not pure trade unions. It stands to reason that had this been a pure trade union, the members of such a union would not be competitors and hence, any collective action would likely be seen as collective bargaining, and not anti-competitive concerted acts. The key takeaway appears to be that the actions of a legitimate trade union comprising individual workers may still enjoy the protection of Article 19 of the Constitution, and legislation such as the ID Act. However, where the trade union in question operates more like a trade association – in that their members are enterprises, or represent enterprises – any industrial actions such as boycotts may be adjudicated under the relevant provisions of the Competition Act.

It is interesting to note that the definition of "strike" under the ID Act has most of the ingredients of a cartel under Section 3(3)(b) of the Competition Act. The conduct in question is as a result of concerted action, and does result in cessation of work thus affecting production of goods or services. However, as seen from the discussion above, the crucial difference if that a cartel offence is committed by a group of enterprises (which include both natural and juristic persons) which are engaged in independent economic activity. On the other hand, the contract of employment required under the ID Act ensures that the "workmen" in question do not have independence of commercial conduct, and are thus not "enterprises".

5. THE PATH AHEAD

The fundamental distinction between the treatment of collective bargaining and industrial action, as seen above, hinges around employment. If one is an employee, an act of collective bargaining would be protected from antitrust action. Whether labour laws protect such an act depends on the facts and circumstances of the case. However, for all practical purposes, the legitimate contract of employment stands a bulwark against the imposition of antitrust law. This protection allows workers in any industry to unionise and organise legitimate industrial action to seek redressal of their demands.

In February 2017, the city of New Delhi witnessed a strike call by the Sarvodaya Drivers Association of Delhi ("**SDAD**"). The SDAD, a union of Ola and Uber drivers in the city, called for lakhs of cars to be off the streets for almost two weeks, demanding better remuneration and incentives. As almost three lakh vehicles stayed off the roads, millions of commuters were inconvenienced but Ola and Uber refused to budge. Amidst reports of sporadic violence, the Delhi High Court stepped in to direct that the SDAD or any other union could not force any driver opting to continue to work from doing so. Finally, under a peace brokered by Delhi Government, the strike was called off and cabs returned to the roads. The question to ask is whether this strike by the SDAD and other drivers unions would enjoy the benefits of legitimate industrial

action. The answer is clearly a resounding negative. Cab aggregators such as Ola and Uber maintain (across the world) that they are but a software company which provides a platform for customers and independent driver-contractors to get in touch with one other. Thus, in the eyes of cab aggregators, such drivers are entrepreneurs and not employees, hence not eligible for protection under traditional labour law. In a cruel twist, such strikes will most likely be seen as a collusive act between "enterprises" and be liable for antitrust action.

This is a peek into the future of labour relations in India. Across the world, the economy is increasingly becoming a "gig" economy. This economy is characterised by freelance or short term jobs, as opposed to permanent, fixed ones. The gig economy priorities access over ownership - hence the rise of Uber and Ola, which don't own a single cab, and Airbnb, which doesn't own a single room. The participants in a gig economy, such as Uber divers or Airbnb housekeepers, are considered as entrepreneurs and independent contractors, as opposed to employees. As such, any collective action by them may be seen as a collusive act by independent enterprises and thus actionable under the Competition Act. The rise of the gig economy across the world is being mirrored in India. Businesses are increasing outsourcing key aspects of their operations to contractors. With employment in the traditional sense fading away, the protections of labour law cease to be effective as well. The gig economy not only leave its participants bereft of the benefits under labour law, but also subjects the same to antitrust action under competition law.

In sum, under traditional labour law, a legal strike is inherently protected from antitrust action by the employer-employment relationship. Collective bargaining within this employer-employee framework is considered safe rom action under the Competition Act since a workman lacks independent power of action and thus is not an "enterprise". However, the moment collective bargaining includes "enterprises", any co-ordinated bargaining action is likely to be seen as cartel activity and thus proscribed by the CCI. The order of the Supreme Court in *West Bengal Artists case*[14] does not make the extent of such disqualification clear, in that it is unclear whether *all* the participants in the collective bargaining act should be enterprises for the defence of trade unionism to fail. Arguably, even if a percentage of the same may be said to be enterprises, the action loses the protection of labour law.

In the new economy, it is thus important for stakeholders to know exactly where they stand with respect to collective industrial action. While employees are protected by their status, independent contractors most certainly would face antitrust liability for such acts. Legitimacy of the cause itself is irrelevant, and it is important for market participants to understand on which side of this legal divide do they stand.

[14] (2017) 5 SCC 17.

ARTICLES

EDUCATION, STATE RESPONSIBILITY & CONSTITUTIONAL BEARINGS

Sharad Verma[*]

Abstract *In post-independence India, education has remained at the core of constitutional values, originally as a Directive Principle under Article 45 of the Constitution of India. Yet, the provision was deleted through the 86th Amendment in December 2002, only to be modified from a mere directive, to a constitutional guarantee under Part III of the Constitution. It is largely the Supreme Court's activism towards the realization of the ideal of free education in Unni Krishnan, J.P. v. State of A.P. (1993) which led t o this constitutional development. Subsequently, the Right to Education Act, 2009 was enacted as a regulatory measure, facilitating another addition made to Part III, that of Article 15(5) through the 93rd Constitutional Amendment, to expand the purview of the guarantee of education to private educational institutions.*

While the prudence of a legal guarantee of education is beyond question, the author seeks to argue that this selective extension of state responsibilities to private institutions under Article 15(5), without extending the same objectives to either unaided or aided "minority" institutions, is a misinterpretation by the Parliament of the mandate of Article 30(1), and constitutes violation of Article 14 between "minority-administered" and private institutions, which raises questions regarding the constitutionality of the 93rd Consitutional Amendment itself, bearing in mind that the extension of such responsibilities to minority education institutions will only supplement educational guarantees further, and would not affect their "minority character", or in any other manner impinge upon the limited prohibitions of Article 30(1).

In this submission, the author seeks to focus on the role of recent judgments of the Supreme Court of India, in neither considering the aspect of violation of Article 14 nor considering the new dimension of constitutionalism that has found acceptance in India through the 'horizontal' application of fundamental rights, which the author argues must be applied equally amongst educational institutions of all kind, and that the current distinction on the basis of Article 30 (1) is unfounded and against views expressed by the Supreme Court in T.M.A. Pai Foundation v. State of Karnataka (2002).

1. INTRODUCTION

Education in India is seen as a means of enabling the citizens to live a successful life and contribute their worth to the society. It may also be seen as a liberating force which awakens the people to their rights and responsibilities, sometimes regarded as a panacea to the many complications that we collectively face. The Constitution of India envisages that there should be no discrimination in the distribution of available facilities in this area, and ensures that, in particular, the disadvantaged sections get their due.

It is important to note the reason that the right to education has currently become an enumerated fundamental right can be safely attributed to the efforts of the Supreme Court. It is one of the rights that the Court created which imposes a positive obligation on the State. The Court was prompt to read in Article 21 a fundamental right to primary education, as part of the wider right to life and liberty. The case of *Unni Krishnan, J.P.* v. *State of A.P.*[1] shook the Parliament which then made the necessary constitutional changes, and this led to the enactment of the 86th Constitutional Amendment Act, 2002, incorporating the guarantee of free and compulsory primary education, in the Part III as Article 21A. The refreshed Article 45 in Part IV now reads that "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." The right to education being a fundamental right, can now be enforced as a matter of constitutional entitlement, and has been described as the most important right, "as one's ability to enforce fundamental rights flows from education."

Additionally, with the stated objective of advancement of the socially and educationally backward classes of citizens, i.e. the Scheduled Castes, Scheduled Tribes and the OBCs, the Parliament introduced Article 15(5) by the 93rd Constitutional Amendment Act, 2005. This provision added to the Constitution is elaborate, and is of the nature of an enabling provision. It provides constitutional protection to legislative action by the State to extend the responsibility of providing seats in educational institutions even to the private institutions, whether aided or unaided, whilst expressly exempting from its purview, aided and unaided "minority" educational institutions referred to in Article 30(1).

It is this curious exemption given to minority-administered institutions by the Parliament which requires analysis, since the extension of the same state-responsibilities that have been mandated upon the private educational institutions could have been legally and constitutionally extended to cover minority educational institutions, which in no manner whatsoever would have transgressed upon the protection guaranteed under Article 30(1), in further pursuit of the stated object of the 93rd Constitutional Amendment, i.e. "to promote the

[1] (1993) 1 SCC 645.

educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes."

2. HORIZONTAL APPLICATION OF CONSTITUTIONAL GUARANTEES

Amongst the most intensely debated contemporary issues in constitutional law is the scope of application of Fundamental Rights provisions. The central question is whether the rights regulate the relationship between the State and the individual, called vertical application, or whether they also apply to relations between private individuals, called horizontal application. With its limited resources and slow-moving machinery, the State has until now been unable to fully develop the genius of the Indian people. By taking the public-private distinction to be not as categorical as supposed, the State in India is ready to reconsider the traditional doctrinal approaches to the scope of application of fundamental rights and the doctrine of "State action".

The State's duty to provide education can be said to be of two kinds, depending on the level of education in context. Constitutionally, primary and upper primary education fall into one category in respect of which an imperative obligation is imposed upon the State to provide free and compulsory education. Yet, the extent of facilities to be provided in this area is dependent on the limits of economic development and the available financial resources. In the Indian context, the Right to Free and Compulsory Education Act, 2009, hereinafter referred to as the "RTE Act", is an appropriate example of horizontal application of constitutional guarantees to regulate and mandate the grant of free education by private educational institutions.

The existing affirmative action programs applying exclusively to State institutions are designed under the shadow of the guarantee of equality under the Constitution. The fundamental objection to such an extension is grounded in a limited application of the equality guarantee, which is bolstered by the prevailing understanding of the scope of the principle of "State Action". It will be clear from of the judgment of the eleven-Judge Bench of the Supreme Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[2], that the Court has been in favour of horizontal application, and therefore, observed that reserving a small percentage of seats in educational institutions, aided or unaided, for weaker, poorer and backward sections of society, phrased as a "sprinkling of outsiders", did not affect the rights of minority institutions, thereby justifying future horizontal application of constitutional guarantees to non-State stakeholders, in a limited and constitutional manner.

Since the enactment of the RTE Act, there have been multiple occasions of challenge to its constitutionality and that of its parent constitutional provision,

[2] (2002) 8 SCC 481.

Article 15(5), with the line of argument remaining largely the same: a challenge to the horizontal application of state responsibilities, and how the same is not constitutionally tenable. In *Ashoka Kumar Thakur* v. *Union of India*[3], this horizontal aspect of the provision was challenged before the Supreme Court as unconstitutional for violating the "basic structure" of the Constitution. The case was heard by a Constitution bench of five Judges, and in a divided (4:1) verdict, the Court held:

> *"... Constitution 93rd Amendment Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. Questions whether the Constitution (Ninety Third Amendment) Act, 2005 would be constitutionally valid or not, so far as "private unaided" educational institutions are concerned, are not considered and left open to be decided in an appropriate case."*

The above-mentioned question, left open to be decided, was considered finally in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[4], in which the constitutional validity of several provisions of the RTE Act was again challenged before the Court. It was contended by the petitioners that "Article 21A or Article 45 do not even remotely indicate any idea of compelling the unaided educational institutions to admit children from the neighbourhood ... since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through legislation transfer its constitutional obligation on the private institutions." Contrary to this, Kapadia CJ., writing for the majority, held that the seat-reservation provision under S. 12(1)(c) of the Act, is a "reasonable restriction" under Article 19(6) upon the contended rights of private educational institutions under 19(1)(g), if any, and is therefore constitutional.

This is not the correct exposition of law since it will be seen that the intricate language and construction of Article 15(5) insulates all laws that provide for reservation made thereunder, from application of Article 19(1)(g) in the first place, and the RTE Act is such a law. This being the case, Article 19(6) being a restriction on Article 19(1)(g), and Article 19(1)(g) itself being inapplicable to Article 15(5), the natural corollary of this legal position is that while examining the constitutional validity of S. 12(1)(c), Article 19(6) cannot be a possible relevant consideration. It is interesting to note that this curious approach of the Court in limiting the scope of the inquiry into the constitutionality of Article 15(5), upon the justification of it being a "reasonable restriction", has been maintained even in the latest case pertaining to the issue, in *Pramati Educational & Cultural Trust* v. *Union of India*[5].

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[3] (2008) 6 SCC 1.
[4] (2012) 6 SCC 1.
[5] (2014) 8 SCC 1.

3. CONSTITUTIONALLY-WARRANTED REGULATION OF ARTICLE 30(1)

The reluctance of the political establishment to apply provisions of the RTE Act to the minority educational institutions stems not only from their erroneous understanding, purposive or otherwise, of the scope and operation of Article 30(1), but also due to the political ramifications of such a move, owing to the strong class-consciousness of the minority communities and minority-administered institutions, and since elections in India are still predominantly communal and also upon linguistic lines in some parts. In order to appreciate why the responsibility to provide free education must be extended to minority educational institutions, an analysis of Article 30(1) cross-examining the Parliament's stance regarding it, is necessary.

An analysis of the very provision cited as the reason for specific exemption of minority-administered educational institutions, shows that Article 30 guarantees to religious and linguistic minorities the right to establish and administer educational institutions of their choice, and the right that their institutions shall not be discriminated against by the State in the grant of aid.

The judicial view regarding the scope and width of regulations which may be lawfully imposed either by legislative or executive action without transgressing into the ambit of Article 30(1) is that these must be directed to making the institution, while retaining its character as a minority institution, "effective" as an educational institution. In *Sidhajbhai Sabhai* v. *State of Gujarat*[6], the Supreme Court observed that any regulation framed in the "national interest" must necessarily apply to all educational institutions, whether run by the majority or the minority. It is, of course, true that government regulations cannot destroy the "minority character" of the institution or make the right to establish and administer a mere illusion; but the right under Article 30(1) is not absolute, so as to be above the law.

In *State of Kerala* v. *Mother Provincial*[7], dealing with Article 30(1), the Court observed that an exception to the right under the provision was the power with the State to regulate education, educational standards and allied matters. To add to this principle, *St. Stephen's College* v. *University of Delhi*[8], the Court clarified that, "the standards of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people."

In *Ahmedabad St. Xaviers College Society* v. *State of Gujarat*[9], H.R. Khanna J., in his separate judgment, has clarified that the idea of giving some

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6 AIR 1963 SC 540.
7 (1970) 2 SCC 417.
8 (1992) 1 SCC 558.
9 (1974) 1 SCC 717.

special rights to the minorities is not to have a kind of a "privileged or pampered" section of the population, but to give to the minorities a sense of security and a feeling of confidence. This interpretation was expressly referred to by the Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[10], wherein it was expressed that there also cannot be any "reverse discrimination." No one type or category of institution should be disfavored or, for that matter, receive more favorable treatment than another.

A holistic analysis of the scope of Article 30(1) and its relation with the other provisions of the Constitution enabled the 11-Judge Bench of the Supreme Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[11] to truly appreciate and clearly hold that Article 30(1) is not an "absolute right". It has its limitations and is not transgressed at any and every attempt at regulation of minority institutions. Unfortunately, despite a plethora of judgments on the nature of Article 30(1), the Supreme Court has faltered with its interpretation while drawing a comparison between the scope of Article 19 (1)(g) and Article 30(1). The Court surprisingly expressed in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[12]., that since Article 19 (1)(g) is not an "absolute right as Article 30(1)", the RTE Act, insofar that it does not cover minority institutions, cannot be termed as unreasonable. This interpretation is misconceived, since Article 30(1), as the above analysis of the Court's consistent view exhibits, is not absolute, and its beneficiaries can be regulated within the bounds of constitution, even without a "reasonable restrictions" clause like Article 19(6) being appended to it.

Additionally, considering that the special Bench *T.M.A. Pai Foundation*v. *State of Karnataka*[13] consisted of eleven-judge bench, it can be seen that the verdict given by a three-judge bench in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[14], holding that Article 30(1) is absolute and thereby upholding the misconceived interpretation of Article 30(1) by the Parliament, is *per incuriam* since "it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench."

However, this is not to suggest that the duty to reserve seats under the RTE Act must be extended to minority institutions solely because it would be in the interest of education. It must be noted that such selective application of Article 21A only to private aided or unaided educational institutions constitutes a glaring violation of Article 14, being bereft of any semblance of "intelligible differentia" between private institutions and minority institutions. It is sought to be emphasized that in the absence of any constitutionally-warranted "differentia" in favor of minority institutions, after fully considering the binding

[10] (2002) 8 SCC 481.
[11] (2002) 8 SCC 481.
[12] (2012) 6 SCC 1.
[13] (2002) 8 SCC 481.
[14] (2012) 6 SCC 1.

judicial views regarding Article 30(1), it becomes clear that the Parliament has failed to maintain 'equality before the law' under Article 14 and its positive implications.

4. THE 93RD AMENDMENT & EQUALITY BEFORE LAW

In *Kesavananda Bharati* v. *State of Kerala*[15], it has been observed that "one cannot legally use the Constitution to destroy the Constitution itself." Applying this principle in the context of Article 15(5), the very provision that was intended to provide constitutional propriety to the "reservation provision" of S. 12 (1)(c), makes an un-intelligible distinction between private and minority institutions, and treats them unfairly in the matter of making special provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, insofar as these special provisions relate to their admission to such educational institutions, whereby, Article 14 stands violated.

The emphasis on the aspect of equality under Article 14 can be understood by analyzing the nature of the guarantee of equality under the Constitution. A right becomes a Fundamental Right because it has foundational value. One has to see the structure of the Article in which the fundamental value is incorporated. In *M. Nagaraj* v. *Union of India*[16], while referring to the eminent jurist H.M. Seervai, the Supreme Court distinguished between the abstract concept of equality, and specific conceptions of it, holding that equality before the law, guaranteed by the first part of Article 14, is a "negative" concept, while the second part is a "positive" concept which is enough to validate equalizing measures depending upon the fact-situation.

