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EDITORIAL

The world hit by the pandemic is slowly returning to normalcy. The responsible Indian citizens have overwhelmingly responded to the vaccination drive initiated by the Government of India resulting in total vaccination of over 100 crores amounting to 78 per cent of the total population. This indicates that we the Indians are cautious as well as taking precautions for any hurdles that may come in the form of natural disasters like flood or any other calamity, outbreak of diseases, threats in the LOC etc., which amplifies the strength of India and the Indian democracy. This being one darker phase in every Indian's life we have always been optimistic and have been celebrating many days which are of international, economic, commemorative or festive importance. The year 2020-21 witnessed celebration of important days of national and global relevance for the youth, girl child, elderly, labourers including the celebration of Constitution day and Human rights day.

There had also been various enactments and amendments meeting the expectations of women, children and other related areas. The noteworthy among this is *the Medical Termination of Pregnancy (Amendment) Act, 2021* which contributes towards ending preventable maternal mortality and other related problems thereby, increasing the upper gestation limit from 20 to 24 weeks for special categories of women. This amendment is also a positive initiative towards attaining the sustainable development goals like reducing maternal mortality ratio, universal access to sexual and reproductive health and rights reminding one of the decisions like *Roe* v. *Wade*[1]*; Suchita Srivastava* v. *Chandigarh Administration*[2] and many more. The year 2021 also witnessed epoch making judgements.

The Supreme Court of India has once again proved itself to be the guardian of justice in the country during one of the most tragic and surprising year as it not only adopted to the online mode by enhancing e-courts programs but also ensured that justice was delivered on time regarding important issues of the country. The Supreme Court in, *Anuradha Bhasin* v. *Union of India*[3], gave certain directions regarding the imposition of restrictions on the internet in a proportionate manner and held that freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys Constitutional protection and therefore is indispensable to Art.19 of the Constitution subject to reasonable restrictions.

The Apex Court in, *Mohammad Salimullah and Anr.* v. *Union of India and Ors*[4]., held that fundamental rights guaranteed under Article 14 and 21 are available to all persons

[1] 410 US 113(1973).
[2] (2009) 9 SCC 1.
[3] (2020) SCC Online SC 25.
[4] Interlocutory Application No. 38048 of 2021.

whether citizens or not, the right not to be deported is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e). The judgment was delivered while challenging the decision to deport Rohingya Muslims who have taken refuge in India to escape persecution. In *Anjali Brahmawar Chauhan* v. *Navin Chauhan*[5] Supreme Court directed the Family Court of Gautam Budh Nagar, to conduct proceedings by video conferencing. The court stated that in normal circumstances we would not have directed video conferencing in respect of matrimonial matters. However, due to the pandemic, the functioning of the Courts has been stopped since March 2020. In *The Chief Election Commissioner of India* v. *M.R.Vijayabhaskar & Ors*[6].,the Supreme Court was dealing with the matter wherein the Election Commission wanted to seek directions from the Hon'ble Court to restrain the media from reporting the remarks passed by the Madras High Court judges against the Election Commission wherein they were blamed and held responsible for the second wave of COVID- 19. The Court held that freedom of speech and expression also extends to reporting the proceedings that happen in Courts including oral observations made by judges. In *Laxmibai Chandaragi B & Anr.* v. *The State of Karnataka & Ors.,*[7] Supreme Court held that, consent of family, community or clan is not necessary once two adult individuals agree to enter into wedlock: The two Judge Bench of the Apex Court had observed that such a right or choice to marry is not expected to succumb to the concept of "class honour" or "group thinking". The Court also said that the police authorities shall formulate guidelines and training programmes on how to handle 'socially sensitive cases.' Further, in *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Pvt. Ltd.*[8] held that two Indian parties can choose a foreign seat of arbitration. This decision provides necessary clarity on the use of foreign seats by Indian parties. The decision strongly builds up the power of party autonomy, which it describes as the brooding and guiding spirit of arbitration.

With this backdrop Karnataka State Law University is coming up with its flagship journal of the year 2020-21 with the themes on Textualism in Constitutional Interpretation, Unwritten Constitutional Conventions and Entrenched Constitutional Text**,** Contours of Power of Pardon in India, Accountability and Separation of Powers under the Indian Constitution**,** Deconstruction of dichotomy between 'order' and 'award' in Jurisdictional Issues, Modern Human Slavery and the Human Rights against Exploitation, Social Justice and Vulnerable Part of Human Society, Judicial Activism and Judicial Restraint.

We hope that our journal will make the readers to think on issues discussed in this volume and our efforts will be meaningful if further deeper research is carried on the connected themes and suitable steps are taken by the appropriate authorities.

-Editorial Board

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[5] 2021 SCC ONLINE SC 38.

[6] Civil Appeal No. 1767 of 2021 arising out of S.L.P. (C) No. 6731 of 2021.

[7] Writ Petition (Criminal) No. 359/2020.

[8] Civil Appeal No. 1647 of 2021 arising out of SLP (Civil) No.3936 of 2021.

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ARTICLES

MODERN HUMAN SLAVERY AND THE HUMAN RIGHTS AGAINST EXPLOITATION*

-Prof. Upendra Baxi**

To begin with the beginning, and share 'public secrets of law'[1] the term 'exploitation' occurs even if only once in the world's longest Constitution, the Constitution of India where Articles 23 and 24 are described as 'rights against exploitation'. Before the discourse on 'modern slavery' began, Article 23 prohibited traffic in human beings and begar and similar forms of forced labour' and declared these as offences. And so did Article 24 which forbade practices of child labour.

We must acknowledge the normative audacity of Indian Constitution, which accomplished three things. First, it declared certain patterns of behavior, usually occurring in civil society, as unconstitutional transgressions. In so doing, it crystallized a history of major demands made during the long freedom movement. Second, it created these as offences against equality in particular and as against the Constitution and commanded Parliament with the duty to make laws about the offences declared, regardless of federal principle and detail. Third, it conferred a fundamental right[2] to have an expeditious, effective, and equitable law.

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* Second Foundation Day Lecture, Karnataka State Law University, Hubballi, Karnataka, delivered online on 17th January 2021.

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1 As Pratiksha Baxi titles her important feminist ethnographical work. *See* Pratiksha Baxi, *The Public Secrets of Law: Rape Trials in Gujarat* (Oxford University Press, Delhi, 2014).

2 By virtue of Article 35.

In a sense, the criminal law was constitutionalized through these fundamental rights enshrined in the Constitution; at the same time, this also testifies to an approach to trafficking and forced labour as paradigmatic situation where the State is expected to combat and minimize the evil practices. The preference for criminalization - punishment, incarceration- is writ large; so are the profound democratic ambiguities of 'exploitation', somewhat redeemed by indicators of this vulnerability provided by Part IV.[3]

International discourse concerning the 'modern slavery' has listed a compendium of dreadful and evil practices like 'forced labour', 'sex trafficking', 'debt bondage', 'forced marriage', 'migration', organ trading', 'drug-running', 'professional begging' and related forms of 'exploitation.' These are diverse and heterogeneous phenomena. The sphere is heavily populated by easy-minded moralizations of politics,[4] occupied by the United Nations specialized agencies and overall by the UN system[5], business and human rights movement,[6] the emerging recognition of

[3] Part IV deals with the Directive Principles of State Policy.

[4] For the difficult dilemmas faced in regard to beggar by the colonial administration between 'equality' on one hand and 'forced labour, particularly manifest in *beggar*, *see* Neeladri Bhattacharya, "Violence and the Language of Law", in Aparna Balachandran, Rashmi Pant, and Bhavani Raman (ed.,), *Iterations of Law: Legal Histories from India*, (Oxford University Press, Delhi, 2018), pp.8-119.

These term 'new abolitionism' is attributable to David Riffe, "A New Age of Liberal Imperialism?", 16 (2) *World Policy Journal* (1999) pp.1-10. He quotes former UN Secretary-General, Javier Perez de Cuellar as saying in 1991 that: 'We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents' at p.1. *See* also, Richard Devetak, "The Moralization of International Politics: Humanitarian Intervention and its Critics", available at https://www.academia.edu/14457754/The_Moralization_of_International. The term has also been used in several blog discussions of the debt crisis in Europe as 'euro-moralizations.'

[5] The United Nations Convention against Transnational Organized Crime which entered into force on July 25, 1951 supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, (Palermo Protocol), Protocol against the Smuggling of Migrants by Land, Sea and Air are modern day international law instruments to combat modern slavery. But as Julia O'Connell Davidson writes: 'Where initially the focus had been on forced movement into prostitution, 'trafficking' now came to embrace a large and disparate collection of global social problems and rights violations. By the 2000s, concerns about child labour, forced labour, domestic servitude, enforced criminal activity, benefit fraud, inter-country adoption and fostering, organ trading, child soldiers, prostitution and underage, servile or forced marriage were all included under the umbrella of 'trafficking', *see* Julia O'Connell Davidson, *Modern Slavery: The Margins of Freedom*, 17(Palgrave McMillan, New York, 2015).

[6] Surya Deva, "From 'Business or Human Rights' to 'Business and Human Rights': What Next?", in Surya Deva and David Birchall (ed.), *Human Rights and Business* (Elgar, London, 2020) pp.1-21.

transitional legal order,[7] the uses made by multinational corporate governance of 'New Abolitionism'[8] and the patterns of 'celebritization of human trafficking.'[9]

This last a discursive term is used by Dina Francesca Haynes to describe the celebrity interest in human trafficking. She finds that amidst 'conflicting inconsistent data about human trafficking, the public does not know which information to trust' and in this zodiac 'a confident, reductionist narrative', which 'can easily hold sway'. Besides, modern slavery is a very 'sexy' topic, not only susceptible to alluring, fetishistic, and voyeuristic narratives', it also 'plays into the celebrity-as-rescuer-of-victim ideal that receives a huge amount of attention from the media and the public'. 'Celebratory activism' promises certain payoffs: for example, making an action plea globally visible, and often facilitating access of the NGOs to policy-makers. But it is pernicious too in (1) presenting 'the superficial or uninformed trafficking narratives' and (2) a 'lack of accountability for the solutions' proposed by the modern slavery celebrities which are too often '…rife with adverse unintended consequences if implemented'.[10]

[7] Neil Boister and Robert J. Currie (ed). *Routledge Handbook of Transnational Criminal Law* (Routledge, New York, 2015); RutiTeitel, *Humanity's Law* (Oxford University Press, Oxford, 2011).

[8] *See*, Julia O'Connell Davidson, *supra* note 3 at 13 which instances 'Global Business Coalition against Human Trafficking that 'includes Coca-Cola, ExxonMobil, Ford, Microsoft and Manpower Group amongst its members. As its co-founder, David Arkless, stated, 'When you get involved in something like this your employees will love it, the public will love it and your shareholders will love it'.

[9] *See* Dina Francesca Haynes, "The Celebritization of Human Trafficking", *The Annals of the American Academy of Political and Social Science*, 653: 25-4 (2014) p.26. The battle over statistics is not confined to celebratory activism only. As Julia O'Connell Davidson (note 3, *supra*) notes: 'Speculation on the enormity of the problem is presented as 'fact', even though the next 'fact' to be unfurled is invariably that it is impossible to measure the scale of this hidden, criminal trade. And when political leaders pontificate on the topic, their thunder against 'modern slavery' is almost always redolent of an underlying desire to bring their nations back to 'Tradition, Order and Sound Conventions' at p.14.

[10] *Ibid*. *See* also, for a discussion of 'brand ambassadors', and failure of accountability, pp. 28 -34. All this reminds one of Bertrand Russell's essay on harm that 'good' people still do! *See*, his *Sceptical Essays*, 90-100, (Routledge Classics, London, 2004; originally published by Allen & Unwin, 1924). Declaring that reason 'may be a small force, but it is constant, and works always in one direction, while the forces of unreason destroy one another in futile strife' and 'every orgy of unreason in the end strengthens the friends of reason, and shows afresh that they are the only true friends of humanity', Russell ventured to hope that: 'Gradually men will come to realise that a world whose institutions are based upon hatred and injustice is not the one most likely to produce happiness' at 100.

What is more, while there is clear pattern of engagement by multinational entities engaging in child and forced labour practices,[11] a Global Business Coalition Against Trafficking [GBCAT] proclaims on February 13, 2017 that in addressing 'global value chains, which involve layers of contractors, subcontractors, recruiters, and labor brokers' businesses are put at risk 'when a third party knowingly or unknowingly employs victims of human trafficking'. What is mysterious in this expression is the word 'unknowingly': is it permissible (to anticipate the term) 'acceptable exploitation') to read this as conscription of trafficked persons by inadvertence? This is the same order of egregious error as was celebrated for long by Seeley who said that the British made the Empire in a fit of inadvertence![12] The GBCAT further says that oversight 'is difficult to establish and maintain, and industries such as agriculture, construction, and manufacturing frequently struggle to guarantee supply chains that are free of trafficked workers'. But there is overwhelming evidence to the contrary.[13]

The trend towards criminalization, institutionalization, and penalization of 'exploitation' runs deep in combating trafficking and has been recently challenged by the violated peoples, social movements, academic experts and institutional specialists. We look at first the trends in international law and dissenting voices.

International legal instruments are supposed to provide clarity and precision regarding key concepts, yet these negotiated texts are frequently silent or unhelpful when it comes to many of the concepts that are central to our everyday lives. Exploitation is one such idea. It is a term frequently invoked but rarely defined in

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[11] *See,* for a recent example of a Canadian corporation in Ethiopia indicted of using child labour Upendra Baxi, "*Nevsun:* A Ray of Hope in a Darkening Landscape?",*Business and Human Rights,* 5:2(2020)pp 241-251.

[12] Incredibly this is what in 1883, the British historian John Robert Seeley, Regius Professor of Modern History at Cambridge, wrote: "We seem to have conquered and peopled half the world in a fit of absence of mind." *See,* Deborah Wormell, *Sir John Seeley and the Uses of History* (Cambridge University Press,Cambridge,1980)pp.151-180.

[13] *See,* e.g. KareManzo, "Modern Slavery, Global Capitalism &Deproletarianisation in West Africa", *Review of African Political Economy,* .106 (2005) pp.521-534; John Elkington, *Cannibals With Fork: The Triple Bottom Link of 21st Century Businesses* (Canada, BC, Gabriola Island, 1998); Urmila Bhoola, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Sessi… · DOC file*

the UN's Palermo Protocol in defining 'human trafficking', Article 3 states that trafficking comprises:

> *Actions*, i.e. 'the recruitment, transportation, transfer, harbouring, or receipt of persons';
>
> *Means/methods*, i.e. 'the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person';
>
> *Ends*, i.e. 'exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.'

This straight-forward looking definition in practice leads to much contention and confusion. For example, the expression 'prostitution of others' or 'other forms of sexual exploitation' are used by many State parties to continue to criminalize all sex work. But the Global Network of Sex Work Projects (NSWP) has long warned of 'the dangers of conflating trafficking with sex work', which many organizations and states do on the assumption that sex work is inherently exploitative.[14] This conflation leads to the criminalization of sex work, often in the name of the Palermo Protocol, and in turn provides justification for all kinds of arbitrary and tyrannous 'raids' and related enforcement measures.[15]

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[14] NSWP, *On Sex Work, Human Rights, and the Law* (Scotland, Edinburgh, 2013).

[15] *See*, The United Nations Office in Drugs and Crime,'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (Vienna, UNODV, 2015). Two of 12 states surveyed follow the definition provided in the Protocol, whereas five states also add additional forms of exploitation, and two remain under- inclusive. The sample size is small but the detailed analyses of various actors, agencies, and perspectives make this study valuable. *See* also, Jean Allain, "Conceptualizing the Exploitation of Human Trafficking" in Jennifer Bryson Clark & Sasha Poucki (ed.*), The SAGE Handbook of Human Trafficking and Modern Day Slavery*. (SAGE, London, 2019; Chapter 1). She employs Allan Werrtheheimer who describes 'exploitation' as coerced 'unfair advantage': *see* his *Exploitation*, 10 (Princeton University Press, Princeton, 1996).

Going down the memory lane a bit, I joined as the Vice Chancellor of South Gujarat University (1973-1976), a sit-in in a public place known a Gandhi Park in Surat by Roopjivinis – they refused to call themselves in derogatory terms but collectively named them as Roopjivnies – those who earned their livelihood on their beauty. They had met to voice their protest against

Despite being justified in humanitarian terms, these anti-trafficking interventions routinely deny dignity, rights, and freedom of work to people who engage in voluntary sex work. This is especially true for migrant sex workers. Prabha Kotiswaran, viewing the concerns as structural and social rather than through the mere lens of crime and punishment, has recently edited a volume on transnational criminal order addressing mainly the idea of self-exploitation as morally legitimate, and which ought to be legally also legitimate.[16]

Very often, the very State parties to the Palermo Trafficking Protocol create lead to 'exploitation.' Thus the justification of 'zero hour contracts' and 'back to work welfare programs' deepen exploitation structures; the similar justification for migrant workers denied human right to minimum wage protection is considered

police personnel demanding unpaid sex as a perk of their office. Earlier, when I had barely completed my first year of teaching at Delhi University, I had a research agendum furnished by an association of sex workers who wanted to know under what law can they form an association which will provide them with collective strength to fight their own battles. One of their problems was to fill in a school form for their children which asked typically for father's name! After deep thought I suggested that they from a trade union. They informed me later that there was an objection from the relevant official that there was no employer-employee relationship which they can demonstrate. The Union was registered after some interaction with the concerned official. These above mentioned situations, to my mind, amount to exploitation and discrimination as analysed generally in the last section of the paper.

[16] Prabha Kotiswaran, "From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking" in Prabha Kotiswaran, ed., *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, Cambridge, 2017) pp.1-58. She speaks of 'apparent governance chaos in the world of anti-trafficking' (p. 6) and urges us to view instead 'a pyramid of trafficking offences with trafficking episodes involving strong coercion and strong exploitation forming a narrow sliver at the top of the pyramid, while the base is occupied by instances of weak coercion along with weak exploitation'.

See also, Elizabeth Bernstein, "Sex, Trafficking, and the Politics of Freedom", April 2012, Paper Number 45, available at https://www.ias.edu/sites/default/files/sss/papers/paper45.pdf.She emphasizes 'contemporary trends in carcerality and neoliberalism' in 'situating punitive policies in terms of current trends within both culture and political economy, and focuses on "militarized humanitarianism." In joining 'scholars ranging from Didier Fassin to Inderpal Grewal to Lila Abu-Lughod, who have demonstrated the coercive underpinnings of such morally prized terrain as humanitarian action, human rights, and militaristic interventions on behalf of women's interest' at 2. She urges that we 'shift the focus from the criminal justice system to the structural conditions that propel people of all genders to engage in risky patterns of migration and diverse forms of exploitative employment at 12. *See* further, Svati P. Shah, "Prostitution, Sex Work and Violence: Discursive and Political Contexts for Five Texts on Paid Sex, 1987–2001", *Gender & History*,16:3 (2004)pp. 794-812.

by many states as 'acceptable exploitation.'[17] This raises the question; acceptable to whom and by what standards?

Although enacted by US in 2003, two years before it ratified the Palermo Trafficking Protocol provides another instance of global State polices, which conflate sex-work with trafficking. The United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act known as the "Global AIDS Act" was based on a 'conservative agenda' which asserted that 'women can be protected from illness and violence by adherence to a life script in which sexual activity is experienced only within appropriate marriage, with the ultimate goal of motherhood'.[18] Certainly, it is designed to confront contemporary conceptualizations of women's human rights accentuating women's rights over their bodies, extending to reproductive choices, and their own decisions on whether, and if so their timing and number. The Global AIDS Act finally stated that 'no funds... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking'. It has been rightly insisted that 'U.S. funded HIV/AIDS initiatives have never before been explicitly limited in terms of what they could do or say about sex work'.[19]

In this, and such like situations, the dominant state or civil society paternalism is in itself a site of acts/ performances exploitation. How may make these formations liable in law or morals?

Yet what does exploitation actually mean, beyond the given examples of it above? Exploitation in its dictionary definition refers to the 'use' of any person for selfish gains. This recalls the Kantian categorical imperative, which prescribes

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[17] *See*, Virginia Mantouvalou, "Vulnerability to exploitation is created by law" available at, https://www.opendemocracy.net/beyond-trafficking-and-avery/vulnerability-exploitation-created law.

[18] Penelope Saunders, "Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act",7: 2 *Health and Human Rights*, (2004) pp.179-191 at 180.

[19] *Ibid*., at 184. She also remarks that: 'While it is not yet clear exactly how much of this work the U.S. Global AIDS Act will limit; it is certain that grantees' approaches to sex work will be affected even in places where prostitution is legal. Conversely, vigorous campaigning to abolish sex work, including direct advocacy for substantial abolitionist law reform, is permitted without any restraint. The limitation on sex work projects is, therefore, analogous to the Global Gag Rule on reproductive rights that prohibits grantees' speech and political activities in support of legal abortion yet permits anti-abortion advocacy'.

that no human being shall be used as a means to an end and that all humans are equally worthy of dignity.

Beyond this, there is much contention. In practice, for example, certain states view sex work as inherently exploitative because they believe it to involve the use of people as means to an end rather than recognizing their dignity. By contrast, others believe that the offering of 'free' consent by, say, sex workers ensures that certain exchanges not agree on legalization of sex work and in any case when what is clearly based on free adult consent negates exploitation.

While there is sufficient global consensus on the wide amplitude of definition, the Protocol-compliant national legislative definitions remain diverse. The 'sending' and 'destination' countries may not agree on legalization of sex work and free and willing consent among adults for sex work. No doubt, organized crimes of trafficking, in which sexual slavery occurs, remain deeply exploitative –because the consent is vitiated by the cross-border structures of coercion. But this situation must be distinguished from others clearly based on free adult consent which negates exploitation. How far the reasonable proof of 'consent' acts often as a shield rather than a sword against sexual trafficking remains a crucial question because divergences are rife across interpretations offered by the prosecutors and constitutional courts mirroring the difference between constitutional cultures and everyday legal cultures.

From another platform, the requirement of 'consent' stand infelicitously provided by the Protocol definition and may not be thought apt for all slavery or slave-like practices. Should the agents and agencies of modern slavery, and the entire edifice of combat against it, depend merely on 'consent'? The adequacy of the ways in which the Protocol defines the problem of modern slavery will always remain debatable, but it is commonly acknowledged that trafficking entails three elements: the act, the means/methods, and the purpose. The question often arises whether 'exploitation' attracts this triple requirement.