It is interesting to note that the Supreme Court has already dealt with the aspect of equality while deciding the case of *Pramati Educational & Cultural Trust* v. *Union of India*[17]. In this case, the Court dismissed the same argument submitted by Mr. Rohinton Nariman, as he then was, made specifically in context of Article 15(5) itself and contending that Article 14 stood violated due to its addition. Contrarily, it was held that the argument of violation of equality does not hold merit, since a future legislation made in pursuance of Article 15(5) by the State is not immune from a challenge under Article 14 on the ground that it treats private and minority institutions unequally. However, it is on record that Mr. Nariman had in fact argued that a violation of Article 14 is constituted by the very addition of Article 15(5) through the 93rdConstitutional Amendment to the Constitution, regardless of any laws made thereunder. It becomes apparent that since the constitutionality of Article 15(5) has not yet been properly construed by the Supreme Court, the controversy remains alive.

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[15] (1973) 4 SCC 225.
[16] (2006) 8 SCC 212.
[17] (2014) 8 SCC 1.

Bearing the positive purport of Article 14 in mind, and after analyzing Article 30(1) of the Constitution, it becomes clear that the admission of a "sprinkling of outsiders", an expression well within the quantum of reservation of 25% of the class-strength as prescribed under the RTE Act, will not deprive an institution of its minority status and character. This shows that the defence taken, and the specific latitude extended by the Parliament, and further giving it a constitutional vestige through the 93rd Constitutional Amendment, clearly violates the constitutional guarantee of equality, being "basic feature" of the Constitution, as had been held in *M.G. Badappanavar* v. *State of Karnataka*[18] and in *M. Nagaraj*[19]. A regrettable consequence of this purposive misinterpretation of Article 30(1) is that the undue favorable exemption granted in favor of the minority institutions today stands as a part of the Constitution in the form of Article 15(5).

5. CONCLUSION

It is apparent that the erstwhile "activist" judiciary, which led the campaign to realize the ideal of free and compulsory education, has taken an unusual approach suited to the convenience of the political branch. The above discourse has sought to expose that the exemption granted to minority-administered educational institutions is unconstitutional, being based upon a masqueraded interpretation of Article 30(1), which is contrary to the oft-explained interpretations rendered by greater benches the Supreme Court in the past. Not only does such an exemption deprive young Indian citizens from the fuller achievement of the guarantee of education, but an analysis of this unprincipled exemption further exposes that it is a glaring violation of the principle of equality under Article 14 of the Constitution, which has unfortunately become a blemish upon the Constitution, as the ill-conceived Article 15(5).

"If Article 14 is withdrawn, the political pressures exercised by numerically large groups can tear the country apart by leaving it to the legislature to pick and choose favored areas and favorite classes for preferential treatment." These words of Chandrachud J. expressed in *Minerva Mills Ltd.* v. *Union of India*[20] seem prophetic in context of the undue and unconstitutional preferential treatment being given to the minority institutions. In its present form, Article 15(5) is a provision designed by Parliament to appease socially and educationally backward classes of citizens and the Scheduled Castes or the Scheduled Tribes for political gains, and it is for this reason that the State must recognise and preserve the mandate of equality under Article 14 of the Constitution in furtherance of full realization of the right to education, but has so far failed to do so.

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[18] (2001) 2 SCC 666.
[19] (2006) 8 SCC 212.
[20] (1980) 3 SCC 625.

Considering that the legislative intent with which Article 15(5) was added was to ensure that the institutions upon which a responsibility to comply with the mandate of the Right to Education Act do not challenge such responsibilities as a violation of the freedom to administer educational institutions under Article 19, which was the erstwhile constitutional and legal provision, the suitable amendment of the Article in its present form would be simply as follows:

> *"Article 15 (5A): 'Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State'."*

It is expected that with this measure, not only will the horizontal application of educational rights in the constitution be more broad-based, it will also be consistent with the mandate of equality, and the current inequality that has been given effect to by the purposive mis-interpretation of the mandate of Article 30(1) by the Parliament will be ameliorated.

REVISITING THE INDIAN CONSTITUTIONAL LAW: THE ROLE OF GOVERNOR AND THE GREY AREA IN THE DOCTRINE OF PLEASURE IN THE INDIAN CONSTITUTION

Kanchan Lavania[*]

Abstract *The office of the Governor is not an altogether new concept in the post independent constitutional system in India. Originating as the defender of the British policies in India, the post of Governor has acquired myriad dimensions. Sometimes seen as a part of the "checks and balances" withholding the sacred principle of democracy and at other merely a vestige of a colonial past acting as a puppet of the Union government. These become important especially in the light of emerging concepts of regional parties, coalition politics, en-masse sacking of the state governments and further the recent developments in Uttaranchal and Arunachal Pradesh. The conclusion of this entire journey of the study and research on the topic is as follows: First, the healthy convention of the appointment of Governor by the President in consultation with the state government, is not practiced now which affects the Centre-State relations; Second, there is no security of tenure for the Governor of the State which makes it difficult for him to act impartially and independently in discharge of his functions and exercise of his powers; and, Third, despite the norms and principles laid down by the Judiciary as to the position, powers and functions of the Governor, we have seen continuous breach and distortion of the same. Since Governor of the State is just like a radius connecting the Union and the States in the circle of democracy which makes him one of the most important constitutional functionary, there is a need to remould his constitutional status to best serve the interest of the State, well being of the people and uphold the cardinal principle of rule of law, democracy and federalism.*

1. INTRODUCTION

"A Governor's 'special powers' wouldn't put him in conflict with the ministry. There would be no 'invasion of the field of ministerial responsibility'. The 'special powers' would be limited to sending

a report to the Union President when 'a grave emergency arose, threatening menace to peace and tranquility'."

—Sardar Vallabhbhai Patel (Constituent Assembly Debates)

The office of the Governor is not an altogether new concept in the post-independent constitutional system in India. Its history may be said to be as old as British connection with India. Originating as the defender of the British policies in India, the post of Governor has acquired myriad dimensions. He is sometimes seen as a part of the "checks and balances" withholding the sacred principle of democracy but, on the other hand, as a merely vestige of a colonial past acting as a puppet of the Union government. His peculiar position arises from the fact that the Indian Constitution is quasi-federal in character which makes him act as an important link between the Centre and the State and at times to act as an impartial or neutral umpire.

Apart from the role which he has to play in the Constitutional machinery, what attracts attention is the procedure for his appointment and removal, the term of his office (security of tenure) and the various functions and discretionary powers envisaged in the Constitution of India. These become important especially in the light of emerging concepts of regional parties, coalition politics, en-masse sacking of the state governments, and the recent developments in Uttaranchal and Arunachal Pradesh. This further becomes visible from the kind of radio silence over the dismissal of Arunachal Pradesh Governor. Despite the government's bluster and blunderbuss, it seems to have suddenly retreated into an awkward silence. The answer to this riddle doesn't lie so much in the numerous political calculations and manipulations, as much as they lie in certain vague and ambiguous clauses in the Constitution.

As we seek to reassess the role of Governor, the question we need ask ourselves and to those responsible with policy and decisions in this crucial aspect are:

- What was the role envisaged for Governors by the architects of our Constitution?
- Have subsequent changes in political circumstances, so drastically altered the situation that provisions of the Constitution are neither adequate nor practical anymore?
- Has this august institution already gone so far down the road to rampaging constitutional convention that it has done serious lasting harm to our system and debilitated our political development, or as some optimists put it, these are merely the teething troubles of an idealistic and yet growing political system, which, when the system

does finally come of age, would appear as minor troubles in the growth of chart of a democracy?

- And finally why is it, that of all instruments of the Constitution, this institution has shown the greatest proneness for misuse and erosion of values?

2. APPOINTMENT OF GOVERNORS AT THE ANVIL OF CONSTITUENT ASSEMBLY

The history of the constitutional principles relating to the Governor is enlightening. In the initial stages of the framing of the Constitution of India, it was decided that the Governor should be elected directly by the people on the basis of adult suffrage, for it was their impression that an elected Governor would give stability to the government of the Province. This decision was in conformity with the idea of giving each state the "maximum autonomy" as a unit of federation.

Meanwhile the political situation of the country abruptly changed when the partition of the country became a certainty and the restrictions and limitation expressed under the Cabinet Mission Plan on the authority of the Constituent Assembly disappeared from August 15, 1947. As a result of such change the scheme of loose federation under the Cabinet Mission Plan, however, withered away from the Indian scene and the framers underlined the need of "a strong Central Government". Further, the communal riots, Gandhiji's assassination, the communist upsurge in Telangana, all affected the mood and thinking of Founding Fathers. They therefore gave up the idea of federation of states and decided to make India "a Union of States". Nehru echoed the thoughts and sentiments of the members when he said: "We have passed through very grave times and we have survived them with a measure of success. We have still to pass through difficult times and I think we should always view things from this context of preserving the unity, the stability and security of India."

Shri Brajeshwar Prasad was of the view that, "in the interest of All- India Unity with a view to encouraging centripetal tendencies, it is necessary that the authority of the Government of India should be maintained over provinces."

However, members like Rohini Kumar Chaudhary and Prof. Shibban Lal Saxena objected to the provision of appointing Governor by the President. Doubts were expressed that if two different parties were at the helm of affairs at the Centre and in a unit, a Governor might be sent by the Union Government who would not work in harmony with the State Government.

These were the reasons why, in spite of the force of the federalist argument, the idea of elected Governors was given up, and the primary consideration, that of ensuring a smooth working of the cabinet system, was allowed to

prevail. Influenced by the British tradition, the framers of the Constitution also put a great deal of faith in the importance of convention in a parliamentary system; and this was particularly so in regard to the position and functions of the Governor. While introducing the draft Constitution, Ambedkar had quoted Grote, the historian of Greece, to emphasise the importance of diffusion of constitutional morality throughout the whole nation, and of paramount reverence for the forms of Constitution as the essence of Constitutional Morality. Looking at the way our constitutional and political system has worked, one has to recognize that there has been progressive weakening of constitutional and political morality, particularly from the time defections started occurring extensively, and money, lure of office and manipulation became conspicuous features of political life.

3. APPOINTMENT OF GOVERNOR UNDER THE CONSTITUTION

The relevant provisions pertaining to appointment of Governor are envisaged in Part VI Chapter II of the Indian Constitution, as follows:

a) Article 153, which states: "There shall be a Governor for each state: Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more states."

b) Article 155, which states: "The Governor shall be appointed by the President by warrant under his head and seal."

c) Article 157, which states: "No person shall be eligible for appointment as a Governor unless he is a citizen of India and has completed the age of thirty-five years."

In practice, the Governor is appointed by the President on the advice of the Prime Minister/Home Minister. Such an advice is given after taking into consideration the opinion of the Chief Minister of the State concerned. The Chief Minister cannot veto the appointment, but a strong CM can willy-nilly have a Governor of his own choice. Since the Constitution does not prescribe any procedure for selecting a person to be appointed as Governor, uniform policy in this respect could not be formulated as yet.

Before the general elections of 1967 when the Congress party had its ministers in all the states, the CM had virtually a free choice in selecting Governors of their respective states because they were stalwarts within the party. But since then the situation has changed. As the result of the change, the appointment of Governors became a cause of tension between the Union and the State.

Further, this change of set up from a single party rule- both at the Centre and States- the role of Governors has also gained a very different connotation.

The recent developments in Uttarakhand and Arunachal Pradesh have turned the spotlight on the office of the Governor.

The qualifications mentioned in the Constitution are just theoretical or literal. Nonetheless our founding fathers, realizing the importance of the office of the Governor and the role he was expected to play, were very clear and emphatic about the background, the qualities and caliber of the people who would fill the gubernatorial office.

In the words of Alladi Krishnaswamy, the Governor should be a person of 'undoubted ability and position in public life, who at the same time, has not been mixed up in provincial party struggle and factions.'

Shri K.M. Munshi thought it would be better to have a Governor "who is free from the passions and jealousness of the party politics"

Nehru's ideal was to have people from outside – "eminent people, sometimes people who have taken no great part in politics. Politicians would probably like a more active domain for their activities but there may be eminent educationist or persons eminent in other walks of life who would nevertheless represent before the public someone slightly above the party."

But these ideals and belief of the Founding Fathers in these conventions has been sadly belied. There have been frequent appointments of active politicians to the office of Governor and quite a few instances of Governor's continuing their connection with the political party responsible for their appointment and, in some cases, returning to active politics after ceasing to be Governors. An unhealthy practice has grown of offering the post of Governor as a consolation prize for 'burnt-out' politicians or as a stepping stone for those still burning with the political ambition.

In Lok Sabha, Mr. Nath Pai said that, "Appointment of Governor has been abused for boosting up the tottering fortunes of a tottering old party".

Soli Sorabjee expresses his views about the appointment of Governor in following manner:

Whither is fled the visionary gleam?

Where is it now, the glory and the dream?

4. TERM OF THE OFFICE OF GOVERNOR

Finally, the draft Article (now Article 156) came up in the following words:

"Term of the Office of the Governor: (1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, Governor shall hold office for a term of five years from the date on which he enters upon his office:

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office."

Many members of the Assembly raised aspersions as to this amended provision as in their vision it will reduce the position of the Governor as merely a puppet in the hands of the Government in power at the centre.

Professor Shibben Lal Saxena castigated the absence of safeguards in the forthright terms: "he will be purely a creature of the President, that is to say, the Prime Minister and the party in the power in the Centre. When once a Governor has been appointed, I do not see why he should not continue in office for full term of five years anyway and why you should make him removable by the President at his whim. It only means that he must look to the President for continuing in his office and so continue to be subservient to him...Such a Governor will have no independence and my point is that the Centre might try to do some mischief through that man." How prophetic were his apprehensions!

Surprisingly, there was not much debate in the Assembly on this provision. Ambedkar's reply was brief and his main argument was that it was "quite unnecessary to burden the Constitution with all these limitations express terms. I therefore think that it is unnecessary to categorize the conditions under which President may undertake the removal of the Governor."

Ambedkar's reply clearly indicates that it was understood and necessarily implied that the Governor would be removed only for serious acts like violation of the Constitution or similar grave offences. The truth of the matter is that the undoubted integrity of persons then in Government, and high prevailing standards of public and constitutional morality and atmosphere of idealism ruled out any real risk of abuse of power or of perversion of constitutional provisions at that time.

5. PROVISION IN THE INDIAN CONSTITUTION

The Constitution of India provides for three different types of tenure:

- Those who hold office during the pleasure of the President (or Governor);
- Those who hold office during the pleasure of the President (or Governor) subject to restrictions;
- Those who hold office for specified terms with immunity against removal, except by impeachment, who are not subject to the doctrine of pleasure.

The Constitutional Assembly Debates clearly shows that after elaborate discussions, varying levels of protection against removal were adopted in relation to different kinds of offices:

- Offices to which doctrine of pleasure applied absolutely without any restrictions [Ministers (Articles 75, 164 & 239-AA), Governor (Article 156), Attorney General (Article 76) and Advocate General (Article 165)];
- Offices to which doctrine of pleasure applied with restrictions [Members of defense services, Members of Union, Member of All India Services, holders of posts connected with defense or any civil post under the Union, Member of civil services of a State and holders of civil posts under the State (Article 310 r/w Article 311)]; and
- Offices to which doctrine of pleasure does not apply at all [President (Article 56), Judges of Supreme Court (Article 124), Comptroller and Auditor General of India (Article 148), Judges of the High Court (Article 218 r/w Article 124) and Election Commissioners (Article 324)].

In the light of these provisions of the Constitution and the demarcation made as to term of various Constitutional functionaries, it becomes important to examine the concept of Doctrine of Pleasure in the Indian democracy as interpreted by the Hon'ble Supreme Court of India.

6. DOCTRINE OF PLEASURE IN THE APPOINTMENT OF GOVERNOR: JUDICIAL INTERPRETATION

The doctrine has been examined in detail in *B.P. Singhal* v. *Union of India*[1], by the Constitution Bench of the Supreme Court of India. It observed:

6.1. Meaning:

Pleasure appointment is defined as the assignment of someone to employment that can be taken away at anytime with no requirement of notice or hearing.

[1] (2010) 6 SCC 331.

6.2. Origin:

H.M. Seervai, in his treatise Constitutional Law of India, explains this English crown's power to dismiss at pleasure in the following terms:

> *"In the contract for service under the crown, civil as well as military, there is except in certain cases where it is otherwise provided by law, imported into the contract a condition that Crown has the power to dismiss at pleasure..where the general rule prevails, the crown is not bound to show good cause for dismissal, and if a servant has a grievance that he has been dismissed unjustly, his remedy is not by a law suit but by an appeal of an official or political kind...if any authority representing the crown were to exclude the power of the crown to dismiss at pleasure by express stipulation, that would be a violation of public policy and the stipulation cannot derogate from the power of the crown to dismiss at pleasure, and this would apply to a stipulation that the service was to be terminated by a notice of a specified period of time. Where, however, the law authorizes the making of a fixed term of contract, or subjects the pleasure of the crown to certain restrictions, the pleasure is pro tanto curtailed and effect must be given to such law."*

6.3. Scope of doctrine in the Indian Context with respect to removal of the Governor from his office:

There is a distinction between the doctrine of pleasure as it existed in a feudal set up and doctrine of pleasure in a democracy governed by rule of law. In a nineteenth century, feudal set up unfettered power and discretion of crown was not an alien concept. However, in a democracy governed by rule of law, where arbitrariness in any form is eschewed, no Government or authority has power to do what it pleases. The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.

The following classic statement from Administrative Law is relevant in this context:

> *"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory powers conferred for public purpose is conferred as it were conferred as it were upon public trust, not absolutely- that is to say it can validly be used only in the right and proper way which parliament when conferring it is presumed to have intended.*

Although the crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that in a system based on rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The whole conception of unfettered discretion is inappropriate to a public authority, which possesses power solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

It is of some relevance to note that "Doctrine of Pleasure" in its absolute unrestricted application does not exist in India.

6.4. Judicial review of withdrawal of President's pleasure:

When a Governor holds office during the pleasure of the Government and the power to remove at the pleasure of the President is not circumscribed by any condition or restrictions, it follows that the power is exercisable at any time, without assigning any cause.

However, there is a distinction between the need for a cause for the removal, and the need to disclose the cause for his removal to the Governor. It is imperative that a cause must exist. If we would not proceed on that premise it would mean that President on the advice of Council of Ministers may make any order which may be manifestly arbitrary, whimsical or mala fide. Therefore, while no cause or reason be disclosed or assigned for removal by exercise of such prerogative power, some valid cause must exist for the removal. Therefore, while we do not accept the contention that an order under Article 156 is not justiciable, we accept the contention that no reason need be assigned and no cause need be shown and no notice need be issued to the Governor before removing the Governor.