I have always maintained the need for a distinction between politics for and of human rights. From the perspectives of human rights (typically of the violated) what deeply matters is the politics for human rights (preservation, promotion, and protection of human rights) and not the politics of human rights (human rights

discursively for managing the competition for political power). Politics for human rights will, for example, seem to conflate the distinction between human abuses and human rights abuses whereas, from the perspectives of the state institutions and managers who practice the politics of human rights, what matters is only the power to punish some human rights abuses. These actors rely more on the exact human rights obligations they have agreed to undertake, and no other inchoate categories of duties they have not explicitly agreed to. However, the situations of modern slavery require of all of us to regard human abuse as a violation of human right to dignity. More doctrinally put, it may be maintained that the obligations to prevent, punish, and promote core human rights or *jus cogens* norms —the peremptory norms of international law attach to all forms of responsible State sovereignty both at customary and treaty regimes.

Further, it is even maintained that certain *ergaomens*, expressed first in Roman law as meaning in Latin: 'in relation to everyone' extends to the community of states. As the International Court of Justice observed in 1970: 'Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination'.[20] The reference to modern forms is quite significant in considering the situation of human trafficking. Since then, that norm of international law has been reiterated in the *East Timor case*[21] and the *Israeli Wall Case*.[22] Since, further, it is increasingly clear that non-state actors are liable for violations of core human rights obligations.

The principal concept in the Palermo protocol is 'exploitation'. And one of the main problems here is a lack of precision regarding what we do mean, and should mean, by exploitation, and how and on what terms this category is actually being applied. One, sociological and philosophical, way of achieving greater clarity is by

[20] *See*, I.C.J. Reports, 1970, Barcelona Traction, Light and Power Company, Limited (*Belgium* v. *Spain*) (1962–1970).

[21] *See The Prosecutor* v. *AntoFurundžija International Criminal Tribunal for the former Yugoslavia* (ICTY) Appeals Chamber, The Netherlands: Case number: IT-95-17/1-A: Decision date: 21 July 2000. Second Phase, Judgment, I.C.J Reports 1970, para. 34.

[22] I.C.J. Report, 2003, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

breaking down our understanding of exploitation into the following categories: (1) classical capitalist structural exploitation:(2) other Marxian variants; (3) carceral exploitation; (4) authority exploitation; (5) dominance exploitation; and (6) corporeal exploitation. All these forms share features in common, but if we are not clear on what we are talking about it becomes easier for governments and other actors to manipulate the definition of exploitation to serve their own ends.

For both Marx and his more recent interpreters, exploitation is not so much an individual condition as a collective and systemic status. The classical distinction, outlined by Marx, was simple: while the working class would be better off as a whole by withdrawing consent to sell its labour-power, it cannot in reality do so in a society based on capitalist production. This is a system of structural exploitation within which workers struggle to find the dignity of decent work. This structural exploitation is deepened when a large number of workers are systemically disorganized and pauperized by the State and market forces.

Other Marxian variants can be grouped together under 'capital theory exploitation'. Under capitalism owners and managers exercise their concentrated market power to shape basic decisions on what is to be produced, how, how much, for how long, and at whose/what cost. And these primary decisions also shape responses concerning justice of distribution (who gets what, how, when for how long, and at what price). In other words, distribution is not an epiphenomenon but is integrally linked to the ways of production. This necessarily has serious implications for workers and their ability to work in dignity. For both Marx and his more recent interpreters, exploitation is not so much an individual condition as a collective and systemic status.[23]

This can be contrasted with carceral exploitation, which occurs when the supplier of labour power is held captive at a site where production occurs. Very often such a situation arises in institutions such as jails, psychiatric care institutions, sites of preventive detention, and camps. Not for nothing did the Italian philosopher Grigio Agamben rue the fact that the camp is the 'space that is opened when the

[23] *See*, Upendra Baxi, *Marx, Law, and Justice: Indian Perspectives* (Tripathi, Bombay, 1993; Delhi, Lexis/Nexis)pp.60-78.

State of exception begins to become the rule.'[24] But this is only a partial illustration; the growth of home-based work and special economic zones marks the extension of the state of exception into ever further domains. Here exploitation arises from the immediate and direct application of coercive power in combination with systems of physical constraint.

Domination and authority exploitation both relate to the exercise of institutional power and legitimacy. For Marx, workers are coerced, on the pain of starvation, to sell their labour power to the employer at a disadvantage. Exploitation involves day to day labour. There are situations of dominance/subservience, which relate to status asymmetries which routinely result in coercion and exploitation. Priests can abuse their disciples and congregation. Police and other agents of the state routinely leverage their authority to extract 'truth' from suspects by simple or enhanced interrogation methods, and in various ways make people vulnerable whom they are supposed to be serving and protecting. Power conferred by higher authorities can be easily abused, but in some cases exploitation can also arise from the manipulation of personal and informal relationships.

Sadly, each of these varieties of exploitation occurs on a daily basis. Central to them all is the relation between the agent of exploitation and those denied their core human rights in the process. Does this mean that the way ahead lies in turning away from the glacial pace of governance reform towards more radical demands for that accelerate the pace of change in structural but unjustifiable states of social inequality? or does the answer lie in both? Surely, the twentieth anniversary of the Palermo Protocol calls us urgently towards the latter.

We need to constantly recall what as Marx said in 1855: 'The classical saint of Christianity mortified his body for the salvation of the souls of the masses; the modern, educated saint *mortifies the bodies* of the masses for the salvation of his own soul'.[25]

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[24] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford, Stanford University Press; 1998).

[25] Karl Marx, "Anti-Church Movement: Demonstration in Hyde Park", June 25, 1855, London; published: *Neue Oder-Zeitung*,June 28, 1855 (emphasis in original).

ACCOUNTABILITY AND SEPARATION OF POWERS UNDER THE INDIAN CONSTITUTION: A CRITIQUE*

- Prof. (Dr.) V. Vijayakumar**

I would like to acknowledge the honour extended to me by the Karnataka State Law University by inviting me to deliver the Fourth Justice R. G. Desai Endowment Lecture 2021. I also would like to thank the organizers of this Endowment Lecture, the family members of Late Justice R. G. Desai, Shri Mohan V. Katarki, Senior Advocate, Supreme Court and Prof. (Dr.) Ishwara Bhat, Vice Chancellor of the Karnataka State Law University, Hubballi, Karnataka, for the honour bestowed upon me in delivering this Fourth Justice R. G. Desai Endowment Lecture, 2021.

It is heartening to note that, Smt. Vijaya M. Katarki, New Delhi, has instituted this annual endowment lecture at the Karnataka State Law University, Hubballi. She has instituted this endowment in memory of her late father Justice R. G. Desai, former judge of the Karnataka High Court. I would like to express my sincere gratitude to the entire family of Justice R. G. Desai for not only inviting me to deliver the endowment lecture but also for allowing the freedom to choose the topic of my choice, which I consider very relevant to the contemporary developments taking place in India. Being a student of Political Science, Public Administration, Constitutional Law and International Law, the discussion on the topic is expected to make the teachers, researchers and students of these disciplines to analyse the doctrine of separation of powers in the right perspectives.

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Justice R. G. Desai was born on the first day of January 1927, in the prominent family of the erstwhile Bijapur District of the State of Bombay. He graduated from Karnatak College Dharwad in 1948 and obtained the degree in law from ILS Law College, Pune in 1950. He started his practice as a lawyer in the District Court in Bijapur. During 1958, at a very young age he was appointed as District Public Prosecutor. He worked tirelessly with a sense of commitment and conducted the sessions trials with great distinction. His uprightness and honesty earned appreciation from everyone in the legal profession. During 1965, he was selected as a District and Sessions judge and served at Dharwad, Bellary, Gulbarga, Mangalore and Bangalore. During 1978, he was appointed the Secretary to Government of Karnataka in the Department of Law and in the following year, 1979, he was elevated as the judge of the High Court of Karnataka. On retirement in 1989, he served as the Chairman of the Karnataka State Consumer Commission for three years. He also functioned as the State Vigilance Commissioner between 1981 and 1984 (as a sitting judge) and was known for his drive against corruption in PWD. He passed away in 2013.

My understanding of Constitutional Law has been initiated at the post graduate level in Political Science at the Presidency College, Madras, followed by the undergraduate law degree from the then Madras Law College and the post graduate law degree and research degree in Constitutional Law and International Law at the University of Madras. Apart from teaching Constitutional Law and Administrative Law to the post graduate students of Political Science and Public Administration at the Presidency College, Madras, the teaching-learning process at the National Law School of India University (NLSIU), Bangalore, since its inception provided a deeper understanding of Constitutional Law. This facilitated the counter views taken on the interpretation of the provisions of the Constitution of India and I would like to place on record my sincere appreciation to all the batches of undergraduate and post graduate students of NLSIU, my co-teachers of Constitutional Law, Justice E. S. Venkataramaiah, Justice A. M. Bhattacharjee, Prof. T. Devidas, Prof. V. S. Mallar, Prof. M. K. Balachandran, Prof. M. K. Bhandari and Prof. T. V. Subba Rao, who constantly questioned the understanding of various provisions of the Constitution of India and facilitated reasoned conclusions based on critical analysis and the text of the Constitution.

With this background, I deem it a privilege to deliver the Fourth Justice R. G. Desai Endowment Lecture 2021 on 'Accountability and Separation of Powers under the Indian Constitution: A Critique'. This topic, in my opinion, is considered not only relevant but essential in countries having democratic Constitutions based either on Parliamentary form of government or Presidential form of government.

I. INTRODUCTION

With the economic reforms sweeping the socialist as well as capitalist countries alike, India took a bold step to move with the world community and opened its frontiers for more free flow of goods and services. The reforms that were introduced in 1991 were followed with more vigorous reforms that led to some of the constitutional amendments as well, apart from a number of legislations. The impact the economic reforms had been felt in social, cultural and political spheres and the same has been appreciated and attacked by the public opinion. A series of environmental and human rights global policies have emerged and the states, including India, have been compelled to establish a number of institutions to implement the same in the domestic sphere. Environmental and human rights issues came to be discussed and implemented along with the concerns relating to development, particularly that of the developing countries.

It is in this context, issues relating to transparency and accountability of government to the citizens keep surfacing in an attempt to streamline governance, establish rule of law and Constitutionalism. The primary object of such developments is only to control the powers of the state as against the rights and liberties of the individuals.

This paper seeks to present the propositions that the "Presence of the doctrines of 'separation of powers' and 'checks and balances' provide for the 'primary accountability' at two levels *viz*., internal and external; and that the reasons for the failure to enforce the primary accountability and thereby the failure to realize the secondary accountability in the process of good governance."

Constitution is an instrument through which the legitimization of the authority of various institutions of the state, elected or nominated takes place. It is always not necessary to have a single written document to conduct the affairs of the state. The term 'Constitution' has been defined in different forms and by different writers.

Generally speaking, these definitions focus on the institutions to be created, their powers and functions, their relationship with each other, the rights and liberties of the people as well as the ideals sought to be achieved by the governments as mandated by the Constitution.

A Constitution is a collection of ground rules of government and society. These rules describe the basic structures of government, its main powers and their limits, and its general relationship to the society. A Constitution, then, is a foundation structure which provides support for the more detailed rules of everyday life. A Constitution must first provide for the creation of the basic organs and institutions of public authority. Second, it must define the powers possessed by each of the public institutions and in some respects define the relationships among these institutions. Thus, a Constitution assigns legal responsibility, defines the limits of authority, and establishes the processes which must be followed before this authority can be exercised. Furthermore, a constitutional document must provide for a method of change, both of political leadership and of the basic constitutional framework, the latter by way of amendment to the Constitution.[1]

One among the other important sources of the Constitution is constitutional conventions. Constitutional conventions play a very important role in the working of a Constitution, even if it is a written Constitution. In other words, the Constitutional conventions become an unwritten part of the Constitution as well as a source of the Constitution, provided that such conventions do not contravene any of the written provisions of the Constitution. The Courts in India have acknowledged the importance of these constitutional conventions in a plethora of decisions.[2] However, such constitutional conventions should seek to strengthen the understanding of the written words of the Constitution and cannot go against the written provisions of the Constitution.

Another important source of the Constitution is the judicial decisions in interpreting the provisions of the Constitution. Whenever the provisions of the

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[1] David W. Elliot, *Introduction to Public Law* (Canadian Legal Studies Series, Cactus Press, Ontario, Canada, 4th edn.,1997) pp. 11-12.

[2] *M.S.M. Sharma* v. *Sri Krishna Sinha*, AIR 1959 SC 395; *Ram Jawaya Kapoor* v. *State of Punjab*, AIR 1955 SC 549; *Shamsher Singh* v. *State of Punjab*, AIR 1974 SC 2192; *U. N. R. Rao* v. *Indira Gandhi*, AIR 1971 SC 1002; and *Supreme Court Advocates on Record Association* v. *Union of India*, 1993 (Supp.) SCALE 1.

Constitutions are found vague or giving two or more meanings or conflicting with other provisions of the Constitution, the decisions given by the highest Court of the land set right the conflicts. Once the highest Court gives such an interpretation, they continue to guide similar situations till they are specifically overruled by the superior Court.

A written Constitution is essentially a basic or fundamental expression of the ideas and organization of a government that is formally presented in one single document. In this sense, Constitutions are codes of rules which aspire to regulate the allocation of functions, powers, and duties among the various agencies and officers of government, and define the relationship between these and the public.[3] More often than not, Constitution is used to designate a written fundamental law of special sanctity (usually a single document, but sometimes a group of interrelated documents) outlining the structure of a governmental system, fixing the powers of the legislatures and officers and Courts, guaranteeing liberties of persons and property, and laying down more or less extensive and detailed principles and procedures to be observed in managing the affairs of the state.[4]

Constitution, in this process, is perceived as an instrument through which the legitimization of the authority of various institutions, elected or nominated, takes place. It is because of this the Constitution is regarded as the fundamental law or basic law of superior obligation. This leads us to the next question as to what should be the contents of a Constitution. Here, it is pertinent to mention the observations made by Carl J. Friedrich as to the nature and content of a Constitution. According to him, 'Constitution is a technique (or a set of techniques) for the organizing and restraining of the government, acts of arbitrary and tyrannical violence are much less likely to occur under a constitutional government. Moreover, a well-drawn Constitution will provide for its own amendment in such a way as to forestall, as far as is humanly possible, revolutionary upheavals.

Gregory S. Mahler attributed five different functions of the Constitution. The third among them, is that the Constitutions provide organizational framework for

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[3] S. E. Finer (ed.), *Five Constitutions* (Harvester Press, Sussex, 1979) p. 15.

[4] Frederic A. Ogg and Harold Zink, *Modern Foreign Governments* (Macmillan Company, New York, 1949) p. 23.

governments… Constitutions will discuss power relationships among the actors in the political system, covering the legislative process, the role of the executive in the policy formulation, checks and balances among the actors, etc. Fourth, Constitutions usually say something about the levels of government of the political system. Finally, Constitutions have an amendment clause'.[5]

It is important and relevant to cite here the observations made by Dorothy M. Pickles. According to Dorothy M. Pickles, 'of themselves, Constitutions cannot guarantee anything. Whether they work well or badly, depends much less on the text of the Constitution, on whether it is technically well or badly drawn up, than on the spirit in which it is applied by the men whose function it is to apply it.' Elaborating the nature of the Constitution he observed that 'a Constitution can only be a general framework, a statement of guiding principles of government and of the machinery through which the principles are to be applied. It cannot be a set of tramlines along which governments are forced, willy-nilly, to proceed. Constitutions allow more or less latitude for adaptation and improvisation. For ideas and needs change with the generations and if they are not adapted to respond to these changing needs, they become restrictive rather than liberating influences. On the other hand, if a Constitution is too easy to change, it affords opportunities for unscrupulous governments to abuse both its spirit and its letter.'[6] It can be observed here that if the Constitution allows for adaptation and improvisation, then such adaptations and improvisation should not seek to destroy the very basic objective of that Constitution or seek to destroy the essential features of the Constitution.[7]

Along with the sources of the Constitution, there is also the need to understand the meaning of the phrase 'constitutionalism'. As the governments created by the Constitution are limited governments as explained earlier, they are also called as 'constitutional governments'. In this context, the phrase constitutionalism generally would mean the refinement of the government. As such, constitutionalism provides the setting for social, economic, political and technological changes to be absorbed in to the political system without disturbing the constitutional balance. In the words

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5 K. C. Wheare, *Modern Constitutions* (Oxford University Press, Bombay, 1984) pp. 34 – 35.

6 *Ibid*, p. 161.

7 This is what is reflected in the judicial decisions to restrict the power of the Parliament to amend the Constitution.

of Carl J. Friedrich, constitutionalism is an achievement of the modern world. It is a very recent achievement and it has by no means become stabilized. Indeed, it is a complex system of providing for orderly change, and there is no reason for assuming that the need for change will come to an end in the immediate future.[8] Constitutionalism has been traced in its relation to liberalism, to rationalism and to individualism. The central theme of constitutionalism seems to lie in its constant attempt to improve the performance of the government so that it is able to deliver goods. In this sense, constitutionalism by dividing power provides a system of effective restraint upon governmental action. In studying it, one has to explore the methods and techniques by which such restraints are established and maintained.[9]

The idea of the restriction of the powers of the king or the governor by law has been advocated even during the evolution of the Constitution itself by Sir Edward Coke (1552-1634), James Harrington (1611-1677) and Richard Hooker and John Locke (1632-1704).[10] If the objectives of the Constitution are read with the factors of power control to realize the greatest possible accountability from the governors, then such a Constitution can certainly deliver the best possible results. Along with the vertical division of powers, there is also the horizontal separation of powers provided under the Indian Constitution. However, these two elements of control, the vertical and horizontal, have not functioned effectively in the Indian political scenario. The reasons for this are many and some of them are discussed in brief in the last part of this presentation.

Similarly, another distinct objective of any Constitution is to prevent any of the three branches from becoming all powerful. Once any such branch becomes powerful by whatever means, there begins the dictatorial display of power. Federalist arguments provide the power first and seek to control that power in the second.

II. EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS

Historically, Parliament was not a single body, but had three parts: the House of Commons, the House of Lords, and the Monarch. At that time, all three parts of

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8 *Supra* note 5, at p. 4.

9 *Ibid*., p. 24.

10 Michael Curtis (ed.), *The Great Political Theories* (Avon Books, New York, vol.1, 1981)pp. 357-360.

Parliament had equal powers within the law making process. If one part refused to approve a Bill, that Bill could not become law.[11] The seventeenth as well as the eighteenth century philosophers considered the then working of the British Constitution and propounded the doctrine of separation of powers.

Aristotle in his work on 'Politics' had explained the need to have three agencies of government like the General Assembly, Public Officials and the Judiciary. John Locke in his two treatises on Civil Government defined three distinct powers such as 'legislative', 'executive' and 'federative'. However, it was Montesquieu, a French Philosopher who laid the foundation of the doctrine of separation of powers that was based on the working of the English Constitution. Montesquieu indicated the importance of separation of powers and observed that

'When the legislature and executive powers are in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws to execute in tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it to be joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same men or the same body, whether of nobles or of the people, to exercise these three powers, that of enacting laws, of executing the public resolutions and of trying the causes of individuals.'[12]

The framers of the Constitution have meticulously defined the functions of various organs of the State. The legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution and no organ can usurp the functions assigned to another. The Constitution trusts these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, two facets of the people's will,

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[11] Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (Oxford University Press, London, 6th edn., 2012) pp. 49-50.

[12] Amal Ray and Mohit Bhatacharya, *Political Theory* (Oxford University Press, Delhi, 2002).

have all powers including that of finance; judiciary has no power over sword or the purse; nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limitations. Judicial review is the powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. Article 50 plainly reveals that the judiciary shall be separated from the executive control or interference (*sic*).[13] Thus, the basic or fundamental accountability of these three organs to the Constitution in the first place and to each other in the second place have been clearly enshrined in the text of the Constitution that probably is not reflected in practice.

Karl Lowenstein had argued in favour of providing some irreducible minimal requirements for any formalized constitutional order. According to him,[14] '(1) there should be a differentiation of the various state functions and their assignment to different state organs or power holders, to avoid concentration of power in the hands of a single autocratic power holder; (2) there should be a planned mechanism for the co-operation of the several power holders. These arrangements - the 'checks and balances' familiar to American and French constitutional theory – imply the sharing and, being shared, the limitations of the exercise of political power; (3) there should be a mechanism, likewise planned in advance, for avoiding deadlocks between the several autonomous power holders to prevent one among them, when the constitutionally required co-operation of the others is not forthcoming, from solving the impasse on his own terms and, thereby, subjecting the power process to autocratic direction. When, under the impact of the democratic ideology of popular sovereignty, constitutionalism had reached the point where the role of the ultimate arbiter of conflicts between the instituted power holders was assigned to the sovereign electorate, the original concept of liberal constitutionalism had been perfected as democratic constitutionalism; (4) there should be a method, also planned in advance, for peaceably adjusting the fundamental order to changing socio-political conditions – the rational method of constitutional amendment – in order to avoid the resort to illegality, violence, and revolution; (5) finally, and this occurred at an early date in the evolution of constitutionalism and indicates its

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[13] *Union of India* v. *Sankalchand Himatlal Sheth*, AIR 1977 SC 2328.

[14] Karl Lowenstein, *Political Power and the Governmental Process* (University of Chicago Press, Chicago, U.S.A, 2nd edn., 1965) p. 127.

specific liberal *telos,* the fundamental law should also contain the explicit recognition of certain areas of individual self-determination – the individual rights and fundamental liberties – and their protection against encroachment by any and all power holders. Next to the principle of shared and, therefore, limited power these areas inaccessible to political power have become the code of the substantive Constitution.' The separation of powers doctrine seems to be inseparable part of any modern Constitution, be it Presidential or Parliamentary. India is no exception to this rule. Probably, this is one among the techniques of enforcing accountability on each of the three organs of the government to each other and to the people thereafter.

James Madison introduced the topic in *Federalist No. 47,* where he said, of 'the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct' in the following words:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[15]

Discussing on definitional difficulties, Peter Gerangelos observed that, 'the extent to which the separation of powers, as a legal rule, is the source of principles successfully defining the limitations protecting core elements of branch power constitutes a significant measure of the efficacy of its legal entrenchment. Indeed, the ability to define such constitutional limitations is fundamental to the question whether entrenchment responds to the imperatives of the doctrine's underlying rationale: the prevention of the undue concentration of power and the abuses which

[15] The Federalist No. 47, at p. 239.

may thereby arise, the better to secure representative and liberal government and the rule of law.'[16]

He went on to observe that 'although not expressly mentioned, the legal entrenchment is implied from the exclusive and separate vesting of the legislative, executive and judicial power in the President, Congress and the Supreme Court respectively.'[17]

On these lines, if we look into the Indian Constitution, the three different branches and their powers and functions are clearly specified and elaborated in various provisions of the Constitution. Only the executive power is vested in the President at the centre and Governor at the State. The legislative and judicial powers and functions could not be vested in a specific provisions like Articles 53 and 154 as the Indian Constitution provides for both the central and state branches of legislature (Parliament and the Legislature of States) and judiciary (the Supreme Court at the centre and High Courts in States). Therefore, the phrase 'vested' need not be given more importance than it deserves as the absence of this phrase with regard to legislative and judicial functions and powers. They are more elaborate and could not be captured in one specific provision of the Constitution as the Indian Constitution is a single document both for the Centre and for the States, unlike the Constitution of the United States of America.