The Supreme Court in its landmark judgment in *B.P Singhal* v. *Union of India*[2] made an important observation as to the scope of judicial review in exercise of prerogative power by the President in removal of the Governor:

- Under Article 156 (1), the Governor holds office during the pleasure of the President. Therefore, the President can remove the Governor from office at any time without assigning any reason and without giving any opportunity to show cause.

[2] (2010) 6 SCC 331.

- Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under Article 156(1) cannot be exercised in arbitrary, capricious and unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for valid and compelling reasons. The compelling reasons are not restricted but are of wider amplitude.
- A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. Therefore, it follows that change in government at the centre is not a ground for removal of Governors holding office to make way for others favored by the new Government.
- As there is no need to assign reasons, any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review. If the aggrieved person is able to demonstrate prima facie that his removal was arbitrary, mala fide, capricious or whimsical, the Court will call upon the Union Government to the Court, the material upon which the President had taken the decision to withdraw the pleasure. If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, mala fide, capricious or whimsical, the Court will interfere. However, the court will not interfere only on the ground that a different view is possible or that the material or reasons are insufficient.

There are certain "silences" in the Constitution which ironically create a furore and raise an infernal din from time to time. The lack of specific provisions regarding how Governors are to be appointed, and how they are to be dismissed or sacked, is one such example. And, this void in the Constitution, especially the vaguely worded term "Doctrine of Presidential Pleasure" as mentioned in Article 156, has resulted in a situation which is nothing short of a "Raj Bhavan Roulette".

7. POSITION OF A GOVERNOR UNDER THE CONSTITUTION

The Governor of a State is a very interesting appointee of our political system. Some view his post as part of the "checks and balances" the Indian democracy is proud of, while some critics consider that the Governors have played a dictatorial role many a times and transcended all the democratic limits. This has made the Indian citizens feel that they are living in a fragile democratic realm which can be shaken effortlessly by the Governor. The Indian Judiciary has also deliberated on the role and position of Governors a number of times

and has tried to give a view which can reduce the escalation between the Centre and the State and is favourable to the Rule of Law.

In *State of Rajasthan* v. *Union of India*[3], a Constitution Bench of this Court described the position of the Governor thus:

> *"The Governor acts as the constitutional head of a State as a unit of the Indian Union as well as the formal channel of communication between the Union and the State Government, who is appointed under Article 155 of the Constitution by the President by warrant under his head and seal. On the one hand as the Constitutional head of the state, he is ordinarily bound by reason of a constitutional convention by the advice of the Council of Ministers conveyed to him through the Chief Minister barring very exceptional circumstances in which an appeal to the electorate is called for. On the other hand, as the defender of the Constitution and the law and the watchdog of the interests of the whole country and the well being of the people of his state in particular, the Governor is vested with certain discretionary powers in the exercise of which he can act independently. One of his independent function is making of the report to the Union Government on the strength of which Presidential power under Article 356(1) of the Constitution could be exercised. Insofar he acts in the larger interest of the people, appointed by the President 'to defend the Constitution and the law' he acts as the observer on behalf of the Union and have to keep a watch on how the administrative machinery and each organ of the Constitutional government is working in the State. Unless he keeps such a watch over all governmental activities and the state of public feelings about them he cannot satisfactorily discharge his function of making the report which may form the basis of the Presidential satisfaction under Article 356(1) of the Constitution."*

In *State of Karnataka* v. *Union of India*[4] a seven judge bench of the Supreme Court held:

> *"The Governor of a State is appointed by the President and holds the office at his pleasure. Only in some matters he has got a discretionary power but in all others the State administration is carried on by him or his name by or with the aid and advice of the Ministers. Every action, even of an individual Minister, is the action of the whole Council and is governed by the theory of joint and collective responsibility. But the Governor is there as the head of*

[3] (1977) 3 SCC 592.
[4] (1977) 4 SCC 608.

the State, the executive and the legislature, to report to the Centre about the administration of the State."

In *Hargovind Pant* v. *Raghukul Tilak*[5], the Constitution Bench of the Supreme Court observed:

> *"It will be seen from this enumeration of the Constitutional powers and functions of the Governor that he is not an employee or servant in sense of the term. It is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India. Every person appointed by the President is not necessarily an employee of the Government of India. So also it is not material that the Governor holds office during the pleasure of the President. It is a Constitutional provision for determination of the term of the office of the Governor and it does not make the Government of India an employer of the Governor. The Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, even by stretching the language to a break point, be regarded as an employee or the servant of Government of India.*
>
> *He is not amenable to the direction of the Government of India, nor he accountable to them for the manner in which he carries out his function and duties. He is an independent constitutional office which is not subject to the control of the Government of India."*

In *Rameshwar Prasad (6)* v. *Union of India*[6], the Supreme Court reiterated the status of Governor as explained in Hargovind Pant[7] and also noted the remark of Shri G.S. Pathak, a former Vice President that:

> *"In the sphere which is bound by the advice of the Council of Ministers, for the obvious reasons, the Governor must be independent of the Centre as there may be cases 'where the advice of the Centre may clash with the advice of the State Council of Ministers' and that in such cases the Governor must ignore the Centre's advice and act on the advice of his Council of Ministers."*

The Constitution bench of the Supreme Court, headed by K.G. Balakrishnan (J) in *B.P. Singhal* v. *Union of India*[8], has finally elaborated upon the status of the Governor and clearly stated that the Governors are not merely

[5] (1979) 3 SCC 458.
[6] (2006) 2 SCC 1.
[7] (1979) 3 SCC 458.
[8] (2010) 6 SCC 331.

rubber stamps of the Centre in the states, and could not be discussed merely because their ideologies were at loggerheads with the top bosses at the Centre.

> *"It is thus evident that a Governor has a dual role. The first is that of a constitutional head of the State, bound by the advice of Council of Ministers. The Governor constitutes an integral part of the legislature of a State. He is vested with legislative power to promulgate ordinance while the Houses of the Legislature are not in session. The executive power of the State is vested in him and every executive action of the government is taken in his name. He exercises the sovereign power to grant pardon, reprieves, respites or remissions of punishment. He is vested with power to summon each House of the Legislature or to prorogue either House or to dissolve the Legislative Assembly. No Bill passed by the House of the Legislature can become law unless it is assented to by him. He has to make a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. The second role of a Governor is to function as a vital link between the Union Government and the State Government. He is required to discharge the functions related to his different roles harmoniously assessing the scope and ambit of each properly. He is neither an employee of the Union Government nor the agent of the party in power nor required to act under the dictates of political parties. There may be occasions where he may have to be an impartial or neutral umpire where the views of the Union Government are in conflict. His peculiar position arises from the fact that the Indian Constitution is quasi federal in character."*

Despite the landmark judicial pronouncements regarding the role, position, function and powers of Governors as envisaged in the Constitution, it becomes very important to explore all the possible reasons behind the departures from strictly constitutional norms.

8. CONCLUSION

We are the products of a dynamic time. The makers of the Constitution did make adequate provision according to their perception of values at that time, but also they never intended that their written word would be the last word. In parliamentary democracy like ours, written words are supplemented by conventions and traditions and at the same time added to or modified according to the need of times.

This idea is well reflected in the words of Justice Y.K. Sabharwal in *I.R. Coelho* v. *State of T.N.*[9], as follows: "the Constitution is a living document. Constitutional provisions have to be construed having regard to the march of time and development of law..."

The aforesaid idea is further affirmed by Vivian Bose (J) in *State of W.B.* v. *Anwar Ali Sarkar*[10], as follows: "they are not just pages from a text book but the means of ordering life of progressive people. They are not just dull lifeless words static and hide bound as in some mummified manuscript, but living flames intended to give life to great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present."

In the light of these thoughts it becomes more important to reflect what all possible changes could be done to ameliorate the situation of tussle between the centre and the state and to reduce the misuse of the high constitutional position by any appointed Governor.

The findings of research as to the reasons for the progressive debasement of this important institution can be summarized as follows:

- Positional Insecurity: Under the federal system of government, as adopted by our Constitution, the Governor is the formal or constitutional head of the State and he exercises all his powers and functions conferred upon him by the Constitution with the aid of his Council of Ministers. In this respect, in the words of Dr. B.R. Ambedkar, "position of the Governor is exactly the same as the position of the President." However, as the Constitution itself provides for exercise of "discretion" by the Governor, there is a qualitative difference between the position of the Governor and that of the President because strictly speaking there is no express provision in the Constitution which enables the President to exercise his independent judgment or discretion. In contrast to these, there are several constitutional provisions where the Governor can exercise his own independent discretion even contrary to the advice of Council of Ministers, viz., Under Articles 239(2), 371, 371 A(1)(d), 371 A(2)(f), 371 (1)(b), 371-C, 371 F, 371 (g), Schedule VI (administration of tribal areas) Para 9(2), 18(2) & 3 etc.

Now, as the position stands today, the Governor is the only non-elected constitutional authority who has no truly assured security of tenure. To quote from Soli Sorabjee, "one of the piquant incongruities is that on literal readings of its provisions the Governor emerges as the least secure and the least protected of all the constitutional functionaries. He is the only functionary without any express security of tenure and without any specific safeguards in the matter

[9] (2007) 2 SCC 1.
[10] AIR 1952 SC 75.

of his removal." Seen against the backdrop of this insecurity of tenure and therefore the positional dependence of the Governor on the powers appointing him, the discretionary powers vested in the Governor become charged with an inherent potential for misuse which has time and again been translated into reality.

- The Duality of roles: As the founding fathers of the Constitution had provided for the Governor to be the Constitutional Head of the State as well as the link between the centre and the state he was vested with a curious double role. "this duality of his role is perhaps its most important and unusual feature. It would be wrong to emphasise one aspect of character of his role at the expense of the other, and the successful discharge of his role depends on correctly interpreting the scope and limits of both." The clement of balance envisaged between the twin roles has of late been tilting once too often in the favour of role as representative of the Centre.

- Politicalisation of the institution of Governor: Vested with a quality of role, armed with significant discretion and debilitated by the insecurity of tenure, the institution of the Governor for gracefully discharging its responsibility depends upon the personal qualities of the incumbent. The whole edifice is likely to crumple the moment the appointment to this institution is made on grounds political rather than constitutional fairness. However, in sharp contrast to the expectations of the framers of the Constitution, strategically unacceptable or uncomfortable politicians and loyal civil servants with known political affiliations were opted for the post time and again. Different political parties have misused the role of the Governor at different times for their partisan interests, thus proving that the Indian society has yet to achieve the state of political modernization and political culture.

Realisation of the sources of the inherent weakness in the fabric of this provides good pointers to the suggestions that can be made to salvage the situation.

- As regards appointment of the Governor, both the procedure of the appointment and the qualities of person chosen, need to be prescribed. The recommendations of the Sarkaria commission must be adhered to in this regard. Any person who is a stakeholder in the party politics must not be appointed because experience has shown that despite theoretical severance with the party the Governors remain partymen.

- The most important is providing the Governor with an assured security of tenure, except in cases of "constitutional misdemeanor" where he would be removable by impeachment, these grounds of

impeachment can be identified, defined and the removal be made justiciable. When we have consciously adopted a constitutional democracy with an independent judiciary, we must be prepared to be able to challenge any action which is established to be arbitrary or malafide. In the words of Justice Bhagwati, "No one however highly placed and no authority however lofty, can claim that it shall be sole judge of the extent of its powers under the Constitution or whether its actions is within the confines of such power laid down by the Constitution. It is for this court to uphold constitutional values and enforce the constitutional limitations." Above all the method and reason for his impeachment should, without fail, be determined by the Constitution itself.

- The inclusion of Instrument of Instruction for Governors was earlier opposed on two grounds: First, it would not be needed as convention would develop to make it redundant and secondly, no provision of an authority to oversee its implementation was there; and, Second, the turn of events being what it has been, provisions can now be made to embody an Instrument of Instruction and empower the highest court in the country to uphold it.
- The words "Pleasure of President" in Article 156(1) is vague as "pleasure" is a mental phenomenon. It is manifestation of mental mood which may not have any link with objective factors or proven facts. Although the Supreme Court has defined the term with some judicial parameters but the same has been ignored. Thus the "word of Damocles" of Article 156(1) which hung over the head of the Governor must be removed.
- There is a dire need to affirm the idea of cooperative or consensus federalism. The idea of multi party system can affect the position of the Governor. The more political parties we have, the more political pressure upon the party in power, to reverse its undemocratic decisions. The political parties play an absolutely vital role in making democracy a success and they are the lifeblood of democratic societies.

If there is any need for any national debate now, it must be on the appointment of Governors with credentials of proven integrity, non-partisan approach and a clear understanding of the constitutional role as provided in the Constitution of India.

RISE OF RELIGIOUS UNFREEDOM IN INDIA: INCEPTION AND EXIGENCY OF THE ESSENTIAL RELIGIOUS PRACTICES TEST

Vipula Bhatt[*]

Abstract *The work focuses on the constitutional validity of the essential religious practices test. It delves to examine the necessity of the test when the Constitution of India has defined the right to freedom of religion very clearly in Article 25, and the test finds mention therein. The paper focuses on the distinction between religious practices and secular practices associated with religion thus highlighting the context in which the initial Supreme Court decisions were based. The test evolved in the course of time and the courts undertook the liberty to determine what essential part of religion and what is integral to religion, thus deviated from the original conception of the test which was aimed at distinguishing essentially secular from essentially religious. The courts have given itself the power to determine what constitutes essential part of religion and what does not. Another doctrine was formulated by the courts according to which essential religious practices form the core of a religion and cannot be altered. Such regressive approach taken by the courts has closed any doors for internal reforms in the religion. The paper highlights how the cases in which this test was used could have been decided by rooting into the constitutional text itself. The paper also aims to provide an alternative to the test that focuses on the need to give the constitutional text a literal interpretation by a deferential but watchful application of Article 25.*

1. INTRODUCTION

"Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction

conferred on it but in view of its role as the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity."

The above quoted words are from the judgment given by the Supreme Court in *Adi Saiva Sivachariyargal Nala Sangam* v. *State of T.N.*[1], where it was, for the first time, held that the Court has acknowledged the concerns raised against the "essential part of religion test". But, the Court didn't alleviate the concern, rather dismissed those on the ground of necessity. The question therefore arises is whether the essential part of religion test truly a constitutional necessity or it is a part of judicial activism.

The essential part of religion test finds no mention under the Indian Constitution. The test in fact adopts a very narrow approach of protecting only those practices that constitute an essential part of the religion. The Supreme Court has over time acknowledged that subject to the restrictions imposed under Article 25 of the Indian Constitution it is the fundamental right of every person to adopt religious beliefs as may be approved by his conscience. The test thus proves to be irreconcilable with and antithetical to the concept of right to freedom of religion envisaged under our Constitution. The test severely curtails the right to freedom of religion by categorizing religious practices into two groups- those which constitute essential part of religion and the others which do not. Only those practices which come under the former category are awarded constitutional protection. Added to this is the fact that in each of the cases in which it was applied, there were alternative means available, rooted in the constitutional text itself. Not just the extra constitutionality of the test is a matter of concern, but also the fact the over the past sixty years, the courts have failed to define definite criteria to determine what exactly constitutes the essential part of religion. The power which the test endows upon the courts to determine what falls under the two categories is a subject of dispute. Such an inquiry is often subjective and there can be no definite answer to what does and does not constitute essential part of religion. The Supreme Court, in *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[2], has laid down vague criteria for determining the essential practices based upon the tenants of that religion. Again, while paying lip service to the proposition in the aforesaid case that religion itself should be allowed to determine what is religious, the Court has, effectively, arrogated to itself that power, relied upon sources of dubious authority, has never explained why it has chosen the sources that it has and ignored others – and most importantly – has elevated the essential religious practices test to the first, and often last, enquiry that it conducts.

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1 (2016) 2 SCC 725.
2 AIR 1954 SC 282.

This paper attempts to examine the constitutional basis and the necessity of the essential part of religion test and provides for an alternative to it.

2. FREEDOM OF RELIGION UNDER THE CONSTITUTION OF INDIA

The freedom of religion under the Constitution of India is provided for under Articles 25 and 26. Article 25 entitles all persons to freedom of conscience, and the right to freely practice, profess and propagate their religion. This right is however subject to certain restrictions. The right can be restricted in favour of public order, morality and health. The article further restricts this right by subjecting it to the other fundamental rights. Article 25(2)(a) empowers the State to regulate and restrict any economic, financial, political or other secular activity which may be associated with religious practice. Thus, the intention of the framers of the Constitution is clear. They wanted to protect only the practices that are religious as distinguished from secular practices associated with religion. Article 25(2)(b) further curtails this freedom by granting Government the power to make laws providing for social reform, even though it might derogate the right to freedom of religion.

Article 26 provides for the right of religious denominations to establish and maintain religious institutions. The Article under sub-clause (b) is clear that the religious denominations can manage its own affairs as so far as in the matters of religion. The religious denominations have no power to manage secular affairs. This is illustrated under sub section (d) which provides that the religious denomination is subject to the laws made by Government in matters of administering property.

3. DIFFERENTIATING BETWEEN RELIGIOUS AND SECULAR PRACTICES

An analysis of Article 25 and Article 26 shows that the makers of the Constitution intended to draw a distinction between religious practices and secular practices that may be associated with the religion. They wanted to accord protection only to those practices that are religious while allowing the Parliament to govern secular acts associated with religion. The same can be understood with reference to the constitutional assembly debates where B.R. Ambedkar said that:

> *"The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit*

the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion".

The above extract clearly shows the concerns of the framers of our Constitution. In our country, there exists a deep nexus between religious practices and those practices which in essence are secular but with a tinge of religious character. With almost every aspect of life being governed by religion, it was felt that there was an eminent need to separate what is *essentially religious* from what is *essentially secular.* Only those practices that are essentially religious were to be provided the constitutional protection and the secular practices were open to government intervention.

This distinction between essentially religious and secular practices tinged with religion was first used by the Supreme Court in deciding the *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[3], where it held that:

"what constitutes the essential part of a religion is primarily to se ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)."

Thus, the essential part of religion test used here was formulated in the context of drawing a line between religious and secular.

The distinction was obfuscated in *Ratilal Panachand Gandhi* v. *State of Bombay*[4] , where the Supreme Court held that it was not open to the secular authority of state to say what is essential part of religion and what is not. The State had no power to restrict or prohibit any religious practice under the guise of its power to administer secular practices.

[3] AIR 1954 SC 282.
[4] AIR 1954 SC 388.