In this regard, Gerangelos also referred to the observations of Powell J in *INS* v. *Chadha*[18]

> [I]t was to prevent the recurrences of such abuses that the Framers vested the executive, legislative and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of powers, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, [par] 9, cl. 3… This clause and the

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[16] Peter Gerangelos, *Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing Ltd., U. K, 2009, First Indian Reprint, Mohan Law House, New Delhi, First Indian Reprint, 2010)pp. 8 – 9.

[17] *Ibid,* p.10.

[18] 462 US 919 (1983) at p. 962. *Ibid,* p. 13.

separation of powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power'.

The Indian Constitution provides many limitations on the powers of the legislatures in general and some of them are contained in Part III of the Constitution on Fundamental Rights. As the legislatures, both at the Centre and States, are the creatures of the Constitution, many specific limitations that cannot be seen in the Parliamentary form of government of United Kingdom, are provided for in the Indian Constitution. The power of judicial review that is not specifically provided for in the U. S. Constitution boasts of the doctrine of Separation of Powers while provisions for such judicial review has been specifically provided for in favour of the Courts. Therefore, the judiciary in India need not overemphasize the need for separation of powers in its favour unlike the U.S. Constitution.

Peter Gerangelos went on to observe that "it seems that prevailing British notions of Parliamentary supremacy, unrestrained by legally entrenched limitations, had lost the confidence of the Framers, understandably in light of their recent experiences both with the Parliament at Westminster and their own colonial legislatures. The critical decision was thus taken to establish a judicial department independent of the legislature in the constitutional provision … the extent to which it was capable of identifying and limiting such legislative activity which extended 'beyond the legislative sphere'."[19]

The major distinction between the British and the American models of governments lies in who has the ultimate power. In the American model, the Presidential form of government, the President as the chief executive seems to have a stronger position with the necessary controls, express or implied on his powers. While the British system, the Parliamentary form of government, seems to have provided the Prime Minister a stronger position subject to the conventional controls on his / her status. However, things have changed over a period of time. The doctrine of separation of powers was modelled on the British practices and has not lost its significance. Today, this doctrine is equally relevant not only to the

[19] Peter Gerangelos, *Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing Ltd., U. K, 2009, First Indian Reprint, Mohan Law House, New Delhi, First Indian Reprint, 2010) p. 13.

Presidential form of government, but also equally relevant to the Parliamentary form of government.

In this regard, the observations of Maxwell and Tulia may be referred to. They observed that it is false to claim that Parliamentary systems 'are distinguished from Presidential systems by their abandonment of the idea of the separation of powers'. The difference between the two systems lies more in the extent of checks and balances. To use Stephan Haggard and Mathew D. McCubbin's terms, Presidential systems are typically characterized by a greater 'separation of purpose'. Whereas the different parts of government are more likely to work in unison in Parliamentary systems, in Presidential systems they are more 'motivated to seek different goals.'[20]

These authors went on to observe that 'neither system separates the branches of government into watertight compartments. In a pure Presidential system, for example, the Presidential veto gives the executive partial control of the legislative agenda. Impeachment gives the U.S. Congress the right to remove the executive from office. In a pure Parliamentary system, the cabinet exercises both executive and legislative powers, with the Prime Minister at the apex of both branches. As long as the legislature monopolizes legislation and the executive obeys the law, however, the functionally specific division of powers remains intact in both systems. Presidentialism and Parliamentarism are thus subtypes of constitutional government and, like all constitutional governments, they are both based on the separation of powers.[21]

The real picture in practice of the British mode has been nicely described by these authors. According to them, 'it is true that Parliamentary systems centralize power in the office of the Prime Minister, and that cabinet government partially fuses legislative and executive branches of government; political realities such as party discipline and Prime Ministerial control over patronage and appointments work to assure strong executive dominance. Moreover, the strength of the executive may depend more on the functioning of parties and the party system than on

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[20] Maxwell A. Cameron and Tulia G. Falleti, "Federalism and the Subnational Separation of Powers" 35 (2) *Publius Spring* (2005) p. 251, available at https://www.jstor.org/stable/4624711.

[21] *Ibid*.

constitutional provisions. In the British Parliamentary tradition in particular, where parties are strong and disciplined and the Prime Minister has extensive influence over patronage and career paths, the executive has enormous powers to set the legislative agenda and shape policy outcomes. Even the cabinet has seen its influence wane relative to the office of the Prime Minister. Yet it is an error to conclude that control over the legislative and policy agendas leads to the sort of abuses of power that, according to Montesquieu and Madison, occur when the whole power of various departments of government is concentrated in so few hands that the lines are blurred between making, executing, and applying laws. As long as the legislature makes the laws, the judiciary interprets and applies the laws in particular cases, and the executive operates within the rule of law, there is no reason to eliminate parliamentary governments from the set of constitutional systems as defined here. The fact that there is partially overlapping membership in the executive and legislature does not mean the executive itself makes laws or that the legislature is a rubber stamp for the executive, much less that the judiciary is not independent. To conclude, they observed that 'in short, highly concentrated executive decision making can occur within the rule of law. What matters most for the separation of powers is whether any one branch of government can violate the Constitution with impunity, and hence replace the rule of law with the rule of a single governmental agency, group, or individual.[22]

Thus, the significance of the doctrine of separation of powers and checks and balances in either form of government, Presidential or Parliamentary, need not be overemphasized. The central objective of this doctrine of separation of powers is to ensure that no single authority becomes all powerful so as to bulldoze the other two branches and ultimately the Constitution itself.

III. THEORETICAL PERSPECTIVE

Before analyzing the constitutional provisions of India and the judicial interpretations on the doctrine of separation of powers, an attempt is made to provide some theoretical perspective of this doctrine as well. Jeremy Waldron explains two principles associated with separation of powers. They are, *first*, the principle of the division of power—counseling us to avoid excessive concentrations

[22] *Ibid*, p. 252.

of political power in the hands of any one person, group, or agency; and, *second*, the principle of checks and balances—holding that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other power-holders.[23]

According to Waldron, the separation of powers does not operate alone as a canonical principle of our (American) constitutionalism. It is one of a close-knit set of principles that work both separately and together as touchstones of institutional legitimacy. The principles he had in mind are the following:

1. The principle of the separation of the functions of government from one another (the 'Separation of Powers Principle').
2. The principle that counsels against the concentration of too much political power in the hands of any one person, group, or agency (the 'Division of Power Principle').
3. The principle that requires the ordinary concurrence of one governmental entity in the actions of another, and thus permits one entity to check or veto the actions of another (the 'Checks and Balances Principle').
4. The principle that requires laws to be enacted by votes in two coordinate legislative assemblies (the 'Bicameralism Principle').
5. The principle that distinguishes between powers assigned to the federal government and powers reserved to the states or the provinces (the 'Federalism Principle'). [24]

At the beginning of his great book, *Constitutionalism and the Separation of Powers*, M.J.C. Vile goes to considerable trouble to produce a pure definition of the separation of powers, distinguished from adjacent principles. He says "[a] 'pure doctrine' of the separation of powers might be formulated in the following way:"

'It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the

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[23] Jeremy Waldron, "Separation of Powers in Thought and Practice" 54 *B.C.L. Rev.* (2013) p. 433, available at http://lawdigitalcommons.bc.edu/bclr/ vol54/iss2/2, last visited on 05.06.2021.

[24] *Ibid*.

executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.'[25]

Two different approaches to the doctrine of separation of powers were mentioned and a balanced approach was proposed by Jeremy Waldron.[26] They are the formalist approach, functionalist approach and finally a preferable approach. These approaches are mentioned briefly as follows:

(i) Formalist Approach

Jeremy Waldron went on to explain the formalist approach to separation of powers. 'the fundamental tenet of the formalist position is that the nature of each branch can be defined with sufficient clarity and mutual exclusivity to enable the establishment of a demarcation between the three branches which can be rigorously maintained. This, of course, reinforces the separation of personnel and functions as well as the maintenance of the institutional independence of the branches.' He also referred to Scalia J in *Plaut* v. *Spendthrift Farm Inc.* [514 US (1995) at pp. 239-240] observed that 'the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features … it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of inter branch conflict … Separation of powers, a distinctively American poet: Good fences make good neighbours.'[27]

Waldron referred to Prof. Martin Redish who had observed that, the separation of powers provisions in the United States Constitution "are tremendously important not because the Framers imposed them, but because the fears of creeping tyranny

[25] *Ibid*, pp.433 – 434.

[26] Peter Gerangelos, *Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing Ltd., U. K., 2009, First Indian Reprint, Mohan Law House, New Delhi, First Indian Reprint, 2010) pp. 16 - 19.

[27] *Supra* note 20 at p. 16.

underlying them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, 'Even paranoids have enemies'."[28]

(ii) Functionalist Approach

Functionalism is not as susceptible to uniform, precise definition as is formalism. All variants of it, however, eschew formalism's maintenance of the rigid division of branches based on precise conceptual definitions, instead taking into account factors external to purely conceptual analysis. Thus, in any particular instance, functionalism may permit what to the formalist would be a technical breach of the separation of powers, if the seriousness thereof is outweighed by public policy factors, efficiency, and the maintenance of good government. The issue for functionalism is the degree of liberality which should be permitted in applying the doctrine.

Given that both formalism and functionalism are prevalent in the jurisprudence of the Courts at differing times and in differing cases, the approach of the United States Supreme Court and the High Court of Australia, is flexible and eclectic, combining elements of pragmatism, public policy considerations, tradition and history with the more strictly formalist legal analysis based on the text of the Constitution.

(iii) The Preferable Approach

Starke J had observed that 'the argument that the separation of powers in the Constitution prohibits absolutely the performance by one department of the powers of any other department of the government is incorrect. The truth is that there is not and never was any clear line of demarcation between legislature, executive and judicial powers. Nor can there be if efficient and practical government is to be maintained' [*R* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at p. 577]. This is in contrast to the observations made by the judges of the Supreme Court of India who described that the American Constitution has strict separation of powers and as mentioned by Starke as mentioned above 'the truth is that there is not and never was any clear line of demarcation between legislature, executive and judicial powers.' It is interesting to note from this observation that performance of each other's powers is possible within the Constitution and that is essential for maintenance of efficient and practical government.[29]

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[28] *Ibid*, p. 19.

[29] *Ibid*, pp.22 – 29.