4. EVOLUTION OF THE ESSENTIAL RELIGIOUS PRACTICES TEST AND ITS NECESSITY

Over the years the context in which the essential part of religion test is used has changed drastically. The key shift can be seen in the judgment in *Ram Prasad Seth* v. *State of U.P.*[5] In this case, U.P. government passed regulations prohibiting bigamy. Those were challenged on grounds of religious freedom under Article 25. The petitioners argued that it was imperative for a Hindu to have a son, since the Shastric text provided that funeral rites of a deceased person can be performed by a son and failure to have a son from the first marriage, bigamy was the only option left. The Supreme Court analysed the Shastric text and held that "[bigamy] cannot be regarded as an integral part of a Hindu religion … the acts done in pursuance of a particular belief are as much a part of the religion as belief itself but that to my mind does not lay down that polygamy in the circumstances such as of the present case is an essential part of the Hindu religion."

The court here used the essential part of religion test to determine if the practice was an important part of that religion and integral to it. This proved to be a radical shift from determining the nature of practice to qualifying its importance.

The court failed to provide any reason for this profound shift which in course of time has altered the development of constitutional jurisprudence in relational to right to freedom of religion and has severely curtailed the religious autonomy of an individual.

The shift from essentially religious to essential part of religion seems to be inconsequential but it has rather serious implications. Allowing judiciary to determine what constitutes integral part of religion without laying down strict criteria on which the court is supposed to decide this question has in fact given courts the power to define the religion itself, a power that the makers of our Constitution never envisaged to bestow upon the courts.

Over the period of time, the courts have adopted this interpretation thus diverging from what was originally intended and laid down in the Constitution.

A year after the case of *Ram Prasad Seth* v. *State of U.P.*[6], the Supreme Court, in *Mohd. Hanif Quareshi* v. *State of Bihar*[7], adopted the same approach by using the word *essential* to qualify the importance of a given religious practice. The Court held that, "we have no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his

5 1957 SCC OnLine All 61.
6 1957 SCC OnLine All 61.
7 AIR 1958 SC 731.

religious belief and idea." Since it was not obligatory or important, the court accorded no protection to the given practice. The application of essential part of religion test was not required and the law providing for prohibition of cow slaughter could have been saved under the health restriction prefacing Article 25(2)(b) since the judgment basically emphasized how preservation of cattle was essential for public health.

The test was again applied in *Durgah Committee* v. *Syed Hussain Ali*[8]. In this case the Durgah Khwaja Saheb Act was challenged on the ground that it allowed State intervention in managing the affairs of the Ajmer Durgah. Here, Justice Gajendragadkar held that, "in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part." In this case also there was no need for the application of the given test. The observations were purely obiter and not required. The case was in fact decided on the fact that since historically, the Durgah was never granted the right to control its own property, there was no case under Articles 26(c) and 26(d). In the same case another horrendous mistake was committed on part of the Supreme Court when it tried to draw a line between religion and superstition "practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself." Here, the Court, in addition to determining what constituted essential part of religion, also endowed itself with the power to "sift superstition from real religion". The Court, by asserting this power, can breach the religious autonomy of an individual, since determination of which practice constitutes religion and which is merely superstitious is subjective and in absence of any defined criteria, can lead to absurd results based purely on a judge's personal views regarding the same.

Another case in which the test was applied was *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[9]. In this case, the validity of the Bombay Excommunication Act, 1949 was challenged. The impugned Act prohibited the practice of excommunication in religious communities. The Court, while citing the case of *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[10], held that excommunication was an "essential religious practice" without realizing that the said case had used the test to delineate religion from secular practices. It is not clear why the Court needed to hold that excommunication was an essential part of religion and not merely a religious practice – especially because the Court also held, without any analysis, that the law was not saved by Article 25(2)(b). Thus, even if excommunication was merely a religious practice and not an essential religious practice, in absence of any restrictions provided for under Article 25, it was subject to legal protection by virtue of Article 25. Justice Das Gupta held that, "what constitutes

[8] AIR 1961 SC 1402.
[9] AIR 1962 SC 853.
[10] AIR 1954 SC 282.

an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion", thus concreting the power of the court to determine what constitutes religion.

In the case, it was also held that Article 25(2)(b) could not be invoked to "reform a religion out of existence." According to Justice Ayyangar, Article 25(1) protected the essential and integral practices of the religion, and these practices were not subject to law providing social welfare under Article 25(2)(b). This was another ludicrous blunder on part of the court as it closed doors for reforming religious practices which though regressive, are in court's view an essential part of the religion. Again the court applied the essential part of religion test in the, to determine if the 'tandava dance was an essential part of the religion'.

Here too there was no need for the application of the test as the regulation allowing police to prevent the Ananda Margi sect from performing the *tandava* dance in public which involved use of weapons squarely falls within the public order restriction prefacing A25(1).

The Supreme Court while determining if the tandava practice was an essential part of the religion committed another mistake. Instead of using the religious text as the basis for their decision, they used the earlier precedents. The court ruled that "it is for the Court to decide whether a part or practice is an essential part or practice of a given religion... it will create problematic situations if the religion is allowed to circumvent the decision of Court by making alteration in its doctrine." This clearly shows that the Court was just paying lip service to the principle of deciding what is essential part of religion on the basis of the religious texts but has,in fact, itself assumed the power to do so. Another mistake that the courts committed can be seen in terms of the reasoning used by them to justify their stance. According to the court, since the Ananda Margi faith had come into existence in 1955 while they adopted the practice of tandava dance only in 1966, the practice was not an essential part of the religion. Since the faith had existed even without the practice, so in no way can the practice be an essential part of that faith. This further restricted the right to freedom of religion as it shunned down all the possibilities of the internal reforms in the religion making the religion stagnant and limited to its original conception.

The test was again applied in 1995 in *M. Ismail Faruqui* v. *Union Of India*[11], to determine if the State had the power to acquire the land over which a mosque is situated. The Supreme Court applied the test and gave its decision on the ground that it was not an integral part of Islam to worship at any particular place. Here again the case could have been decided without applying the essential part of religion test. The law passed in the aftermath of Babri masjid-Ram temple dispute could have been protected on the ground of public order covered

[11] (1994) 6 SCC 360.

under Article 25(2)(b), saw the application of the test for yet another time. The main question raised here was regarding the competency of the government to appoint a non-Malayali Brahmin as the priest of the Siva Ernakulam Temple. The Court, while applying the essential part of religion test, held that, "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human the specific mandate of the Constitution and law made by Parliament." The reasoning of the Court that parts of Hinduism at variance with Constitution cannot be deemed to be part of Hinduism is totally flawed. The Court here decided what constitutes religion on the basis of conformity of the practice with the Constitutional text rather than on the basis of the tenants of that religion.

The test was further applied in deciding the case of *Nikhil Soni* v. *Union of India*[12], where the Rajasthan High Court applied the essential part to religion test to hold that santhara was not an integral part of Jainism and therefore the court can prohibit the practice. The court based its judgment on the faulty essential part of religion test, whereas it could have upheld the law prohibiting santhara as providing for social reform by disallowing the practice.

The test was then applied in *Noorjehan Safia Niaz* v. *State of Maharashtra*[13] where an action was brought against the trust authorities for banning the entry of women inside the inner sanctum of the durgah. The Supreme Court while relying on the essential part of religion test came to a conclusion that there was no material on record to show that banning the entry of women inside the sanctorum was an integral part of Islam and thus, the women should be allowed to enter the inner sanctorum. The judgment, though correct, seems to have been based upon a faulty reasoning. Firstly, the Court applied the flawed essential part of religion test and since the practice didn't constitute an integral part of Islam, forbid it. The Court held that, "essential part of a religion means the core beliefs upon which a religion is founded.... There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character". By saying so, the court retaliated the verdict given in *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[14], thus delimiting the scope for any internal changes in the religion even if those might be progressive and reformatory. Secondly, the court held "Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play... In fact, the right to manage the Trust cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right guaranteed under Article25 of the Constitution."

The Court, in the instant case, held that Article26 is subject to Article 14, Article 15 and Article 25 of the Constitution. This is quite contradictory to

[12] 2015 SCC OnLine Raj 2042.
[13] 2016 SCC OnLine Bom 5394.
[14] AIR 1962 SC 853.

the text of the Constitution which specifically provides that Article25 is subject to all the provision under Chapter III of the Constitution. If the makers of the Constitution intended to subject Article 26 to other fundament rights they would have expressly done so as they did in the case of Article 25. Thus, both the grounds upon which the court based its decision are faulty. An alternative approach could have been to first and foremost determine if the practice of banning women inside the inner sanctorum of the durgah was a *religious practice* followed under Islam or not. If it was a religious practice, then the only recourse could have been to prohibit the ban on grounds of morality, as such ban is based on no logical criteria and was far from the domain of communal rationality, or another alternative was to allow the government to pass a law providing for social welfare or reform under Article 25(2)(b) prohibiting the practice of banning women on grounds that no institution which derives its strength from religious or personal law, may act of issue directions or opinions (such as fatwa) in violation of basic human rights.

5. ALTERNATIVE TO ESSENTIAL PART OF RELIGION TEST

The essential practices test is based upon an imperative mistake, genesis of which lies in the misrepresentation of the word "essentially religious" in the constitutional assembly debates and flawed understanding of the earlier Supreme Court judgments. This coupled with the institutional problems that it creates, should be enough for a fundamental reappraisal of this test within the scheme of Indian constitutional jurisprudence.

There seems to be a serious problem associated with scrapping the essential practices test, i.e., what is the alternate for this? The solution is simple: "by replacing it with a deferential – but watchful – application of Articles 25(2)(b) and 25(1), using the illustrations provided in Articles 25(2)(a) and 26(d) to draw the distinction between the religious and the secular" thus giving the constitutional text a literal interpretation. As it has been observed in the preceding section, in all the cases that the test has been applied to, there was another method, rooted in the Constitution itself, to decide upon the case. Thus, the Constitution itself provides for a mechanism to accord protection to the religious freedom of individuals and also lays down grounds on which this freedom can be restricted. In the presence of such an exhaustive mechanism, there exists no need for the essential religious practices test, which in itself is an extra constitutional approach. The Constitution accords to protect the right to freedom of religion of individuals and the right of the religious denominations to manage affairs of religion. So, the first thing that is to be kept in mind while dealing with disputes related to religious practices should be to determine whether the practice in dispute is essentially religious or its merely a secular practice tinted with religion. Article 25 provides for instances when a practice is considered to be secular. These include economic, financial and political activities that may be guised as

religious. This seems to be a tough task keeping in mind the deep nexus that exists between the two. While determining the distinction between the two, the following words of the Supreme Court in *A.S. Narayana Deekshitulu* v. *State of A.P.*[15] are to be kept in mind:

> *"Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice."*

Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Article 25(1) and Article 26(b).

Only if after analyzing the nature of practice, the court comes to a conclusion that the said practice is in fact a religious practice, it can be accorded the constitutional protection. But another thing that is kept into mind before according legal protection to the said practice is whether the law interfering with such practice can be protected on the grounds of public order, morality and health. The Constitution mentions these grounds for restriction without defining what each of these terms mean. So, before going into the question of protecting the reformatory laws on these grounds we need to define these terms.

"Public order" is an expression of wide connotation and signifies the state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the government which they have established. Public disorder is caused when any act interferes with the effective and peaceful functioning of society. There must exist a reasonable nexus and a close proximity between public disorder and the religious practice. Only reasonable restrictions can be imposed on the right to freedom of religion in the name of preserving public order as every breach of peace does not constitute public disorder. Therefore, there is a need to strike a balance between maintenance of public order and the right to freedom of religion.

Second ground for restricting the freedom of religion is that of morality. Morality can be construed in two different senses:

[15] (1996) 9 SCC 548.

- descriptively to refer to certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behavior, or
- normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons – secular morality

Thus, religion is not always synonymous to morality. According to Gert Bernard, morality is what we can call a public system: a system of norms (1) that is knowable by all those to whom it applies, and (2) that is not irrational for any of those to whom it applies to follow.

Morality, thus, guides a person's conduct through means of rationality keeping in mind the interests of all those who are affected by the conduct. The constitutional restriction on the right to freedom of religion based on the ground of morality is in turn based upon this secular definition of morality. Keeping in mind the secular definition of morality, there are chances that a religious practice may actually be immoral or non moral and when it is so, the Constitution authorizes prohibition of such practice on the grounds of morality.

Public Morality varies from culture to culture and from time to time, however, for the State to invoke this as a reason for limiting a right, it must demonstrate that the limitation is necessary to maintain respect for the fundamental values of the community concerned.

The third ground for restriction as provided under Article 25 is preservation of public health. According to the American public health association, public health promotes and protects the health of people and the communities where they live, learn, work and play.

Public Health may be invoked as a ground for limiting the rights only to allow a State to combat serious threat to the health of its population or to individual members of the population.

The measures must be aimed at preventing disease or injury, or providing care for the sick or injured. Thus, religious autonomy can be restrained on the grounds of a particular religious practice being a serious threat to the health of the people of a given society.

Another restriction on the freedom of religion is in the form of laws providing for social welfare and reform. Through this restriction, the makers of the Constitution have granted enormous power to the government to restrict or prohibit any religious practice that may be regressive in favour of promoting social welfare. The courts have failed to assert the importance of this restriction by laying down the proposition that the essential religious practices are not amenable to the restriction under Article 25(2)(b). Such proposition has done the most harm to the development of constitutional jurisprudence in terms of right

to freedom of religion. Not only it is based on the faulty presumption of there being certain religious practices that are more important than others, but also that those practices can under no circumstances be reformed however regressive and backward those might be. There is a need to discard this proposition as it clearly goes against what the Constitution provides for, i.e., the power of the government to reform or discard religious practices in favour of social reform and welfare. The Constitution itself provides for a reformist intention and the courts can under no circumstances delimit this.

Another problem that we face here is about striking a balance between the need for social welfare and reform and the right to freedom of religion. How far can the Government be allowed to exercise its power given under Article 25 (2)(b)? Does there exists any limit to this power? Both these questions can be answered simply by determining if the practice is regressive or not. If the practice is regressive and backward, in the absence of any constitutional limitation upon the power of the Government, the Government is free to pass any law to prohibit such practice in the name of social reform. The task of determining this falls upon the courts. While considering this question is can be useful to look at the dissenting opinion of Justice Sinha in *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[16], where he declared the practice of excommunication as unconstitutional and upheld the validity of the Act prohibit this practice.

> *"The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct... But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his sight to follow the dictates of his own conscience."*

On the basis of his opinion, any practice which deprives a person of his human dignity, of his civil rights and treats him like an outcast are regressive and need to be discarded. Thus, the legislature has the power to restrict the right to freedom of religious and prohibit any religious practice that deprives the person of his basic human dignity. At this point, there is a need to consider what constitutes human dignity.

[16] AIR 1962 SC 853.

Dignity is often defined in terms of the inherent worth of each human being which is independent of his race, caste, sex, gender, social status or religion. It refers to the inherent worth of each human being and is based on the presumption of human equality that is based on the premise that every individual is born with the same quantum of dignity.

Dignity can also serves as a ground for enforcing various substantive values and under this conception, the dignity of a person is deemed worthy and dignified to the extent he confirms to such ideals. Thus people are prevented to act in ways which might be "undignified" in the view of the social and political community and require them to live according to the societal standards of morality and rationality and according to the society's conception of what is dignified. This can be explained with the example of certain governments banning burqa on grounds of furthering women's dignity irrespective of whether those women agree to such a ban or not.

Dignity can also be associated with respect for a person's individuality and a demand for recognition. Such a definition of dignity requires interpersonal respect amongst fellow citizens. This can be understood in terms of rights of the homosexuals or other groups with identities non-conforming with the other citizens. The demand for recognition, for the dignity of recognition, requires protection against the symbolic, expressive harms of policies that fail to respect the worth of each individual and group. It requires others to accept that all individuals are equally worthy and so are their life choices.

The courts are required to give human dignity a wide interpretation keeping in mind the need to strike a balance between individual autonomy and individual dignity and, the right to freedom of religion. To decide if the religious practices deprive a person of his dignity, we need to see if those practices are directly affecting this civil rights and other constitutional rights. And if they are so affecting these rights, the courts need to inquire to what extent such transgression can be allowed in order to protect the right to freedom of religion.

Thus, the alternative to the essential religious practices test is quite clear. Courts need to apply the principles laid down in the Constitution which provides a vast scope for judicial determination of whether the religious practices are to be accorded legal protection or not. The Constitution itself provides for a mechanism for reform, thereby negating the need for courts to deny constitution protection to regressive practices by characterizing such practices as non-essential. This is because, in doing so, the courts are re-characterizing the religion itself (even if in a more progressive light), a task which the frames of the Constitution had assigned to the Government.

6. CONCLUSION

> *"If the Courts started enquiring and deciding the rationality of a particular religious practice... the religious practice would become what the Courts wish the practice to be."*

The essential religious practices test that has been crystallized through the judicial pronouncements over the past 60 years has been the biggest deterrent to the right to freedom of religion. The test in fact is a diversion from the principles laid down in the Constitution. It is not only unconstitutional but also based on a flawed reasoning. It assumes that certain religious practices are central to religion while the others are merely incidental, but this indeed is a mistaken assumption and an incorrect understanding of the religion as religion consists of all these practices put together. Through this test, the judiciary has undertaken the task of re-characterization of religion and the power to determine what constitutes an essential religious practice, thus taking over the role of clergy. Such determination is totally subjective and in the absence of any specific criteria other than the determination being based upon the tenants of that religion, it has proved to be arbitrary. The judges have, continuously, tried to expand their power regarding the determination of essential religious practices and have failed to base their decision on the tenants of that religion. Over time, they have laid down additional requirements like the practice being a permanent one, not amenable to any changes, which in term shuts down any scope for any progressive internal reform in the religion. The judges have also empowered themselves to distinguish between which practices constitute 'real religion' and which are merely superstitious beliefs. This again is a subjective inquiry and with no constitutional basis for distinguishing between the two, may lead to absurd results hence deterring the right to freedom of religion. Another horrendous mistake was committed by the court when it had laid down that the essential religious practices are outside the scope of Article 25(2)(b) and hence curtailing the power of the Government to pass any lay that prohibits such practices in favour of social welfare and reform. By doing so, the court has undermined the power of the government to pass laws providing for social reform which might be inconsistent with the right to freedom of religion. This is totally against the spirit of Constitution which itself provides for a reformatory approach. Thus, there is an imminent need to discard the essential religious practices test. The practices including triple *talaq*, polygamy, banning women to enter the temples, among others, need to be decided keeping in mind the principles of morality and human dignity which the Constitution provides as reasonable restriction upon the right to freedom of religion.

The Constitution of India protects religion as a whole without favoring any religious practice above another and this protection is in turn subject to reasonable restrictions. The essential religious practices test is in fact a diversion from the spirit of Constitution and the biggest deterrent to the principle

of religious autonomy, which needs to be discarded immediately. The courts need to work within the framework of Constitution and stop their attempts to re-characterize the religion according to their opinion of what constitutes an essential part of the religion which in turn has undermined the principle of secularism embodies in our Constitution.

IN THE FAST CHANGING ECONOMIES, "PRIVATE AUTHORITIES DISCHARGING PUBLIC FUNCTIONS" – AN ANALYSIS OF "STATE" IN PART III OF THE CONSTITUTION OF INDIA

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Abstract *A State, which exists via the conduit of public authority and opinion, originating from the tradition of the social contract theorists and the authors of the Federalist Papers, i.e. the founding father of the United States of America, can be posited as being burdened with the intrinsic duty of ensuring the upholding of the constitutional guarantee of fundamental rights. In India, those rights are specifically enumerated under Part III of the Constitution of India casting a duty on the State, (positive or negative, as the case maybe) in order to preserve and protect these rights relative to the citizens of the country. An integral aspect of Part III rights in India (in the past primarily) was that they were primarily enforceable against violative actions committed by the State and its agents and not against private individuals, who were primarily exempt from liability. As a result of the same, with the rise in the rate of globalization and, with it, privatization in the modern economic market, several instances of Part III rights violations were reported to the Supreme Court of India, thereby requiring an analysis and definition of "State" under Article 12 of the Constitution.*

A key aspect in determining whether an entity before the court of law comes under the definition of "State" under Article 12 involves an examination of the nature of its functioning as falling within the tests prescribed by the doctrine of public function, and if said test is insufficient to allow for the ascription of statehood, then the question of liability dependent on the same. This paper, thus, seeks to analyze the nature of primary and secondary institutions, the difference between State and religion, (in order to display the importance of the public function doctrine in the fundamentally absurd notion of "State") the rising growth of capitalism and privatization in the 21st century, the position of the public function doctrine in the United States of America, contrast of the same with the Indian position, and finally a set of recommendations regarding the impact of the same on the definitional exposition on state.

1. INTRODUCTION

A hypothetical construction of "State", and its functioning within the realm of behavioural regulation in a construction involving a conspicuous absence of a tendency to gravitate toward a "civil society", would result in quite the absurd creation. Religion has borne a marked influence on the creation of a civil society, especially following the postcedent specificities:

- A centre of control is often sought to be established which, in the former one, can observe a centralization of power around the notion of the divine, but vesting actual executive authority within the religious organization is considered to represent the guiding principles of the divine under question. In the latter, a similar practice is echoed when power is centralized around principles or a grundnorm, and actual executive authority is grounded in individuals charged with the discharge of their functions in a constitutionally valid manner.
- One of the primary goals that are shared by both the institutions under examination happens to be the idea of social regulation. Both religion and the State seek to achieve the same end and that can be stipulated as the framing of a regulatory set of rules and mechanisms that allow for smooth interaction to take place between individuals (under state supervision, directly or indirectly) with the view of enriching the State and, in the process, being expedient to their own enrichment.
- Another similarity rests in the method of enforcement of certain norms. Both institutions employ a form of fear that is instilled within the populace through sanction, in order to create an inescapable motivation to perform a particular task, as mandated.

It is therefore permissible for one to posit that the primary differentiation inferable from a comparative explored between the State and religion happens to be a lack of divinity and the orientation of ethereal fear that is attached towards the same that is fundamentally distinct from material fear that is experienced when considerations of disobeying state regulations are entertained. In such a situation, reverting to the hypothetical mentioned in the opening lines, the construction of an entity, quite similar to religious order *sans* the ethereal fear characteristic of the same, set to the performance of similar functions, would seem superfluous. Yet, in the existent reality, we observe a wholehearted embracing of the ideology of the State, and a constant effort to distance humanity from the idea of religious government. Such a shift is fairly understandable, owing to the disastrous reign of the clergy primarily characterized by famine, poverty, suppression of intellectual pursuits, denial of scientific truth and an explicit effort to ensure the lower socioeconomic strata remain uninformed as to the developments in society and science. The purpose of purporting such a

hypothesis was in order to demonstrate the absurdity of an entity such as the State, when examined in isolation and yet considered in a relative manner one observes that the evolution of the State was an attempt of hope, one that would help alleviate the suffering of the people under the hands of corrupt institutions functioning under the auspices of organized religion, which granted complete recognition to the archaic feudal model of socio-economic organization as it benefited greatly from the same.

A secondary inference that can be drawn from the above hypothetical consideration is the idea that the human beings display a tendency to integrate or layer, and such an assertion is amply supported in historical precedent, wherein the development or the pioneering of neo-age socio-economic institutions is never subject to direct and standalone application. The manner of application is always one wherein elements are integrated into the current dominant narrative in a manner so as to conduct a test of efficacy and if considered passable, then an independent status is evolved for the same. However, the independence so obtained is also not one that is absolute, seeing as to how the antecedent social institution that occupied a dominant status retains a degree of influence within the context of the new institution. Such a position of waning and waxing importance makes the creation of a system of differentiating interests as it inevitably leads to conflict, with specific reference to the areas wherein the interest sets overlaps either in terms of:

- Individual fulfilment;
- Group fulfilment, typically of smaller groups that do not constitute the ruling elite;
- Self-preserving interest of previously dominant social institutions themselves. (Typified by instances where the State seeks to do away with the consideration of religious needs and necessities thereby threatening the existence of said religion.)

It is imperative to consider these inferences in light of positing a definitional analysis of statehood, as the very notion of "State" is subject to a dynamic change in the twenty-first century. The primary reason that can be traced for such a change happens to be economic in nature. The predominant goal of international relations in the modern geo-political scenario happens to be fundamentally economic, a contest of sorts in order to determine the country with an economy robust enough to influence policy decisions around the world in their favour, a basic attempt at satisfying subsumed libido dominandi. Hence, on the backdrop of rapidly modernizing economies, the definition of "State" must be reconsidered, as there exist newer entrants into the field of discharging functions that could be considered the sole province of State functioning in the recent past. A primary aspect of the definition of the "State" would be an internal perspective on the nature and function of the state entity, seeing as to how the above definition is primarily concerned with the standing of the State at an

international level, for the consideration of actors at such forums is to evaluate and determine the validity of the State's existence. In order to achieve such an end, let us consider the definition provided by eminent sociologist, Max Weber, in his essay "Politics as a Vocation", as follows:

> *"Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory. Note that 'territory' is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it."*

An examination of the Weberian definition of "State" allows for several interesting conclusions to be drawn and points to be considered. At the outset, it is evident that Weber seeks to craft a definition for the term "State" from an anthropological or a sociological viewpoint, as the definition, of itself, does not adopt a legal argument, but rather makes room for the existence of the same at a later point in the event scale. Weber makes curious use of the terms "human" and "community" in conjunction with one another, in an attempt to strike at the heart of any comprehensive definition of State, its human origins. Such usage also takes into account the role that social evolution plays in the development of a state from the existent human society or community. The usage of the same, is reminiscent of a certain degree of authority that rests with the community that is separate from the "decision-making" unity of the State, seeing as to how the only reason for Weber to concede a community-evolved point of origination would be indicative of a certain degree of control retained my members of the community in order the ensure that the representatives of the state discharge their functions in a manner that is consonant with the founding principles. Secondly, it is possible to observe the crux of the Weberian conception of state, i.e. the *monopoly* over the use of force. Weber believes it be imperative that for an organization whose primary function is to regulate societal interactions to be classified as taxonomically consistent to a *state* it must exercise an absolute control over using force in a manner that would be deemed legitimate in an effort to advance its goals and policies. At this juncture, one can infer that Weber concedes that an important aspect of the State revolves around the use of morally and legally sanctioned force to ensure that its constituent members keep in line with established laws and practices, an admission novel during his time amongst peers on the same issue. Weber considers two more issues within his definition, the first being the role that territory plays and the second being that of power delegation. On the issue of the former, Weber opines that territory is the geographical determinant of the extent of the monopoly that the state exercises over the use of force. The right that the State enjoys in an undisputed manner pertaining to the use of force ceases to exist beyond the boundaries that demarcate one state from another. On the issue of the latter, Weber agrees the right enjoyed by States is transferable and can devolve to other players, private

or otherwise in a manner that is permitted by the State and to that extent alone, any transgression from the same is viewed seriously as trespassing onto state sovereignty as a whole.

2. DIFFERENCES BETWEEN PRIMARY AND SECONDARY INSTITUTIONAL AUTHORITY

Upon examination of the traditional definition that is ascribed to "State", the idea of rapidly modernizing economies in the twenty-first century and the influence of the same on the Weberian notion of the state must be examined, in order to shed light on the fundamental aim of this paper, an attempt to integrate the public function doctrine into the definition of a state. With the work propounded by Adam Smith, the Father of Capitalism and arguably of modern economics, one observes a paradigm shift in the nature of economic activity in of itself, when this was coupled with the Industrial Revolution, permanently altered the manner in which human beings transacted with one another. Metaphysical institutions such as markets were established as institutions meant to regulate the economic behaviour of the masses, but not infringing into the validity of social norms. This refers to an explicit infringement, not an indirect influence that such institutions effectuate onto social norms, in part may even be responsible for the development of a unique set of norms aimed at streamlining behaviour proven to be beneficial on the markets. However, the aim of these newer institutions was accompanied by a restrictive mandate in terms of explicit societal interaction regulation. In order to represent the concept in a more efficacious manner, an example is illustrated as follows:

Institution A (Socio - legal)	*Institution B (Economic)*
Purpose - The establishment of governing rules, principles and regulations in an attempt to enforce certain fundamental norms, to ensure the smooth functioning of society as an entity reliant on the state.	*Purpose - The establishment of a favourable atmosphere for the conducting of economic activity, in a mutually or exclusively beneficial manner, as the case maybe. To ensure proper conduct due contracting parties in an attempt to ensure maximum efficiency of functioning.*
Mandate - To directly govern, through executive, legislative or judicial action the behaviour of its constituent members in matters extending to all spheres. (Social, economic, political)	*Mandate - To indirectly govern, through regulations and internally binding documents the behaviour of individuals both natural and juristic participating in the market in question.*

Institution A (Socio - legal)	*Institution B (Economic)*
Example - Let us consider the issue of qualifying Part III rights of the Indian Constitution, with specific reference the freedoms guaranteed under Article 19, if one were examine the freedom of speech and expression and the reasonable restrictions placed upon the same, by the constitution, being subject to law, order and national security. Now, if this law was to be framed under the authority of institution A, the restrictions would be applicable to all the individuals intended to be included under its ambit, so mentioned in the usually the opening clauses of the Act in question. It can be stated that the law is active at all given times, in a manner wherein individuals being governed by the same do not possess an option to provide their consent, either explicitly or implicitly towards being subjected to its provisions. Of course, seeing as to how in those institutions belonging to the "A" category that function on the principle of representative democracy, or the rule of the masses, the consent to a particular government's policies can be expressed during the time of an election when the field is thrown open to competing ideologies allowing the electorate an eclectic choice of individuals to choose their representative from. However, during the course of the functioning of the government, there is no option to express consent to particular policies and a difference of opinion can be expressed in myriad ways against governmental policies, but the expressing of such a difference does not exempt individuals from the rule of law being extended to them.	*Example - If the similar issue of qualifying Part III rights are considered with specific reference to the freedom of speech and expression, in order to expose the differences between Institution B and Institution A, the regulatory framework drafted by Institution B would in keeping with its limited mandate be applicable only in those instances wherein the constituent members explicitly or implicitly expressed their consent, and undertook the activity in question. Hence, the status of such a law can be best described as passive or inactive in the sense that it is invocatory in nature and assumes authority when consent to be tried under the same is provided for. In instances wherein individuals do not engage in such activities or do not imply their consent towards the same, it can be stated that the law is inapplicable to them. Here, the individuals who interact with the institution and through the same the regulations and rules framed by such an institution retain the direct right (which can manifest in an implicit manner as well) to reject certain rules in favour of others and not participate in certain activities citing similar grounds.*

The aim of the above comparison was to illustrate the growing importance that non-state institutions, which are primarily specific in nature, have evolved over time, and such an evolution is accompanied by a growing importance with the exponential increase in the human population forcing states to devolve greater chunks of their traditional authority in an effort to improve governance. If one were to take into account the phenomenon of privatization, it has provided a perfect route for entrance to private players into sectors and to perform functions that were traditionally reserved for the State. Privatization has essentially ensured that the State allows for the functioning of private

companies and individuals to invest and own operating units in different sectors wherein the government previously controlled the functioning corporations, in essence such a measure is one that is being increasingly adopted by governments in developing countries, brought on in part by intelligent planning and in part by necessity.

3. THE EVER – INCREASING PRESENCE OF PRIVATIZATION IN THE 21STCENTURY

At this juncture it is imperative to consider the query regarding the necessity of such a measure being hailed as one of great import and preached by the premier financial institutions at the global level, namely the IMF and the World Bank, to countries around the world especially as mentioned earlier developing ones, is due to the numerous benefits that accrue from a system that practices privatization as opposed to one that does not, and they are as follows –

- A drawback of government run institutions happens to be neglect as governments possess a vast array of responsibilities that require the exigent allocation of attention towards, thereby allowing for several of such enterprises that run on the use of government machinery fairly sluggish in their performance and lackadaisical in their approach towards the idea of product sales and customer service provisions. Allowing for the entry of private players provides greater impetus to the provision of products that possess a higher intrinsic quality and more efficacious customer servicing as the bottom line for most firms is profit-oriented making it crucial for them to perform remarkably well and couple the same with a high level of innovation. This, in turn, can be stated as an improvement in the overall efficiency that can be ascribed to the economy as a whole.

- It must be observed that another drawback with state-sponsored economic activity is the constant possibility and in many cases tangible interference by the state machinery (and the term state machinery refers to individuals who form the controlling aspects of government) in the functioning of the industry in question. This negates any attempted separation by the government from the daily functioning of the corporations that it substantially funds or owns. An absence of such interference is markedly conspicuous in an economic system that allows for substantial private funding.

- Another aspect of private funding that is beneficial to the economic health of a particular state as opposed government sponsored industry arises when the first two points mentioned above are considered and examined in conjunction. India is a democracy that functions on the principle of majoritarian rule or the sovereignty being vested in the masses as opposed to any other organizational source, and,

additionally, India is a multicultural society that also allows for a multi-party system and with the culmination of mono-party dominance (until a brief renaissance under the Narendra Modi BJP-led government appointed for the term 2014-2019), it would be a grave error to assume that a primary motivating factor for governmental policy making is focused on the polls that are emergent on every incumbent government. Hence, this makes it impossible to arrive at a reasonable conclusion that governments indeed push for developmental agendas that are detrimental to their possibilities of reelection to office. This was particularly brought to light following the numerous scams of the previous UPA, Congress – led government between 2004 and 2014.

- The argument of added pressure can also be made when considering the functioning of companies owned and operated independently by private contractors, which tips the scales in favour of privatization over government funding again. The nature of the manifest added pressure is in the form of shareholder commitments that are imposed on the company as failure to meet said requirements would result in the company being acquired, which would possibly result in a loss of employment for all the existing management. The management being directly related to the functioning and profitability of the corporation would work in order to ensure that such a situation does not come pass and thereby, making the products and services of higher quality and improving the efficiency in the market.

- Lastly, the argument of raised competitiveness in the market can be made when examining the benefits of privatization of any given sector. This refers to the conditions that surround the declaration of certain markets and being open to private players and investment, most governments using the tool of deregulation, and especially when traditionally regulated industries are thrown open, the potential for profit attracts multiple firms and investors thereby immediately increasing the level of competition within the market. In order to stay relevant and profitable within in a highly competitive market, it is exceedingly important for corporations to innovate and minimize costs, as a failure to do the same usually spells an early, inopportune exit from the market. Such pressure and possible elimination does not plague solely governmentally funded industries of substantially funded ones, thereby making room for complacency.

While it must be understood that privatization like most of the other economic concepts or models which seek to structure the economic systems in particular ways has its own share of disadvantages and possibilities of misuse. While the risks are quite pronounced when these privatized sectors are not

regulated properly, the advantages far outweigh the costs especially in developing economies that are usually in dire need of the investment from foreign sources.

The necessity of the above exposition on the nature of State and religion, the differences between the two and the nature of primary and secondary institutions through a mandate and functional comparison, followed with a contrast to the nature of organizations and the modern spread of privatization, coupled with its benefits and possible defects, happens to be the groundwork necessary in order to truly understand the nature of the modern State, the problems of conflicting institutions that all function under the auspices or the regulatory permissions granted by the State. It is particularly important in the light of the same to have considered the nature of primary and secondary institutions as they allow one to paint an accurate image of the manifest hierarchical structure resultant from the same. This, in turn, makes the process of identifying state function in the first instance particularly convoluted and analyzing its impact on the definition of the state becomes the final goal that is to be undertaken in the instant paper.

When the question of public function is considered in order to provide a comprehensive definitional analysis of State, the key aspects that have to be taken into consideration are as follows:

- The definition of public function as a doctrine employed by the Judiciary in order to ascertain the extent of the extant definition of the same.
- Seeing as to how the country wherein the same is primarily practiced, defined and analyzed by the judiciary is the United States of America, upon the completion of the analysis in the first above mentioned point a contrast on the system that is existent in India in order to address state liability. (With specific reference to the doctrine of sovereign, non-sovereign functions and sovereign immunity)

c) Lastly, addressing the role played by the doctrine of public function in the definition of state in the United State of America and extrapolating the same onto an Indian scenario wherein, a hypothetical (in which the doctrine is contrasted with that of India's usage pursuant to the second point mentioned above) is scrutinized in an attempt to arrive at a definition for state within the understanding of Article 12 of the Constitution of India.