In addition to the three approaches mentioned above, the 'purposive approach' seems to be rather relevant to understand the doctrine of separation of powers. In this regard it is most appropriate to refer to the observations of Prof. M.J.C. Vile. According to him 'at the broadest level the separation of powers, in all its myriad forms and variations, is purposive in nature. When legally entrenched in a written Constitution this purposive element follows with it and must be factored into any interpretation of it. He went on to observe that "this 'purposive' quality of the traditional classification of government is important, for it makes the discussion of functional analysis much more than simply an attempt at description; it inevitably carries a normative connotation as well. The very use of these terms assumes a commitment to some form of constitutional government."[30]

Apart from this theoretical perspective mentioned above, various writers have classified the powers of the three branches of government into core or primary functions of the three branches and into incidental or secondary functions. The process of defining precisely the constitutional limitations on branch power derived from separation of powers is vexed, multifaceted and intricate, even where 'fundamental' or 'core' branch powers and functions are involved. Courts and scholars have recognized the immense difficulties involved in attempting to categorize the multifarious functions of government as 'legislative', 'executive' and 'judicial' and to isolate these functions in the hands of in the hands of one of the respective branches.[31] According to them, it is difficult even to provide mutually exclusive definitions of branch functions. What can be provided is some form of workable definition of branch functions in order to enable the policing of the boundaries.[32]

Based on the approaches discussed above, I would like to mention two distinct models of separation of powers. The first one is the 'rigid model' or what may be called as the 'water tight compartment model'; and the other is the 'flexible model' or what may be called as the 'over-lapping model'. Under the first one, all the three organs of the government are given powers and functions that are strictly

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[30] *Ibid*, p. 30.

[31] *Ibid*, p. 14.

[32] S. Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, Melbourne, 2002); and Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, Melbourne, 1983).

compartmentalized and this model does not provide for any co-ordination among these three branches. Such a model is seldom used in any Constitution as such arrangement is not conducive to democracy or constitutional governance. Under the second model, although powers and functions are demarcated clearly, yet there is always the scope available for working through interaction among the three branches. Certain specific functions or powers that are strictly belonging to one organ is also made available to the other organs of the government in the Constitution itself. If such an overlapping is provided in the Constitution itself, then, there is no conflict of powers or functions can be attributed. For example, the power to make laws is totally vested in the Parliament. Yet in times and of circumstances enumerated in the Constitution itself, this power is exercised by the President under Article 123 of the Constitution, although there are other conditions attached to Article 123. Similarly, the President may also be entrusted with the power of making laws for the States under Article 357.[33]

These provisions, although entrust the power to make laws on the President, the office of the President cannot be understood as the supreme law-making authority as it is specifically assigned to the legislature i.e. the Parliament. The Parliament also sits as a 'judicial body' when it seeks to impeach the President or remove other constitutional functionaries including the judges of higher judiciary. This judicial power of the Parliament is not the essential power of the Parliament, but constitutionally assigned subsidiary function. Similarly, the judiciary that exercises the 'interpretative' power is also constitutionally assigned 'rule making' power under Article 145 of the Constitution. Thus, the Constitution of India provides for three distinct 'essential' functions of three branches of government and alternate subsidiary functions on all the three branches. While retaining the essential legislative power, Parliament can also discharge 'judicial' power as mentioned above as a subsidiary function. Mere performance of the subsidiary function will not make the Parliament, the 'essential' judicial function under the Constitution. Thus, it is in respect of 'subsidiary' functions, the concept of separation of powers becomes the 'overlapping' model. This model facilitates the concept of 'checks and balances' while the first model does not. By and large, many of the democratic Constitutions of the world today follow the second model, thus paving way for working through

[33] Ordinance making power under Article 123 and the *President's Act* under Article 357.

coordination among the three branches of the government. The Constitution of the United States of America does this precisely and so does the Indian Constitution.

Whatever is the nature and extent of the doctrine of separation of powers and checks and balances are specifically entrenched in the provisions of the Constitution, there is also a clear possibility of one branch of the government constitutionally authorizing the other branch to perform, subject to such limitations and duration as may be specified, then it would not go against the doctrine of separation of powers or checks and balances for the simple reason, that such an exercise of power is authorized by the Constitution itself. To illustrate, reference can be made to the Ordinance making power of the President and the Governor under Article 123 and 213 of the Constitution. Although it is an essential legislative power, the Constitution authorizes them to promulgate ordinances under specific circumstances and for a limited time frame. Under such circumstances, one cannot say that there is overlapping of legislative function. As long as the Constitution specifically authorizes one branch to perform the tasks assigned to another, there is no contradiction in the doctrine of separation of powers. Even if there is specific authorization of delegation such power assigned to one branch on to other branch or within the branch, there would be no violation of the doctrine of separation of powers. To illustrate, the following two provisions of the Constitution are relied upon.

The first illustration is based on the provisions of Articles 356 and 357. For conceptual clarity, Article 356 (1) is reproduces here:

> Article 356 (1) - If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation–
>
> (a) **assume to himself all or any of the functions of the government of the State** and **all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State;** (emphasis added)
>
> (b) **declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;** (emphasis added)

> (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, **including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State:** (emphasis added)

Provided that **nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts**." (emphasis added).

The provisions of this Article 356 (1) are crystal clear. In the first place, the President may assume to himself all or any of the functions of the government of the State. He may also assume all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State. However, there is a clear prohibition on the exercise of the powers of the legislature in sub-clause (a) of Article 356 (1). In the second place, the President, who cannot assume the powers of the Legislature of the State, has been authorized under sub-clause (b) to declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. This sub-clause includes two different aspects. The legislative power of the State may be either exercised by the Parliament itself, or the Parliament may authorize someone else to exercise the legislative power of the State, which amounts to delegation of such power by the Parliament. In the third place, sub-clause (c) authorizes the President to make such incidental or consequential provisions, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State. Fourthly, the proviso to clause (1) of Article 356 prevents the President from doing something i.e., the President cannot assume to himself any of the powers vested in or exercisable by a High Court, or even to suspend in whole or in part the operation of any provision of this Constitution relating to High Court.

A careful analysis of this provision would reveal that the Constitution specifically authorizes the performance of powers and discharge of function of another branch subject to the limitations specified therein. It is submitted that this provision clearly reflects not only the presence of separation of powers, but the incidental and consequential concept of checks and balances. This provision also authorizes for

delegation of the legislative power of the State, not by the President, but by the Parliament by making necessary law in this regard. Thus, the safeguards necessary for the three branches of the government to work together with a spirit of cooperation rather that remain in water-tight compartment.

Similarly, Article 357 provides for the exercise as well as delegation, including the limitations on such a delegation (also authorizing even the sub-delegation) of such a legislative power pertaining to a state. For reference, Article 357 is reproduced in the following:

> Article 357 (1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent-
>
> (a) For Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;
>
> (b) For Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;
>
> (c) For the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.
>
> (2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under Article 356, have been competent to make shall, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority.

Thus, based on the explanations mentioned above, it is submitted that no written Constitution in the world, including the U. S. A., provides for water-tight compartment

model. All the written Constitutions, including Indian Constitution, provides for the over-lapping model of separation of powers. This view is clearly reflected in the observation made by Jackson, Judge of the Federal Supreme Court of the United States of America, in *Youngstown Sheet & Tube Co.* v. *Sawyer*, in which he held that 'the Constitution enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'[34]

It is also relevant and important to note the observations of James Madison on the doctrine of separation of powers.

"It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Madison also discusses the way republican government can serve as a check on the power of factions, and the tyranny of the majority. "[I]n the federal republic of the United States… all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." All of the Constitution's checks and balances, Madison concludes, serve to preserve liberty by ensuring justice. Madison explained, "Justice is the end of government. It is the end of civil society."[35]

IV. INDIA'S FIRST *CONSTITUTION* OF 1874[36]

Probably for the first time, the *Regulating Act 1773* separated the powers of the executive and judiciary in British India. This Act created the Governor General-

[34] 343 US 579 at p. 635.

[35] James Madison, Federalist Papers, No. 10, 1788.

[36] https://en.wikipedia.org/wiki/T._Madhava_Rao

in-Council. Warren Hastings was to be the Governor General with four other members, Clavering, Manson, Bervell and Francis in the Council. The Governor General-in-Council could make a law subject to (a) Required to be consistent with laws enforced in England; and (b) they cannot be valid unless they were registered and published in the Supreme Court at Calcutta. This *Regulating Act 1773*, also set up the Supreme Court of Judicature in Calcutta. It is interesting to note that the *Regulating Act 1773*, was enacted at the time when Montesquieu's theory of Separation of Powers was in the air. This Act is also regarded as the first in the series of parliamentary enactments made by British Parliament that altered the form of British government in India from time to time. The powers of the Supreme Court were independent to such an extent, Lord Macaulay described the rule of the Supreme Court was the reign of terror.

It is equally interesting to analyze the developments relating to the doctrine of separation of powers taking roots in the Indian context. Sir T. Madhav Rao, the Diwan of Indore, drafted a model Constitution for princely states of India in 1874 based on the principles of separation of power of the state and sent it to Lord Napier, the then Viceroy of India. His proposal was then forwarded by Lord Francis Napier to his successor, Viceroy, Lord Northbrook who dismissed it completely. Lord Northbrook fearing rebellion by princely states decided not to support proposals which could cause deep anguish among Indian princely states.

Henry Tucker, a judge at Bombay High Court and Alexander Rogers, a noted civil servant were in favour of introducing a written Constitution for the princely states. According to Henry Tucker, the Calcutta must force "the *Maharaja* to give his subjects a written Constitution". While Alexander Rogers said that "he had been shown the draft of a Constitution drawn up by an eminent Native Statesman (Sir Madhav Rao) of great experience" which he believed will work in India if some changes are made according to the Indian context.

Amrita Bazaar Patrika wrote articles against the proposal of Madhav Rao of giving a Constitution to the state of Vadodara. The draft had a total of 46 Sections and clearly incorporated the doctrine of separation of powers as well as checks and balances and to a large extent incorporated based on the constitutional practices of United Kingdom. The most important among the features of this Constitution is

the provision made for various rights of the subjects that cannot be violated either by the Sovereign (Prince or *Maharaja*) or by the legislature (*Darbar*).

Some of the important provisions are mentioned here to highlight the visionary thinking of Sir T. Madhava Rao.

1. *The Maharaja as Sovereign is the highest authority in his dominions.*
3. *The government of the country shall be carried on according to laws and customs, whether at present in force or established hereafter.*
4. *A Darbar for making laws shall be organised, composed of men of wisdom, virtue, property, and patriotism, and such Darbar shall assist in the framing of useful laws from time to time and under rules to be hereafter laid down.*
5. *The laws in force at any time shall not be altered, modified, suspended, abolished, or in any way interfered with, except by other regularly enacted laws duly promulgated.*
13. *The Sovereign will not administer justice personally, as he has delegated this power to the constituted judiciary.*
22. *The Sovereign shall not make any permanent alienation of the land or other public revenues to any extent in favour of any private individual or any corporation unless under the sanction of a specific law regularly enacted and promulgated in due course.*
26. *The rights and liberties which are now enjoyed by the people under existing laws and customs shall continue unabridged to the utmost extent possible.*
27. *Nothing shall be done affecting or likely to affect, the rights and liberties of the people except by means of regularly enacted laws duly promulgated. This includes the right to hold public meetings (Section 31).*
32. *No person shall be taken, or imprisoned, or deprived of his estate, or exiled or condemned or deprived of life, liberty, or property, unless by due process of law.*

34. *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

35. *The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

36. *No person in the country shall, at any time, or in any wise, be molested, punished, or called in question for any differences in opinion in matters of religion, who does not disturb, or is not likely to disturb the civil peace of the country.*

37. *The public press shall be as free in the country as in British India.*

38. *The right of the people to have the best qualified persons appointed to perform public duties shall be at all times fully and faithfully respected.*

40. *No Judge of the superior Courts shall be appointed or removed except by the Sovereign under the advice of the responsible minister, the Dewan, who will have duly consulted the British Resident.*

41. *Every Judge shall solemnly bind himself to administer justice according to the laws and customs of the country and in conformity with the provisions herein laid down.*

42. *No Judge shall, privately or publicly, directly or indirectly hold any office, pension or allowance, or receive any remuneration, present, or gratuity from the Sovereign in addition to his proper salary as judge.*

43. *The judges of the several Courts shall have ascertained salaries not subject to reduction at any time during their continuance in office. Nor shall the salary of a newly appointed judge be made lower than the usual rate in view to raise it by degrees to that rate.*

44. *Every law, proclamation, order, or custom which may be opposed to the provisions herein laid down shall be null and void, so far as it is opposed.*

A careful analysis of these provisions would reveal the incorporation of the principles of separation of powers in the draft Constitution, although not accepted by the British rulers to protect their own interest.