4. DEFINITION AND EXTENT OF THE DOCTRINE OF PUBLIC FUNCTION

The doctrine of public function can be understood as an attempt to devolve liability in a manner that accompanies the devolvement of power and

authority from traditional bases, such as governmental organs and substantially funded organizations to private players owing to the freeing of economic space for investors. In order to illustrate said assertion let us consider the hypothetical scenario below:

> *There exists a town 'x', (the size of said town can be approximated by calculating the land owned by the local government in the capacity of an agent of the state government, a number which come up to ten hectares) which has a fixed population and is located at the foothills of the Rockies, United States of America, and it exists primarily in order to facilitate the rather large, obtrusive mining facility that is owned and operated by corporation 'y'. The government of the State in whose territorial jurisdiction the town 'x' comes under issues a notification opening up the purchase of large tracts of land in excess of five hectares to individuals, private corporations and other entities vested with legal persona. Following the issuing of such notification, 'y' acquires all the land owned by the agent 'x' and takes the reins of administration within the territorial limits of 'x'. Such a status quo prevails for five years and then an incident occurs that results in litigation against the governing authority. The incident is as such – "During the course of construction of a road that lead from the town to the entrance of the mine (a road constructed for the purpose of allowing the townspeople an opportunity to have easy access to the stream which ran parallel to the mine entrance, and additionally since most of the townspeople worked at the mine, the families would find it easier to visit in such cases with the presence of a road), an innocent bystander making his way home from the nearby stream was killed in an accident that involved the negligence of the contractors (belonging to 'y') building said road and the family of the deceased filed a suit in the court of law stipulating that the liability of the corporation be raised to the level of a state as posited by the Constitution, pari materia to that of the United States of America. The court in deciding that since the corporation was – a) performing the functions of the state in the region for a few years; and b) the nature of their instant action, i.e. the building of the road for purposes that were community-oriented qualifies as discharging of functions that are essentially public and hence must be liable as the state would provided that they directly discharged said function.*

Such a situation would exemplify the doctrine of public function in the country of the United States of America, primarily under examination, as the doctrine has adopted by the judiciary in an attempt to modernize the state perspective in cases wherein liability must be differentiated and ascribed as being constitutional or non-constitutional (In cases wherein a court is asked to

identify whether a party to a case can be classed as a State actor or not). Prior to exploring the nature of the public function doctrine in the US, let us consider the definition of "State" within the same, and that may be divisible into the positive and the negative definition which seek to define different aspects of the state. While the former attempts at defining the nature of the 'State' in of itself with regards to its structure, the latter's definition is a functional one referring the extent of State authority in an attempt the allow for a delineation that marks the separation of said entity from society to be denoted as state. The positive definition can be posited as follows:

> *"In its most enlarged sense, it signifies a self-sufficient body of persons united together in one community for the defence of their rights, and to do right and justice to foreigners."*
>
> *"In a more limited sense, the word 'state' expresses merely the positive or actual organization of the legislative, or judicial powers; thus the actual government of the state is designated by the name of the state..."*

Upon analyzing the latter aspects of the above mentioned definitions, it is obvious that the in a positive light, "State" is an institution that possesses a wide mandate guaranteed by grundnorm, in the above case referring to the Constitution of 1787, and this wide mandate also allows for the state to formulate a governmental structure that includes the legislative, executive and judicial organs the powers inherent in them and the scope of their interactions and authority. It also refers to the discharge of functions therefore mandated by the constitutional grundnorm, which vary from organ to organ, with the legislature primarily mandated to deliberate and pass legislation, the executive to interpret the same and the judiciary to resolve disputes, interpret the constitution and preserve fundamental rights. On the other hand, the negative definition of the state was laid down the in *Civil Rights Cases*[1], where the Supreme Court in an opinion authored by Joseph P. Bradley, which states that,

> *"...Individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind...it does not authorize congress to create a code of municipal law for the regulation of private rights..."*

The definition clearly demarcates the extent of the State with respect to its function, with the court expressing a clear inability of the State to legislate on matters that are wholly private or personal in nature under the authority of Section V of the Fourteenth Amendment that gives the state the right to enforce said amendment, with specific references to Section I and II of the Amendment that instruct the state to ensure the presence of the due process of law.

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[1] 1883 SCC OnLine US SC 183 : 27 L Ed 835 : 109 US 3 (1883).

The United States Judiciary developed the doctrine of state function in the original instance in *Marsh* v. *State of Alabama*[2], wherein the Court held that a private corporation that owned a town and operated it would be held liable for actions committed by the same as a State would (the same is akin to the hypothetical scenario constructed in the antecedent paragraphs). However, the Supreme Court in later decisions regarding the doctrine of public function usually considered a single function as opposed to a multitude that initially allowed them confer liability in *Marsh* v. *State of Alabama*[3]. The doctrine appears to have no concrete definition and the application of the same is only exposed when cases decided by the court are examined, as an objective standard extrapolated from the doctrine appears to be lacking. The only conceivable manner in which the extent of the doctrine of public function can be examined is to analyze the criteria laid down by the court in order to apply said principle in law. There appears to be two distinct tests or manner of application for the public function doctrine and the first follows from the *Marsh* v. *State of Alabama*[4], and has not been laid down in any single case but can be extrapolated from several similar ones wherein the courts have expressed same views and the nuances of the test are as follows:

- There exists a private party that performs the functions that are traditionally and exclusively reserved for the state.
- The power to perform said function is traditionally associated with the sovereign.
- The nature of the power to perform is such that the state is itself obligated to perform the same.
- The power happens to be an exclusive prerogative of the sovereign.

The aforementioned test appears to be fairly restrictive in its allowance for a function to be classified as public as opposed to private. The primary emphasis appears to be on the sovereign or the State and the association of said function with that of the mandate of the State in order to perform. The keywords being, (ones that have undergone modification on the basis of different fact-situations) "traditional", "associated", "exclusively" and "prerogative". These terms make it abundantly unambiguous that in order for any function be classified as a state/public function, it must first pass the test of exclusivity, wherein the nature of function must be such that only that is traditionally obligated to perform it and when such a right to perform is delegated to a private player then such player must be held up to a constitutional standard.

The conflicting test to the aforementioned one originates with the case of *Evans* v. *Newton*[5], wherein the Supreme Court adopted a different standard for

[2] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[3] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[4] 1946 SCC OnLine US SC 9 : 90 L Ed 265 : 326 US 501 (1946).
[5] 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).

the application of the public function doctrine, one that included three limitations laid down in order to satisfy the court for the application of the doctrine, and they are as follows:

- There exists a tradition of municipal control.
- That tradition has become firmly established with the passage of time.
- The function is open to all classes of the public, and hence the public function doctrine applies.

With reference to the conflict in *Evans* v. *Newton*[6], taking into reference to other previously decided cases, specifically the case of *Jackson* v. *Metropolitan Edison Co.*[7] and that of *Flagg Bros. Inc.* v. *Brooks*[8], the idea behind the "exclusivity" test in the first one happens to refer only to the right that is vested within the State or the sovereign to perform the act in question, as opposed to the facts of the *Evans* v. *Newton*[9], wherein the performance was an ongoing practice until recently before the filing of the suit. Additionally, *Evans* v. *Newton*[10] made it unambiguous that the nature of the "exclusivity" could be attached to the operative aspect of effectuating a vested right. The Court also observed while a right to perform is reserved by private parties, actual performance is limited to the State and its agents. The Court also considered the question of public perception by postulating that it was of great import for a function to be considered as public to have the weltanschauung of the people in contact with said function believe that it was essentially public in nature (the court considered that a particular class of individuals would be affected by the function in either a positive or negative manner). At the culmination of the case (and that of *Jackson* v. *Metropolitan Edison Co.*[11]), the public function doctrine could be restated as any function would allow for invocation of the doctrine if it was actually performed by the State and its agents but the right to perform was vested in the public as a whole (allowing for private players as well), and the performance of the same affected a class of people in a particular manner and if the class perceived the function as being public.

5. ASCERTAINING THE VALIDITY AND APPLICABILITY OF THE PUBLIC FUNCTION DOCTRINE IN INDIA

The doctrine of public function, though not under a specific label has been applicable in India post-1947. However, in order to examine the present status of public function in India the history of the definition of 'State' or 'sovereign'

6 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
7 1974 SCC OnLine US SC 224 : 42 L Ed 2d 477 : 419 US 345 (1974).
8 1978 SCC OnLine US SC 80 : 56 L Ed 2d 185 : 436 US 149 (1978).
9 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
10 1966 SCC OnLine US SC 1 : 15 L Ed 2d 373 : 382 US 296 (1966).
11 1974 SCC OnLine US SC 224 : 42 L Ed 2d 477 : 419 US 345 (1974).

function must be explored. *Peninsular and Oriental Steam Navigation Co.* v. *Secy. of State for India*[12] was a landmark judgment in pre-independent India where the High Court at Calcutta provided the first negative definition of state function. The case primarily allowed for the affixment of liability, which was vicarious in nature, onto the State for the acts of its agent in the course of business. In a string of cases that followed, the Court laid down several functions as either being sovereign on non-sovereign with questions pertaining to liability of the State under the same, until the landmark judgment *N. Nagendra Rao & Co.* v. *State of A.P.*[13], wherein the Court concluded that even in cases wherein the function was deemed to be sovereign, the state would be liable to compensate the aggrieved for acts of negligence (amongst other tortious actions) by the agents it employs.

The definition of "State" under the Constitution of India is provided under Article 12, with the part reading as follows:

> *"The Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."*

Upon examining the provision, it is fairly evident that the framers of the Constitution intended to have a narrower definition of "State" as they include the concluding phrase as being under the control of the Government of India, a phrase without which the Court could have interpreted several other organizations and bodies whose functions resemble state functions be classified as states. The higher judiciary in India oscillated between two tests of determining the constitutional status of an entity under Article 12, the first being the functional test and the second being the legal/control test. In *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*[14], the Supreme Court ruled in favour of the control test, stating it to be fitting and keeping in consonance with the spirit of the Constitution of India. The functional test is fundamentally a test performed by the court on any organization in question with respect to the functions discharged by said organization and upon comparison with the jurisprudence built up on the subject-area of sovereign and non sovereign functions, arrive at a reasonable inference as to whether the entity can be classified as a State or not (it is when its functions resemble that of the State's or sovereign functions). The control/legal test, on the other hand, as was laid down in the case refers to the organizational structure being in commiseration with that of the State or under the control of the Government of India (the terminology employed by the court was: "functionally, financially or administratively"). Additionally, the Supreme Court has however set to work on developing the jurisprudence on the grounds of liability of non-state actors (private) in cases wherein there exists a discharge

[12] (1865) 1 Bom HCR App 1.
[13] (1994) 6 SCC 205.
[14] (2002) 5 SCC 111.

of public/state functions. This was especially observed in *Indian Medical Assn.* v. *Union of India*[15], *People's Union for Democratic Rights* v. *Union of India*[16], *Unni Krishnan, J.P.* v. *State of A.P.*[17], and finally approaching a fruition in *Zee Telefilms Ltd.* v. *Union of India*[18], wherein the Court upon classifying the BCCI as a non-state entity under the definition of Article 12 imposed liability on the same under the doctrine of public function concluding that the entity performed functions that could closely be associated with the functioning of the State.

6. CONCLUSION

When the systems that allow for the application of the doctrine of public function in the United States is compared with India, several points arise which have touched upon with brevity. At the outset, the idea of public function in India lacks the clarity that is perceivable in the US, which ironically possesses a more discordant form of application as opposed to the relatively unambiguous method that is employed by the Indian Judiciary. It is also observable that in the United States, the Judiciary has unified the idea of public function with that of a State actor in order to ascribe liability, whereas the method adopted by their Indian counterparts is one separation of the two, whilst imposing liabilities for both.

Another area of primary difference is the impact of the same on the definition of statehood. In the case of the United states, owing to a unified approach, the idea of a state actor or a state is one that is in a state of constant flux, dependent on the fact-situations emergent in newer cases that could possibly present an opportunity for the Judiciary to alter the meaning of the same or in other words, a classical proponent of the functional approach. In India, however, the idea of State under Article 12 is far narrower and limited as the control test is preferred and hence, there exists a dual system *per se* wherein one set of bodies that are under the control of the Government of India, which can be classified as extensions of state and other bodies that discharge state/public functions which can be deemed liable under Article 32 or 226 under the principle of direct horizontality.

By way of conclusion, it is the personal inference of this paper that the system that is followed in India is far more efficacious as it eliminates ambiguities in defining a state dependent on varying social facts as opposed to the US system (especially so, as it preserves the notion of liability for wrong actions). This in turns boosts the efficiency of the Judiciary as a whole thereby allowing for a greater realization of the ideals of justice.

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[15] (2011) 7 SCC 179.
[16] (1982) 3 SCC 235.
[17] (1993) 1 SCC 645.
[18] (2005) 4 SCC 649.

AN ASSESSMENT OF INTERNATIONAL CONSTITUTIONALISM IN CONJUNCTION WITH THE USE OF FORCE IN ARMED CONFLICT

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Abstract *One of the resounding hallmarks for progressive development is internationalization. In the changing geopolitical landscapes of contemporary times, the establishment of an ordered international framework is necessary for political and economic stability. In such an international context, the legal underpinnings to such institutions must be extrapolated, and the engendering of an international legal order is the next logical step in facilitating a truly international world. But, given the valuable opportunity cost of state sovereignty in such a trade-off, the international community has been reluctant to structurally reform international law, in favour of an international constitution that fulfils functional objectives (as it is essentially the practice of institutional international law). This paper takes cognizance of the manifest exigency for an international constitution, and to that effect, justifies its conception of an international constitutionalism, i.e., sectoral international constitutionalism.*

Upon conceptualizing the nature of an authentic international constitution, the paper examines one fundamental concern in the field of international law, being the use of force in armed conflict. And it showcases how an approach of sectoral international constitutionalism is efficacious when the grundnorm (i.e. the international constitution) is the United Nations Charter. The paper critically analyses the current trajectory that the nation states are adopting, and accordingly advances a proposition that international constitutionalism is soon to be an essential component in geopolitical landscapes. Upon making a case for the UN Charter to be the archetypal international constitution, the paper conducts a logical approach to check whether the inherent objectives that are to be satisfied by international sectoral constitutions, are in fact satisfied and critiques the failure of the UN (i.e. the UN Charter) which in certain respects impede the possibility of cognizing a truly international setting. And contextualising the problems faced as such, the paper concludes by stipulating a few changes of significant import that would

institutionally remodel the UN, and go a long way in the generation of a new international legal order.

1. INTRODUCTION

A continually growing internationalism is a characteristic feature of the contemporary post-Westphalian world. A legitimate conception of the evolving nation state can only be engendered, when premised on a contemporary understanding of expanding international collaborations and developments. Even prior to the institution of the United Nations, an international context has manifested, and an increasingly inclusive world has developed since. Developments such as the advancement of the archetypal western liberal model in culturally differing societies, and a deeply pervasive globalisation that has made its presence felt in domestic, regional, and international markets, engender a suitable background for the generation of an international framework that seeks to address various issues of import.

There are several causal factors that warrant the existence of such an international set-up. Perhaps the most pressing factor is that of the necessity for economic cooperation. It is a documented fact that resources are limited; it is also known that concentration of resources is not uniform. A reading of both these ostensibly self-evident social facts showcases the necessity for resource-sharing (i.e. economic trade). As is the case with any form of ordered affirmative action (by an institutional authority), legal institutions must provide regulations and procedural laws that mandate the activity that is required (i.e. in this case, economic activity). Another extremely pressing cause that has warranted the existence of an international system is the institutionalization of cosmopolitan morality post the events of World War II. The implementational reality of such a cosmopolitan morality is best evidenced in the creation of inalienable universal moral norms that have been integrated into a framework of human rights. World War II shocked the moral conscience of humanity, specifically, the events of the Holocaust, and the resultant backlash led to the formulation of a structurally consistent and functional international organisation (i.e. the United Nations).

The League of Nations, which was the precursor to the United Nations, failed from a functional perspective for the simple reason that an organisation that governs itself by a legal mandate (that dictates nature, and extent of functionality of the organisation) requires the power of enforceability in the matter of ensuring authentic functioning, and the League of Nations could not hold nation states legally accountable, and thus, neither enforceability, or punishment for lack of it thereof, was possible by the League. Post the second world war, the atrocities committed due to expansionism and war prompted the international community to develop a legal text that would be formulated on the principles of human rights, respect for sovereignty, and international peace and security.

And to that effect, the United Nations Charter has been instrumentally successful in fulfilling the legal dimensions to the matters of import mentioned above. Therefore, it only follows that the natural conclusion to such a realization would be the establishment of a legal-political institution that oversaw and facilitated the aforementioned objectives. This was the context in which the multinational organisation, i.e. the UN was formulated.

Out of the several objectives that the United Nations has assumed, the two prerogatives that are arguably the most essential are safeguarding state sovereignty and guaranteeing international peace and security. Internationalism and, subsequently, relevant precepts of international law are fundamental elements of contemporary reality, and certain issues demand the lens of analysis to be entrenched in an international perspective. The contemporary problems that affect the discipline of law (in terms of lacunae in its theoretical abstraction) and society (real & practical problems that plague society) are at their crux, problems relating to state sovereignty, and the extent of state responsibility in national and international arenas. And perhaps the most dangerous hindrance to state sovereignty is the use of force in international law. And it is this specific practice, i.e., of the use of force that must be critically analysed in light of international law pertaining to the subject matter.

The legal underpinnings of such an international context would be well suited, if adjusted to a structurally cogent and functionally valid framework, that operates as an international constitution. Such an international constitution has not manifested, and the hypothesis is merely a hypothetical derived from the current social facts, and the projected trajectory of international law, and international arrangements in the world. To reiterate, the most important objective in international law, is in ensuring international peace and security, and the guarantee of state sovereignty, and the use of force is a critical component in the conceptualisation of an international constitution that deals with the subject matter.

The academic discourse on international constitutionalism however, has not been limited due to the fact that its manifestation has not occurred yet. The opinion on the subject matter is reflective of the fact that international constitutionalism is seen as the future, in constantly evolving geopolitical dynamics. This paper seeks to address the question of state sovereignty in the quest for international peace and security, and ostensibly, the corollary of the use of force. The scope of investigation will be premised from assessing the largest and most efficacious institution (i.e. the United Nations) in the international framework of nation states, to advance the proposition of a futuristic international constitution, manifest in the form of the United Nations Charter. It shall seek to accomplish this objective by examining:

The nature of a possible international constitutionalism, via exploration of the different possibilities available (the primary possibilities are listed):

- Customary international law
- United Nations Charter

The role of the posited international constitution in the paradigm of the use of force in international law. To this effect, the paper examines the case of:

- The exercise of self-defence in international law
- Interventions

2. RELEVANCE OF INTERNATIONAL CONSTITUTIONALISM IN THE CONTEMPORARY WORLD

International constitutionalism is the normative legal framework that provides a regulatory mechanism that governs the established functions of the world community, and establishes a mandate for a new international legal order. Just as the intrinsic quiddity of laws that manifest in India's legal system, is materialized through the form of its grundnorm (i.e. the Constitution of India), the quiddity of the system of international laws that are in place to provide an existential and functional legal basis for the regulation of political wills of the nation states, lies in its normative structure that constitutes an international legal order. While the essence of international constitutionalism may just be that, there exist several contrasting theories that stipulate what it truly entails, and amidst the debate on the subject, Walker's definition of international constitutionalism stands valid for the purposes of this paper: "indispensable symbolic and normative framework for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalia world". The two overarching variants of international constitutionalism are:

- Sectoral international constitutionalism
- World order constitutionalism

For the purposes of this paper, sectoral constitutionalism is investigated in light of the use of force in international law. And this is because of the relationship that sectoral constitutionalism shares with institutional law, and if one were to posit a hypothesis, as to the projected legal trajectory, the resolution would be a furthering of the development of institutional law. Institutional law essentially deals with organisations that operate at an international level, and the assignment of rights, liabilities, and responsibilities that are to be accorded to the organisation vary based on the nature of the organisation and its functionality, which is why there exists a trade-off between normative fulfilment and functional efficacy. In practice, however, the application of institutional law is in conjunction with international law, as most of the relevant organisations that can be meaningfully classified as institutions that come under the purview of institutional law, are primarily international in nature. And therefore, the

institutional law that is discussed in close conjunction with sectoral-international constitutionalism is that of an international institutional law. The best example substantiating such a claim can be seen in the existence of the United Nations, which interfaces with both institutional law, (as an institution of significant import) and international law, as the United Nations Charter is one of most important sources of international law. It becomes particularly important in the case of intervention, as the use of force in international law is extremely contestable, and as such, institutions within the purview of a deliberative, enforceable, and judicial capacity are of absolute importance in the ascertaining of legal validity and relevance in an international context (normative and functional relevance).

The problem with world order constitutionalism is that it is not suited to a constantly metamorphosing world. In an era where information is on the rise, and different avenues, and unconventional areas in several disciplines (social and scientific institutions) are being constantly discovered, legal development is crucial to the issue of regulation in these said fields. Several problems that plague society need distinct legal reforms that address the issue as the problems that plague society -themselves are extremely intricate, and constitute areas of possible scope for development of regulatory and judicial mechanisms by the discipline of law. A historical analysis of the institutions that existed two decades ago, in relation to the existent contemporary institutions showcases the fact that problems have cropped up, and have become multidimensional variants that require specific solutions catered to it. This is possibly why the study of law in of itself has become exceedingly interdisciplinary, interfacing with sciences and the social sciences. Therefore, a single process, i.e. a single legal system at an international level cannot possibly hope to solve the legal concerns of every nation. The severity of such a responsibility must be cognized, as international constitutionalism is principally organised around functional perspectives. The mere conception that the political will of a nation can be surrendered to an institution that is jurisprudentially based on a set of base legal principles signifies an extraordinary perceptual shift towards the status of state sovereignty. And therefore, this decreased relevance to state sovereignty is for obvious reasons, not for metaphysical motives, but rather engendered for functional causes. And considering that the premise in of itself is only suited around establishing efficacious functionality (in terms of recognition, and regulation), that premise must be satisfied in its conclusion, and the natural conclusion of espousing world order constitutionalism is the probable failure in functionality. It is categorically impossible to establish a singular system of laws facilitating and providing the grounding of a new international legal order, as it essentially calls for the superimposition of a static solution on a dynamic system.

In light of the presented problems of world constitutionalism, an institutional sectoral constitutionalism offers the necessary solutions to ensure the functional fulfilment of the objectives of the respective institutions. It entails

a separation of duties and accords them to different institutions, and these institutions are accorded a legal status, and within the ambit of the specific objective that the institution seeks to address, it assumes the legal standing of a grundnorm granting semantic legitimacy to the conception of international constitutionalism.

The manner in which sectoral constitutionalism would manifest is through an internal division of its procedural and normative content. And, that is precisely why sectoral constitutionalism branches off into two variants:

- Procedural sectoral constitutionalism
- Substantive sectoral constitutionalism

Procedural constitutionalism deals with the development of organisational structures that operate on the substantive law that is provided for in a particular legal concept. The organisational structures provide for a functional fulfilment of the goals that are entailed, and the legal grounding for any such affirmative action adopted by the institutions in question would be provided for in the substantive law that is guaranteed. An example shall substantiate the method of operation: in the legal paradigm of human rights, the procedural sectoral constitutionalism can be accorded to the organisation that is, the United Nations Human Rights Council, whereas the Universal Declaration of Human Rights would amount to the substantive sectoral constitutionalism.

The problem with conceptualising international constitutionalism in such a manner, is the syntactical fallacy in labelling it as constitutionalism. It must be understood that while the substantive and procedural aspects of sectoral constitutionalism may not be tantamount to (in isolation or in totality) a constitutional perspective on this subject matter, it still highlights the vital concerns that international constitutionalism must face. And, another reason why there exists scope for mischaracterising sectoral constitutionalism in its current form is due to the fact that the present understanding of constitutionalism is premised on the conception that is formulated at a national level. Such a legal system is naturally singular, and structurally solid and functionally relevant in its expression of the political will of the nation on a variety of issues. This presupposition must be destroyed at the very outset, because any postulation that is made is essentially a hypothesis that does not possess empirical substantiation. Therefore, variations in the structural integrity of such models are absolutely permissible, as they are established only in light of resolving some of the intrinsic problems that accompanies internationalisation, but is left unaccompanied by an international constitution.

The actual relevance of an international constitution can only be conceptualized when observing the role played by the state in dealing with contemporary problems that threaten the fabric of society. In order to conceptualize the role of a state, it is assumed to play a role in three different levels:

- National level (i.e. domestic arrangement of laws within the territorial boundaries of the nation)
- Regional level (Regional arrangement of laws and measures in place, in light of multilateral organisations that carry out obligations embodied by more than one state. This can be classified as international, but is not so in the truest sense of the word, international, as it is not universally international. E.g. SAARC)
- Universally international (applying to all or most nation states in the world. E.g. The United Nations)

Now in light of issues such as use of force in international law, it becomes fairly evident that the State's first two levels of operation are useless in guaranteeing a meaningful resolution of conflict that is compatible with international law. The idea of the use of force, can either be one of the two things, interventions or the right to self-defence. In the case of effectuating action at the national level, w.r.t. the right to self-defence, it becomes entirely problematic, as military action is left unregulated, and affirmative action that erodes the sovereignty of states involved in the dispute is left to occur unfettered by the required shackles of the law. And the cause for engendering the institution of the United Nations was to avoid the very same problem that would be caused by following a route wherein nation states essentially act on issues that are essentially the subject matter of international law. The effects of war are devastating, and it can have several repercussions on other nation states in the world, as the nature of weaponry and warfare in itself has undergone significant reform. What exacerbates the situation is the idea of regional military organisations such as the NATO that also operate as there exist principles of collective self-defence which mandate affirmative action. And such a system of warfare (i.e. the use of force) becomes extremely detrimental to the interests of international peace and security.

The very first lines of the UN Charter's Preamble are to save the succeeding generations from the scourge of war. And military action by several nation states of the world compromises international peace and security, and as a result, steps should be taken to ensure that regulation, and conflict resolution occur at the international level, where any act/decision taken or made is done under the watchful scope of the international community. This ensures that the international community is made a stakeholder in this regard, and several legal concerns of accountability, reparations, and judicial action can be deliberated upon in an international forum.

That is precisely why in the interests of the international setting's (i.e. the United Nations) primary objectives of facilitating international peace and security, an international constitution is perhaps the only solution. The problems that the world in all its geopolitical vacillation, are all inherently international in nature, and therefore, it is logically congruous to assert that the solution

must also conform to an international legal order. And in the eventuality of a possible international legal order, international constitutionalism would have to manifest as it provides a normative grundnorm to the substantive considerations of the law.

3. THE NATURE OF AN INTERNATIONAL CONSTITUTION

There are a multitude of sources from where international law is derivable, and to that effect, the possibilities of generation of an international constitution would also naturally be multitudinous in nature. But it must be understood that not all sources of international law can be classified as legitimate grounds for the formulation of an international constitution. For example, the advisory opinion of the International Court of Justice under the auspices of the Statute of the ICJ (65[1] & 65[2]) may well be considered exemplary legal opinion, but has no real authority. And the idea of authority is important in the notion of an international constitution, as one of the chief reasons for the opposition to an international constitution is that international law in of itself is essentially soft law, and lacking enforceability, it stands to have no practical benefit in the devisal of an international legal order.

Therefore, it becomes clear that while there maybe myriad possibilities for an international constitution, the fact of the matter remains, that only the sources of international law that prescribe rules and regulations and mechanisms for enforceability, can even be considered as a possible international constitution. The other important reason why such a conception of an international constitution is required is because only enforceable aspects of international law are compatible with sectoral international constitutionalism. For reasons stated above, the natural conclusion that the paper posits in the structural format of an international constitution is that of the sectoral variant. And as stated above, the two branches of sectoral constitutionalism are:

- Procedural sectoral constitutionalism (international)
- Substantive sectoral constitutionalism (international)

And considering how there are the basic prerequisites for the generation of an international constitution, their fulfilment is of the utmost import. In terms of substantive sectoral law, several of the possibilities are sufficient in the goal to provide an international constitution, e.g.:

- UNGA resolutions (that have not already been accorded the status of customary international law. They are accorded the status upon State practice that is in alignment with the resolution's principles and clauses)
- Reports by bodies of the United Nations
- Advisory opinions of the International Court of Justice

There are two manifest commonalities in the aforementioned examples of international law, and the first commonality, is as mentioned above, an existence of core substantive law that seeks to provide legal opinion on a particular legal concept). The second commonality that is found in the instances described above is the inherent lack of a procedural sectoral constitutionalism. Considering how sectoral constitutionalism is extremely interrelated to institutional law, it must be recognized that a fully functioning organisational structure that operates on a legal basis must be existent. These examples lack such organisations that can enforce mandate, and as a result, such cases of international law cannot possibly be adopted as a viable source for an international constitution.

The discussed cases of international law are essentially consent based. And whilst the currently prevailing model of international law essentially operates on the basis of state consent, the entire idea of shifting towards an international constitutionalism is to ensure that state-consent does not designate the success or failure of a precept of international law. This policy allocates much more importance to the role of the state in international law as opposed to an international legal order. The categorical imperative of international constitutionalism is the establishment of a new legal order at the global level, that does not falter when states withdraw, make reservations, or fail to provide consent on issues of legal and global relevance. And upon observing the trajectory of international law, it becomes fundamentally evident that the global community is moving towards such a reality, as peremptory norms (i.e. *jus cogens*), treaty obligations, state practice, and Charter law are all essentially available as enforceable legal tenets regardless of consent. And if that is any indication to the future of international affairs, it becomes evident that a centralized and powerful international legal order constitutes it (and as such, at its crux, will lie an international constitution).

Therefore, the only two real sources of international law, that possess the capacity to be classified as a possible mechanism of an international constitution are:

- The Charter of the United Nations
- Customary International Law

Upon inspection of the following sources, the fundamental fallacy with (customary international law becomes evident. It is intrinsically malleable, and contingent on consent, and not on the enforceable quiddity of its normative structure. This is precisely what international constitutionalism is looking to avoid, as it achieves to stray away from the idea of consent- based governance in international law. Even in the case of peremptory norms, i.e. *jus cogens*, the one thing that becomes apparent is the fundamental fallacy of its substantive position. The conceptual legitimacy of peremptory norms is always questioned, and dubious as legal scholars question its origins. The source of origination is

essentially challenged. Customary international law is intrinsically a case of state practice that has been followed from antiquity, or is the product of treaty obligations looking to enforce a principle of international law. The quality of enforceability is through the international court of justice, as it is legally possible to try states for violation of international obligations, and the notion of state practice from antiquity or treaty obligations does come under the ambit of what can be classified as "*international obligations*". Therefore, enforceability is essentially guaranteed through the institution of the ICJ. Therefore, the fallacy can be best described as a jurisprudential lacuna in the subject matter of its foundation (as its foundational legitimacy is not premised on conventions, or actual legal covenants that positively establish the nature, extent and limitations of the law in question).

Another fallacy in the case of customary international law is the functional failure of several cases of violations of customary international law. From a functional perspective, the enforcement mechanism in of itself is riddled with several concerns, the primary concern being the utter breakdown of the precept of customary international law in question, upon non-compliance. This was evidenced in the case of the Kellogg Briand Pact which was a multilateral treaty entered into in the year of 1928. The important signatories were the United States of America, the Federal Republic of Germany, and the French Republic. This stipulated that nation states would not resort to war under any circumstances to resolve disputes or conflicts. Its legacy was merely symbolic as the world devolved into a war only 11 years later. This brings to light another important limitation with customary international law, and that is the fact that whilst procedural sectoral constitutionalism is conspicuously incomplete w.r.t. the fact that no fully functioning organisations cater to the pragmatic achieving of the objectives in its entirety. And in the cases, that they do provide for some form of accomplishment (i.e. the ICJ), it need not be entirely fulfilling of its objective. For e.g., in *Nicaragua* v. *United States of America*[1], despite the International Court of Justice deciding that they possessed the jurisdiction to try the case, the United States of America exited voluntarily from the case, and it must be understood that the jurisdiction that the ICJ possesses is voluntary compulsory jurisdiction, and in this case, despite declaring jurisdiction to exist, the organisation could do little to prevent the United States of America from exiting the case. But reverting to the limitation that manifests in the case of the ICJ, the fundamental problem is that there is no structural cohesiveness to the idea of customary international law. Principles of customary international law maybe derivable from distinct cases and treaties (e.g. the *Corfu Channel* case), but are not amalgamated into a definite legal text which could serve as a bedrock for a new international legal order (i.e. an international constitution).

An international constitution must be structurally robust, and functionally valid, and it should essentially behave as a grundnorm that provides validity

[1] 1986 ICJ Rep 14.

to the international law in question. This does not necessarily mean that an international constitution requires to deal with all concerns universally. It just implies that in deciding a particular legal concept that pertains to a specific issue, sectoral international constitutionalism dictates that the totality of legal opinion offered, must be present in one particular form that mandates the operation of organisations that ensure the enforceability (i.e. legitimate functionality) of the law in of itself. A real life example will substantiate the assertion being advanced; in the case of intervention (or rather the use of force), an international constitution would essentially be genuine and valid if the international law to be offered on said issue was present in one homogenous form of the law. Customary international law on the other hand adopts a more haphazard route, as several cases and treaties all behave as valid sources of international law. Therefore, customary international law cannot be meaningfully termed as a grundnorm for the international law on intervention.

Therefore, the one thing that becomes evident upon the assimilation of information regarding the other alternatives that could have decidedly been the international constitution on intervention, (i.e. the use of force) is that by the method of cancellation, the UN Charter fulfils all the criteria, and is currently the best bet for an international constitution on the international law of intervention. The next section will explain the basis for the UN Charter's choice as an international constitution, and it shall also justify how the UN Charter is best suited for dealing with the problem of the use of force in international law.

4. THE UN CHARTER- AN INTERNATIONAL CONSTITUTION ON THE USE OF FORCE

In a sectoral international constitution, there are several objectives that are to be satisfied before according a status of "international constitution" to the body of international law being referred to. The criteria are as follows:

- The existence of substantive law that elaborates a particular legal concept in relation to a particular issue. With the added element of it singularly encompassing the entire legal opinion on the matter. That is, it must be structurally authentic and consistent.
- The existence of an organisation that ensures enforceability, and the fulfilment of the institution's norm. It must possess procedural legitimacy in its organisational framework.

The first criterion pertains to the substantive-institutional criteria (institutional as sectoral constitutionalism pertains as a generality to institutions), and the second discusses functionality, which in effect, imbibes a sense of realism to the substantive core of institutions such as the United Nations rendering them, well-ordered legal systems with well-defined institutions designed to last. Considering the fact that the proposed institutional authority that would

be a potential candidate for an international constitution, (as it were), specifically pertaining to the use of force in the international arena is the United Nations, this paper shall examine how the aspirational directive, and current state practice (and international law on the matter at hand) is geared towards accomplishing the same (thereby satisfying its own prerogative, and the paper's prediction).

4.1. Introduction

At the very outset, the UN Charter espouses a principled congruity with its institutional framework. This can be evidenced (as stated above) in the very first lines of the Preamble to the UN Charter: "to save the succeeding generations from the scourge of war". The policy that is adopted by that of the UN is intrinsically non-interventionism, and while the UN Charter deals with several issues of significant import, the most important priority is that of dealing with the issue of safeguarding international peace and security, and to that effect, its ideological position (i.e. institutional norm) of non-intervention is reflected in the very first chapter of the UN Charter; "Purposes and Principles of the United Nations" Article 2(4), which stipulates that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

The prudent question, therefore, would be a questioning of the nature of questioning that must take place, in an existential assessment of the institution of the United Nations. And as such, one must closely inspect article 103 of the UN Charter, which reads as follows: "In the event of any conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail." This becomes crucial, because in any assessment where possible institutions, and as a consequence, relevant and *causally warranted* instruments (i.e. instruments engendered from institutions) are considered as contenders for an international constitution, the settlement of competing interests between different systems (either institutions, or instruments) is of fundamental import. Therefore, the case that can be made for the UN Charter to be a forerunner, in the endeavour to become an international constitution, becomes even more persuasive.