Apart from this, it is pertinent here to mention Gandhiji's announcement made in 1920, in which he stated that any Constitution for India must not be a gift of the British, but must be a product of the Indian people through their representatives. These historical developments should also be kept in mind while discussing about the constitutional provisions and their interpretations by the judiciary in understanding the meaning, nature and scope of the doctrines of separation of powers and checks and balances.

V. CONSTITUTIONAL PROVISIONS AND INTERPRETATIONS

It is essential here to understand the differences between the interpretation of statutes enacted by the Parliament and the State Legislatures on one side and the interpretation of the provisions of the Constitution on the other. The judiciary has been entrusted this function of interpretation of both the statutes and the Constitution. The existence of Article 13 (2) is one such example, for which there is no parallel in the Constitution of the United States of America. However, in the interpretation of the Constitution, the judiciary has to play a meaningful role. It has to keep in mind the written provisions of the Constitution and sort out the any possible conflict between or among the three branches of the government. As judiciary is also created by the Constitution, it cannot claim any superior position *vis-à-vis* the other two branches of the government. Apart from this, the judiciary has to have a balanced approach in accordance with the written provisions of the Constitution while interpreting the status, powers and functions of various constitutional authorities established by the Constitution.

In the second place, the judiciary, while interpreting the Constitution has to keep in mind the very objective of the doctrine of separation of powers that seeks to provide the necessary power to the three branches of government and at the same time prevent the concentration of powers at the hands of any one branch of the government. In the third place, the judiciary, while interpreting the provisions of the Constitution, should rely only upon the written provisions of the Constitution rather than relying upon the constitutional conventions or practices of other

Constitutions, written or otherwise. Rule of law and other values of constitutionalism would also support this observation. A nine judge bench of the Supreme Court in *I. R. Coelho* v. *State of Tamil Nadu*,[37] had observed that 'the principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.'

In this regard, before analyzing series of constitutional provisions and judicial decisions, it is also necessary to refer to a couple of Privy Council decisions. The first one is the Privy Council decision in *Attorney General for Ontario* v. *Attorney General of Canada*, decided on 16th May 1912.[38] In this case, the judgment was delivered by Lord Chancellor Lore burn for self and on behalf of Lord Macnaugtan, Lord Atkinson, Lord Shaw and Lord Robson. Dismissing the appeal from the Canadian Supreme Court, the Privy Council held that 'In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act*, **if the text is explicit the text is conclusive, alike in what it directs and what it forbids** (emphasis added). When the text is ambiguous, for example, when the words establishing two mutually exclusive jurisdictions one wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the state itself or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the dominion or to the provinces, within the *British North America*

[37] AIR 2007 SC 861 at para 44.

[38] Privy Council Appeal from the Supreme Court of Canada, 1912 A.C 571.

Act. It certainly would not be sufficient to say that the exercise of power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously, bestowed by *British North America Act.* Indeed, it might ensue from the breach of almost any power.'[39]

It is equally significant to mention the second judgment of the Privy Council in *Alhaji D. S. Adegbenro* v. *Chief S. L. Akintola*[40] to propose the manner in which the provisions of the Constitution need to be interpreted. This judgment was delivered by Viscount Radcliffe for himself and on behalf of Lord Jenkins, Lord Guest, Lord Devlin and Sir Kenneth Gresson on 27th May, 1963. This case came before the Privy Council on appeal from the Federal Supreme Court of Nigeria. The Privy Council observed by referring to the words of the Constitution of the Federation of Nigeria, that '… by these words, therefore, the power of removal is at once recognized and conditioned; and since the condition of constitutional action has been reduced to the formula of these words for the purpose of written Constitution, it is their construction and nothing else that must determine the issue'. Responding to another argument that the Nigerian Constitutions are modeled on the current constitutional doctrines of the United Kingdom, the Privy Council held that '… **In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where the dismissal is an actual possibility: and the right of removal which is explicitly recognized in the Nigerian Constitution must be interpreted accordingly to the wording of its own limitations and not to limitations which that wording does not import.'**

The Privy Council also referred to the observations of Lord Bryce who once said that **'the British Constitution works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. This instrument now stands on its own right; and, while it may well be useful on occasions to draw on British practice or**

[39] *Ibid,* p.583.

[40] Privy Council Appeal No. 5 of 1963.

doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording and never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution (emphasis added).'

Keeping these observations as the basis, a cursory look at the various provisions of the Constitution may be necessary here to illustrate the presence of the doctrine of separation of powers and functions more elaborately than in the American Constitution. Similarly, a plethora of provisions of the Indian Constitution also provide for the dependent doctrine of 'checks and balances'. Although the framers of the Indian Constitution specifically wanted to incorporate the British Parliamentary form of government, yet in approving the draft Constitution they failed to provide for clear form of government. Answering to a series of questions on the powers conferred on the President by the draft Constitution, Dr. B. R. Ambedkar referred to the proposed adoption of an 'instrument of instruction' that would completely bind the President by the council of ministers in the functions of the government. However, the draft instructions proposed by the Constituent Assembly were rejected by the Assembly and was never incorporated in the Constitution.[41]

Dr. B. R. Ambedkar, speaking about the choice of the form of government in the Constituent Assembly observed that 'the choice between the systems is not very easy. A democratic executive must fulfill two conditions: (i) it must be a stable executive; and (ii) that it must be a responsible executive. The American system gives more stability but less responsibility. The British system gives more responsibility but less stability.[42] Provision relating to collective responsibility was incorporated under Article 75 (3) of the Constitution that was to be exercised by the Parliament. This provision itself proves that the control is exercised by the legislature over the Council of Ministers, in practice defined as executive, whatever is the nature of such executive. This collective responsibility or accountability to

[41] P. B. Mukherji, *The Critical Problem of the Indian Constitution* (University of Bombay, Bombay, 1967) p. 31.

[42] Constituent Assembly Debates. Vol. VII.

the legislature for the actions of the Council of Ministers has been specifically provided for [Articles 75 (3) and 161 (3)]. However, the concept of collective responsibility is neither defined anywhere nor is it given any due recognition in practice, either at the Centre or at the States. This is the only accountability specifically provided for but seldom exercised meaningfully because of the existing party system in India.

An attempt is made here to list out the constitutional provisions to indicate the presence of both the concepts of 'separation of powers' as well as 'checks and balances'. These provisions clearly establish the presence of the concept of separation of powers, not as a 'water-tight compartment' model but based on the 'over-lapping model'. In the first place, the executive 'power' of the Union is vested in the President.[43] Similarly, the executive 'power' is vested in the Governor in so far as the executive 'power' of the State is concerned.[44] In terms of the executive 'powers' and 'functions' of both the Union and States, Articles 72, 73, 76, 77, 111, 117, 123, 124, 143, 144, 155, 156, 216, 223, 224, 162, 163 (2), 165, 166, 174, 176, 192, 200, 207, 213, 239, 239AB, 239B, 240, 263, 280, 292, 293, 316, 318, 331, 333, 339, 340, 341, 342, 344, 350B, 352, 353, 354, 355, 356, 357, 358, 359, 360, 372A, 373, 392 and many other provisions of the Indian Constitution provide for the same. These provisions pave way for a series of executive 'powers' and 'functions' to be performed by the President and the Governors under the Indian Constitution. The specific executive functions are also mentioned in Articles 85, 87, 103, 192 and 258A.

The legislative 'powers' and 'functions' of both the Union Parliament and State Legislatures are provided under Articles 241, 241A, 245, 246, 247, 248, 249, 250, 252, 253, 265, 267, 271, 275, 276, 286, 302, 303, 304, 307, 309, 312, 312A, 321, 323A, 323B, 327, 328, 345, 357, 368, 370, 371, 372 and many other provisions of the Indian Constitution. Similarly, the judicial 'powers' and 'functions' are also provided under Articles 124, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141,

[43] Article 53- 'The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution.'

[44] Article 152 - 'The executive power of the State shall be vested in the Governor and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution.'

142, 143, 214, 215, 216, 217, 220, 221, 222, 223, 224, 225, 226, 227, 229 and many other provisions of the Indian Constitution.

Apart from providing the 'powers' and 'functions' of the three branches of the government, both at the Centre and at States, the Constitution also provides for a series of provisions to check the arbitrary exercise of such powers and functions by any one of these three branches. Thus the doctrine of 'checks and balances' that is derived from the existence of the doctrine of 'separation of powers' or 'separation of functions' is also present under the Indian Constitution. Some of the provisions that seek to check the powers and functions of the three branches of the government whenever they transgress the constitutionally provided limits. They are Articles 146, 151, 117, 207, 211, 212, 217, 222, 247, 262 (2), 274, 280, 281, 292, 323, 324, 329, 338, 352, 353, 354, 356, 357, 358, 360, 365 and other provisions of the Constitution. The presence of these elaborate checks and balances prove the existence of the doctrine of 'separation of powers' whether recognized or not and continue to remain as the source of enforcing accountability among the three branches of government.

Judicial Interpretations on Separation of Powers:

Let us turn to the judicial interpretation in India on this doctrine of separation of powers. Immediately after the commencement of the Constitution, in one of the first constitutional challenges based on the doctrine of separation of powers, In *re Delhi Laws Act*,[45] a seven judge bench of the Supreme Court held that the Indian Constitution does not provide for strict separation of powers. Justice Kania, the then Chief Justice of India observed that 'although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature. Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?' Thus, it is clear that one need not look for a specific provision for the exercise of the power, but there are different provisions

[45] AIR 1951 SC 332.

that need to be read and understood for the powers and functions of the three branches of government under the Constitution.

Similar concerns were also raised by the then Chief Justice of India, Justice B. K. Mukerjea in *Rai Sahib Ram Jawaya* v. *State of Punjab*.[46] He went to observe that 'the Indian Constitution has not indeed recognized the doctrine of separation of powers in the absolute rigidity but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State of the functions that essentially belong to another'. In *Ram Krishna Dalmia* v. *Justice Tendolkar*,[47] Justice S. R. Das, the then Chief Justice of India observed that, 'in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, **some such division of powers legislative, executive and judicial – is nevertheless implicit in our Constitution (emphasis added)**.

In *Chandra Mohan* v. *State of Uttar Pradesh*,[48] a constitution bench had observed that 'the Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States'. This is a very narrow or limited interpretation of this doctrine. It is submitted that neither the Courts nor the political power holders have understood the implications properly, a reason why the concept of accountability has become the casualty. Doctrine of separation of powers is not limited only between the judiciary and the government or what is termed for convenience as 'political executive'.

A thirteen-judge bench of the Supreme Court in *Keshavanada Bharati* v. *State of Kerala*,[49] held that the separation of power between legislature, executive and the judiciary is also a basic feature of the Constitution. The Court held that, 'there is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others

[46] AIR 1955 SC 549.

[47] AIR 1958 SC 538.

[48] AIR 1966 SC 1987.