As a result, it becomes abundantly clear that the text of the United Nations charter is of utmost importance, and this bit of information can be stated to be crucial, (at the risk of hyperbole) as it implies that the optimal-approach would be that of *textualism*. And as any literalist understanding of statutory or codified law would dictate, an examination of the important provisions is necessary. Therefore, with regards to the international constitutionalism on the use of force, there are certain interrelated paradigms to examine. There is firstly,

the substantive content of what '*using force*' dictates in a contemporary setting. And secondly, the idea of state sovereignty which constitutes the other end of the equation of any usage of force in an international arena. And lastly, it deals with the overarching manner in which international peace and security also form significantly important priorities in a conceptual discussion on the usage of force in international law. The relationality between these concepts is not hard to understand, as a theoretical abstraction, and through several important cases, and subsequently developed provisions of customary international law, the relevant links have been drawn out, for e.g.

4.1.1. Corfu Channel Case, the Nicaragua case, & the Naulilaa Dispute

The use of force, if not considered justified, (its justification is multi-levelled, and hierarchised into different subsections of conflict that each deal with their own substantive law on the relevant issue [i.e. special type of conflict]) can be considered an affront to a State's sovereignty which occupies the highest position of respect in an international system. In this manner, state sovereignty and the usage of force form antithetical constructions to one another. This is broadly understood in light of the overarching consideration of international peace and security, for the uncomplicated reason that the very idea of a fully functioning and existentially secure international system of states is contingent on peace and stability amongst nations. Therefore, the next section of the paper shall examine the first two paradigms mentioned above, whilst simultaneously investigating the diverse ways of using force in international law.

4.2. Article 2(4)

Article 2(4) is particularly important for two reasons, the first is for the importance that is accorded to the policy of non-intervention, and the second is for the clear manner in which it seeks to safeguard state sovereignty. The implicature which suggests the protection of state sovereignty is ensured by a call for nations to refrain in the use of force against the territorial integrity or political independence of the State which essentially amount to state sovereignty. In this manner, the interrelatedness of state sovereignty and the use of force can be conceptualized.

The Article, while laying out charter provisions that seek to guarantee state sovereignty by issuing descriptive declarations of illegality (not explicitly, as it assumes a call for refraining of the activity) if force is used between or amongst nations. However, while charter law may seem to exert a stronghold on the engendered implicature on state sovereignty, the relevance and spirit of Article 2(4) extends deeper than a charter prescription. The article and the very notion of non-interventionism is a part of customary international law. In the 1970 Declaration on Principles of International Law, Article 2(4) was

elaborated as a core principle, and systematically analysed. The outcome of such a systematisation, was a clear expounding of the distinct kinds of force which would not be permitted, under the auspices of the relevant article. This ideological deliberation is also pertinent to the cognizing of the normative content that represents the amalgamation of the customary international law-perspectives on this article, and the article, in of itself. The various kinds of force are as such:

- Wars (Expansionist policies by military means, i.e. acts of militaristic aggression)
- Violation of borders (thereby violating state sovereignty)
- Acts of reprisals
- Deprivation of the right to self-determination and political independence
- Interference in a foreign nation's internal matters

In such a conceptual discussion on the use of force, the different modes in which use of force manifests in international law can be broadly categorised into the following groups:

- War – (covers a)
- Self-Defence (comes under [b] and requires independent and exclusive analysis)
- Interventions (covers b in part, c, d, & e)

Therefore, to understand the legal legitimacy of the UN charter as an international constitution, the following investigation must be conducted: Both the objectives that are mentioned as essentials for sectoral international constitution should be examined w.r.t. the UN to examine whether the three diverse types of the use of force are adequately addressed.

4.2.1. War

If one were to conduct a historical analysis of the roots of war, and military aggression, there is a deep almost paradoxical road map caved with instances of archaic military aggression, that go a long way in assisting a teleological investigation that critically examines the legality of war. While it is an entirely different question to assimilate and present historical findings regarding the feasibility of war, some notable findings that leading to consciousness development of the contemporary position of war are:

a) Pre-Christianisation of legal systems and warfare: War is not so much an ethical dilemma, as it is a resource-based problem. Ergo, legal analysis is limitative in every regard.

b) Christianisation of war, and formulation of legal theories seeking to justify and explain the causes of war. Namely, Aquinas and St. Augustine, who helped explain the just cause theory, and the qualifications of a *just war*, respectively. This spirit of pacifism which shaped, an anti-aggression policy of Europe (in theory, which was not reflected in practice whatsoever, irrespective of the efforts involved), which of its own merit was largely influential in shaping our world's current legal system.

c) Post-Christianisation of legal systems: This was the beginning of a new era in the international sphere, as institutions such as the League of Nations, and instruments such as the Kellogg Briand Pact, entered into existence. This establishment was a symbolic representation of the failure of observing subjective and ideological considerations of warfare (which bordered on intent determination and sovereign authority), and moved onto an objective criterion of collective need based action and reactionary allowance as opposed to warrantable actions (whose qualifications are personal and situational). This natural rejection of subjective criterion in favour of an objective system that determined legitimacy, is logical to say the least, given the fact that most Christian theories seeking to justify war between and amongst countries, produced paradoxical outcomes, that were indistinguishable, and impossible to adjudicate.

War, as can be seen from the terse historical timescale, is represented in the contemporary world as an illegal act. Prior to any legal justifications that render insight to the effect that war is illegal, it must be stated that Article 2(4) outlines that very same solution, as a prescriptive warning of the maladies of war. The Kellogg-Briand Pact was never terminated, and while it was violated due to the horrendous activities of World War II, its non-renunciation and reaffirmation in several other inter-war treaties only seeks to establish foundational integrity to the stipulation that war must be illegal. Therefore, it is an impossibility in today's setting to declare war, as an existing state of legal relations between or amongst nations. What makes this even more contentious, and fortunately impossible for any return of war, into today's legal systems is the implicature engendered from article 103 of the UN Charter (as mentioned above). Even if newer inter-war treaties were entered into (hypothetically), there would be no resultant outcome that would justify and prove the existential validity of war, for the simple reason that Charter Law, for what it stands justifies the existent status-quo, which again, fortunately rests with the "illegal" description of war.

The aims/objectives, the Preamble to the UN Charter, and the Charter itself establish the "substantive-law" basis which satisfies the first criterion for being a substantive sectoral constitution. Its enforceability is not limited only to the ICJ, but also extends to the United Nations as well. The United Nations

can effectuate enforceability using the threat of imposition of sanctions, embargoes, etc. And if the member nations of the UN under the auspices of the United Nations decide to follow a policy of seclusion, or forced isolationism, then the country at the receiving end of the UN's force suffers greatly. And in several cases, even the symbolic authority of the UN is enough to necessitate action. For instance, for several legal scholars in India, the establishment of a national human rights institution in the first place, was simply to avoid mounting international flak and pressure (from the UN). Therefore, in this manner, even procedural sectoral constitutionalism is provided for. (As institutions and distinct organisations operating on a mandate all exist to ensure enforceability)

4.2.2. Self-Defence

The right to self-defence, of member nations applies when nation states aggressively use force to commit acts of aggression and violate the territorial sovereignty of other member nations, and thus, violate state sovereignty. This is where the idea of the use of force becomes a double-edged sword, as:

a) The use of force violates state sovereignty as it destroys the territorial integrity and impedes political independence of a state.

b) But, the use of force can also help safeguard state sovereignty as it can be accorded as a protection under law (that can be utilized when attacked). That is, if a member nation of the UN is attacked militarily, then the nation has a legal right to retaliate (with proportionality of course), and as the member nation retaliating has been accorded the legal right to retaliate, he does not have to be held accountable, whereas the first aggressor will be held accountable under the full force of international law, and the Security Council (the body possessing primary responsibility in the UN) can take appropriate measures to punish the aggressor.

This is admittedly paradoxical, considering the fact that the UN Charter and customary international law on the matter of the "use of force" have all independently and collectively deemed it to be an abject illegality. But the use of force by itself is not to be deemed illegal. Article 2(4) may stand testament to the call for non-interventionism and pacifism in international relations, but Article 51 exists for the specific reason mentioned above (explained through how the use of force can actually be used as a double-edged sword).

However, there is one primary area of focus that must be critically examined, as the UN Charter fails to answer one fundamental question that has only grown increasingly relevant in today's day and age. This is pertaining to the question of anticipatory self-defense. This paper provides a clear justification for its usage of textualism and its literalist interpretation of the UN Charter, borrowing from the Charter itself, almost mapping its proof of its existence

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a) The use of force violates state sovereignty as it destroys the territorial integrity and impedes political independence of a state.

b) But, the use of force can also help safeguard state sovereignty as it can be accorded as a protection under law (that can be utilized when attacked). That is, if a member nation of the UN is attacked militarily, then the nation has a legal right to retaliate (with proportionality of course), and as the member nation retaliating has been accorded the legal right to retaliate, he does not have to be held accountable, whereas the first aggressor will be held accountable under the full force of international law, and the Security Council (the body possessing primary responsibility in the UN) can take appropriate measures to punish the aggressor.

This is admittedly paradoxical, considering the fact that the UN Charter and customary international law on the matter of the "use of force" have all independently and collectively deemed it to be an abject illegality. But the use of force by itself is not to be deemed illegal. Article 2(4) may stand testament to the call for non-interventionism and pacifism in international relations, but Article 51 exists for the specific reason mentioned above (explained through how the use of force can actually be used as a double-edged sword).

However, there is one primary area of focus that must be critically examined, as the UN Charter fails to answer one fundamental question that has only grown increasingly relevant in today's day and age. This is pertaining to the question of anticipatory self-defense. This paper provides a clear justification for its usage of textualism and its literalist interpretation of the UN Charter, borrowing from the Charter itself, almost mapping its proof of its existence

onto itself in a Godelian fashion. But if the same manner of legal interpretation is utilised, then anticipatory self-defense should be as non-existent in state practice and international systems as war is. This is simply based on the fact that the word "anticipatory self-defense" just do not appear in the UN charter. (text of Article 51 written below) But this does not change the fact that it is in fact a reality, and while textualism was one important element of this paper's analysis of Charter law, the other and perhaps the most relevant element of this paper is the stress that is laid down on realism in the aspirational directive, and determined current trajectory (based on current state practice and recent history). Therefore, it would not only be unwise to ignore the practical realities of the current Middle Eastern crisis, or of the Iraq War, it would also be internally inconsistent. Therefore, the real question that becomes relevant and is unfortunately left unanswered is, the question of the legal permissibility of anticipatory self-defense. While there do exist theories and legal documents such as the Goldsmith interpretation of international law, the answer if answered in the affirmative, lacks foundational integrity (as mentioned above). This is particularly threating if the goal is to argue for the United Nations Charter to become an international constitution, for the simple reason that any well-ordered legal system that does not stand on established roots of legitimacy cannot, in any semantically meaningful sense of the term well-ordered, call itself, *well-ordered.*

The crux of the problem can be summarised as follows. And this is inevitably a paradox as well. If threats to use force are clearly considered to be equivalent to the use of force, and they are deemed to have the same status and carry the same effect, then a response to the actual force should naturally be equivalent to a response to the threat to use force. However, it is known that in international law, anticipatorily using self defense and protecting one's nation from an armed attack that is yet to occur is not permitted according to the UN charter. But there is a clear recognition of the congruity between a threat to use force and an actual use of force. If the primary reason behind allowing the right to self-defense a recognition of the horrific nature of the actual use of force, and one also knows that actual use of force and threats to use actual force are congruous, then the defense should be accorded in both circumstances, if internal logical consistency is sought after. And its ignorance, shall bear paradoxical fruit. Proof of this assertion can be found in the very text of Article 2(4) which covers threats of force as well as use of force. The ICJ in its advisory opinion under the auspices of article 65[1][2] of the Charter, tendered to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons, stated as such: "signalled intention to use force if certain events occur" constitutes 'threat' pursuant to Article 2[4] of the UN. The very purpose of article 51, envisaged as a double-edged sword to the possible defects that arise from the strict implementation of Article 2(4) should technically account for all the qualifications of the relevant article. Its limitative feature requires institutional reworking.

But discounting the problem mentioned above, the current imperatives of the UN Charter are fairly straightforward, and satisfy the burdens necessary for it to be deemed an international constitution. In terms of procedural sectoral constitutionalism, the United Nations Security Council, which is the body that executes and enforces all significant decisions in the UN and is the body of primary responsibility in the UN, has the capacity to economically sanction any of its member nations. It must be understood that in the case of the UN, the ICJ also provides legal support of enforceability in conjunction to the United Nations. And on the count of substantive sectoral constitutionalism, the substantive law that applies on this particular subject matter is present in Article 51 of the UN Charter. In fact, the entire chapter VII of the UN Charter deals with action with respect to threats to the peace, breaches of the peace, and acts of aggression. Therefore, Charter Law is sufficiently adequate to deal with this matter.

Article 51 of the UN charter stipulates that, "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Mem- 10 her of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in exercise of the right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

4.3. Interventions

Continuing from the tangential discourse initiated in the previous section, the important legal query that must be resolved prior to any stipulation of the UN Charter, is that of the legal permissibility of "humanitarian interventions". Humanitarian interventions have three distinct criteria:

- Humanitarian intervention involves the threat and use of military forces as a central feature.
- It is an intervention in the sense that it entails interfering in the internal affairs of a state by sending military forces into the territory or airspace of a sovereign state that has not committed an act of aggression against another state.
- The intervention is in response to situations that do not necessarily pose direct threats to states' strategic interests, but instead is motivated by humanitarian objectives.

It is not hard to cognize how the first two features of humanitarian interventions seem wildly antithetical to Charter law. It goes against the very principles of the UN Charter as read in from the Preamble to the Charter. By

involving the utilisation of the use/threat to use force, it violates Article 2(4) of the UN Charter, not to mention a violation of customary international law. The second feature in addition to all the illegalities listed here, is also specifically violative of article 51 of the UN Charter, for the simple reason that it advocates military involvement in another country that is yet to commit an armed attack against the aggressor nation's borders.

However, the most important aspect of what makes humanitarian interventions counter-intuitive and contradictory to the UN Charter is its last feature. It discusses humanitarian objectives, and motives of nations. This subjective deliberation of ideological and intentional considerations that determine the justifiability of warfare was seen as regressive, and in fact the ideological apparatus of the UN was created and geared to steer clear of such archaic approaches. This stance shift in modern times needs to be accommodated by the United Nations charter if the institution looks to keep abreast with changing realities. It is counter-intuitive in an even more strange manner. Citing the fast-evolving nature of conflict, and the impossibility of solutions in several situations (by the adoption of conventional means of problem solving, e.g. institutional dependence on the United Nation, military aggression is seen as a path to peace. The strangest aspect of humanitarian interventions is its counter-intuitiveness, as peace through war is as contradictory as lighting a place with darkness. In both cases, the discussion revolves around ontic-ontological constructs, and they are extremely antithetical to one another. However, it seems to be preferred. This philosophical dichotomy and any jurisprudential implications it may have in the international community must be ironed out w.r.t. humanitarian intervention is the futuristic goal is to make the Charter of the UN an international constitution.

The procedural and substantive law on the issue of interventions is clear in the UN Charter. The substantive law on this subject matter is presented in Chapter VII, which states: "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". This entire section explicates the basis for a UN mandated intervention, which must follow a certain protocol. It must be introduced in the form of a resolution in the SC, which mandates the necessity to intervene, and it must pass after voting in the Security Council, and upon doing so, military action can be effectuated. There are two kinds of interventions:

- Humanitarian interventions
- Non-humanitarian interventions- mandated by the UN Charter.

The UN mandated interventions have a clear body of substantive law in the Charter, and are procedurally legitimate as well, as there are clear considerations that must be cognized whilst conducting a UN mandated intervention.

5. CONCLUSION

In the examination of the three different variants of the use of force in international law, it must be noted that this analysis is not meant to provide a definitive answer that the UN charter is the archetypal epitome of an international constitution. It is not to suggest that in the determination of a well ordered and well defined legal system that possesses both existential certainty and functional legitimacy, the United Nations Charter presents itself as a paragon of constitutionalism. It is only meant to assert that it may well hold the key to becoming an international constitution if the social facts of the future are conducive to the development of an international constitution. Having said that, some of the inherent drawbacks in the UN Charter that can be significantly remodelled and institutionally reworked to suit the current undercurrents of international law are as follows:

- There is no charter law that deals with the issue of anticipatory self-defence.
- There is no charter law that deals with the issue of humanitarian intervention.
- There needs to be a greater amending power to the UN Charter, as there have been a significantly less number of amendments to the UN Charter.

The first drawback must be solved for the simple reason that the paradox that presents itself between the constituent elements of Articles 2[4] and 51, with specific regards to threats to use force and protection that can be accorded in cases of threats to use force, is of a grave type, and its presence, only institutionally dilutes the authority of the UN, as real-life instances of usage of anticipatory self-defense continue on existing regardless of the theoretical abstractions arising from legal principles. This is not to ignore the face-value criticism that can be levelled against the Charter, as it possesses a philosophical quandary, in the form of a paradox that is yet to be settled.

If there is any hope to ensure that the institution of an international constitution is lasting, it must keep pace with changing social realities. The very incongruity between humanitarian interventions and the UN Charter do not showcase a dynamism of the latter's systems. It merely comes across as a historical institution surviving on tradition and net positive benefits that remains steeped in a static equilibrium of sorts when it comes to the engaging questions. The last drawback is crucial, as a lack of amending power to the UN Charter keeps the United Nations entrenched in a static status-quo, but the problems are dynamic, and multidimensional. In order to ensure that the United Nations futuristically develops into an international constitution, it needs to institutionally evolve with evolving social facts.

As elaborated above, the entire conceptual discussion on international constitutionalism is essentially premised on a hypothesis. There are no concrete material facts that dictate how it will pan out in actuality. This does not however preclude legal scholars to postulate a narrative, and hypothesise a framework for an international legal order. And that is precisely what this paper does.

This research paper essentially examines what kind of international constitutionalism is more likely to manifest (and arrives at the sectoral approach as opposed to the world order approach), and consequently, extrapolates the necessary criterion required for said manifestation. Through method of cancellation, and sufficient theoretical discourse on the subject matter, the paper arrives at a conclusive answer regarding the composition and possible form of international law, that an international constitution would be best suited to that future world (and the answer that is arrived at is the United Nations). This paper also examines the nature of the use of force in international law, and posits why national constitutionalism is insufficient and fails when subjected to questions that are intrinsically international. The paper then proceeds to examine the use of force by exploring three different variants of it (interventions, self-defence and war) under the broad umbrella of the extrapolated objectives required to effectuate an international constitutionalism, and provides through rigorous examination, the different areas that require institutional and legal reform, if an international constitution can ever be accomplished.

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