[49] AIR 1973 SC 1461.

from exercising and discharging powers and functions entrusted to them'. The Court went on to hold that 'by specifically quoting Montesquieu and Locke, the framers of the U.S. Constitution supported the idea 'that political power, in order to be safe, had to be divided.' They were seeking to provide ways and means **within the Constitution** to tame that political power and make it purposive. At the same time, they were also envisaging the techniques through which power would be a check to other powers, thereby maintaining a constitutional equilibrium in between elections' (emphasis added). The then Chief Justice of India, Justice Sikri went on to observe that 'separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution; this structure cannot be destroyed by any form of amendment.'

In *Indira Nehru Gandhi* v. *Raj Narain*,[50] the Constitution bench observed that '**the doctrine of separation of powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of government into three branches does not imply, as its critics would have us think, three watertight compartments (emphasis added)**. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation.'

This is the first major change in the stance taken by the judiciary in appreciating the significance of this doctrine which needs to be understood based on written text of the Constitution. In *Minerva Mills Ltd.* v. *Union of India*,[51] the Court observed that 'it is a fundamental principle of our constitutional scheme, that every organ of the State, every authority under the Constitution derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to who should decide as to the limits on the power conferred upon each organ or instrumentality of the State and what should be done when such limits are transgressed or exceeded. **Under our Constitution we have no rigid separation of powers as in the United States of America (*sic*), but there is a broad demarcation, though, having regard to the complex nature of governmental**

[50] 1975 Supp. SCC 1.

[51] AIR 1980 SC 1789.

functions, certain degree of overlapping is inevitable.[52] However, the Court did not clarify the distinction between the 'broad demarcation' and the 'inevitable overlapping'. The observation of the Court that there is 'rigid separation of powers in the United States of America' needs to be analysed in this regard. The doctrine of separation of powers and checks and balances are not mentioned anywhere in the text. However, a reading of the text indicates that Article I, Section 1 vests the legislative power in the Congress, Article II, Section 1 vests the executive power in the President and Article III, Section 1 vests the judicial power in the Supreme Court. Whether the 'vesting' clause used in these three articles are to be understood as rigid separation of powers under the U. S. Constitution needs to be looked into. If one goes through the other provisions of the U. S. Constitution, it is very clear that the separation of powers identified is not rigid one, on the contrary, series of checks and balances are provided within the Constitution to ensure that no branch of government or authority becomes all powerful at the cost of the other two branches.

The objective as indicated by Montesquieu got translated in this first written Constitution of 1789. Again, we have to understand that while Article 53 and 154 use the phrase 'vested' while the same is not true with reference to the other two branches. It is because, the U. S. Constitution is only a federal Constitution and several States have their own Constitutions in place. On the contrary, the Indian Constitution is a single document, both for the Union and the States. Therefore, the framers possibly avoided the use of 'vested' in relation to the legislative and judicial power. It does not mean that they are absent. One has to read different provisions assigned to these two branches clearly at the Center and at States. There are very many provisions that seek to check and balance the exercise of power of one branch by the other two branches. Some of these provisions have been mentioned earlier in this paper.

Referring to an earlier decision,[53] the Supreme Court held that 'the reason for this broad separation of powers is that the concentration of powers in any one organ may by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged'. The

[52] *Ibid*, at para 95.

[53] *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.

Court also referred to Dr. B. R. Ambedkar who had observed that, 'the power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution…If I was asked to name any particular Article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other Article except this one (Article 32). It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance'.[54] It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however high can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. **That is the essence of the rule of law, which *inter alia* requires that 'the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law**.' The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, part of the basic structure of the Constitution.

In *L. Chandra Kumar* v. *Union of India*,[55] a seven judge bench of the Supreme Court held that, 'the essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. It is even more interesting to appreciate the observations of Justices Shelat and Grover who in the same decision observed that '**there is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reasons of which powers are so distributed that**

[54] Constituent Assembly Debates, Vol. VII, at p. 953.

[55] AIR 1997 SC 1125, at para 45.

none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them' (emphasis added).[56]

The State of Bihar v. *Bal Mukund Shah*, the majority of a constitution bench held that, 'the legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the Constitutional Scheme, will also fall foul on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an 'independent judiciary'. Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme.'[57]

In *Asif Hameed and others* v. *State of J & K and Others*,[58] a three judge bench observed that, 'although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the state legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and

[56] *Ibid*, at para 577.

[57] AIR 2000 SC 1296, at para 32.

[58] AIR 1989 SC 1899, at para 17.

executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.'

In *Subhesh Sharma* v. *Union of India*,[59] the Supreme Court held that 'the constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence consistent with the constitutional purpose and process.' The Court went on to add that there is a need to review the earlier decision of the Supreme Court in *S. P. Gupta* v. *Union of India*.[60]

A Constitution bench of the Court in *Union of India* v. *Raghubir Singh* [61] held that the 'power to review Acts of legislature is entrenched in the Constitution. **Such a power flows from the separation of powers envisaged by the Constitution and the position in UK is different.'** In a different tone and with the intention of not usurping the power of the other branch of the government, the Supreme Court in *Almitra Patel* v. *Union of India* [62] observed that 'under separation of powers, it is not for Courts to tell the executive how to do its various jobs. The Courts are only to direct it to use its powers when it is not doing so'. In *Dattaraj Nathuji Thaware* v. *State of Maharastra*,[63] the Supreme Court referred to Article 50 of the Indian Constitution and observed that there is a clear separation of powers and the wordings of that Article are so clear to pave way for an independent judiciary, free from executive interference (*sic*).[64]

In *Ram Jawaya Kapoor* v. *State of Punjab*,[65] a constitution bench of the Supreme Court held that 'the Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different

[59] AIR 1991 SC 631.

[60] AIR 1982 SC 149.

[61] AIR 1989 SC 1933.

[62] AIR 2000 SC 1256.

[63] (2005) 1 SCC 590.

[64] Article 50 speaks about subordinate judiciary from the executive as the higher judiciary is clearly separated and their independence guaranteed through various provisions of the Constitution. See also relevant CAD on Article 39-A, and the present Article 50 of the Constitution.

[65] AIR 1955 SC 549.

parts or branches of the government have been sufficiently differentiated.' In this regard, it is interesting to note that the Court was using the phrases 'power' and 'function' synonymously, or it is possible for anyone to construe that the Court did not distinguish between these two phrases. However, a cursory look at Article 53 makes it amply clear that these two terms are used to mean two different aspects under the Indian Constitution. In support of this analysis, mention should also be made to Article 356 to draw the support for such a view. Article 356 (1) (a) provides that the President may by proclamation 'assume to himself all or any of the 'functions' of the State Government, or the 'powers' of the Governor, or any other body or authority in the State other than the legislature of a state'. However, with the interpretation and law declared by the Supreme Court in *Samsher Singh* v. *State of Punjab*,[66] this view, it is submitted would remain only of academic interest. This will continue till the Supreme Court is able to overrule this decision in the future. A positive step towards this has been taken by a constitution bench of the Supreme Court in *Madhya Pradesh Special Police* v. *State of Madhya Pradesh*,[67] wherein it was held that the Governor could exercise his discretion if the advice tendered by the council of ministers is against the provisions of the Constitution.

In *E.T. Sunny* v. *C.A.S.S.S. Employees Association*,[68] a division bench of the Supreme Court held that 'the role of Courts as watchdog in keeping executive and legislature in check' clearly brings out the concept of 'checks and balances' envisaged and interpreted by the Court. A nine judge bench in *Supreme Court Advocates on Record Association* v. *Union of India* [69] held that 'when the concept of separation of judiciary from executive is assayed and assessed, the concept cannot be confined only to the subordinate judiciary. If such a narrow and pedantic or syllogistic approach is made and a constructed construction is given, it would lead to an anomalous position that the Constitution does not emphasize the separation of higher judiciary from the executive. Justice Ahmadi went on to observe that, 'the concept of judicial independence is deeply ingrained in our Constitutional Scheme and Article 50 illuminates it. The degree of independence is near total

[66] AIR 1974 SC 2192.

[67] AIR 2005 SC 325.

[68] (2004) 8 SCC 683.

[69] (1993) 4 SCC 441.

after a person is appointed and inducted in to the judicial family…. but Court has not strictly adhered to the doctrine of separation of powers but it does provide for distribution of powers to ensure that one organ of the government does not trench on the constitutional powers of other organs'. However, it may be observed here that the Court did not over rule its earlier decision in *Samsher Singh*.[70]

In *P. Kannadasan* v. *State of Tamil Nadu*,[71] the Supreme Court held that the Constitution of India recognizes and incorporates the doctrine of separation of powers. Even though the Court has adopted past form of government where the dividing line between the legislature and executive becomes thin, the separation of powers is still valid and the state legislatures cannot make laws to annual judicial decisions. The amended law so made can be challenged but not on the ground that it seeks to in-effectuate or circumvent the decision of the Court. This is what is meant by checks and balances inherent in a system of government incorporating the concept of separation of powers.

A review of these and many other judicial decision on this concepts of 'separation of powers' and 'checks and balances' would reveal that the Courts have not clearly laid down the nature and extent of the presence of these doctrines under the Constitution. It may be observed further here that the Courts have been lamenting on a number of occasions, particularly in the field of enforcing environmental legislation and the failure on the part of the executive to enforce them. What exactly the Courts can do under such circumstances except giving directions is not very clear. The accountability of the executive to the legislature and to the other constitutional organs of the government is yet to crystallize in a proper form and in accordance with the written provisions of the Indian Constitution.

In *State of U.P.* v. *Jeet S. Bisht*, the Supreme Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and

[70] AIR 1974 SC 2192.

[71] (1996) 5 SCC 670.

balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning.[72]

In *Binoy Viswam* v. *Union of India*,[73] the Supreme Court observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

The Supreme Court in *State of U.P.* v. *Jeet S. Bisht*,[74] made the following observations:

> 20. Separation of power is a favourite topic for some of us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that Constitutional Court's role in that behalf in non-existent. The judge made law is now well recognised throughout the world. If one is to put the doctrine of separation of power to such a rigidity, it would not have been possible for any superior Court of any country, whether developed or developing, to create new rights through interpretative process.
>
> 21. Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless, there are methods of prodding to communicate the institution of its excesses and shortfall in

[72] (2007) 6 SCC 586.

[73] (2017) 7 SCC 59.

[74] (2007) 6 SCC 586.

duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of power as operating in vacuum. Separation of power doctrine has been reinvented in modern times.

A nine judge bench of the Supreme Court in *I. R. Coelho* v. *State of Tamil Nadu*,[75] held that 'the principle of constitutionalism is now as legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centres of decision-making.' Reiterating the status of separation of powers under the Constitution in para 64, the Court held that 'the separation of powers between the Legislature, Executive and the Judiciary constitutes basic structure, has been found in *Keshavananda Bharati's* case by the majority. Later, it was reiterated in *Indira Gandhi's* case. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution'. Referring to Montesquieu and Alexander Hamilton, the Court held that 'the Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of constitutional law, the importance of the separation of powers on our system of governance was recognized by this Court in Special Reference No. 1 of 1964 [(1965) 1 SCR 413].' The Court went to hold that '**equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary'** (emphasis added).[76]

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[75] AIR 2007 SC 861, at para 44.

[76] *Ibid*, para 128.

A constitution bench in *State of Tamil Nadu* v. *State of Kerala*,[77] the Supreme Court observed that separation of powers is a basic tenet of the Constitution and is fundamental to Rule of Law and went on to add that breach of doctrine of separation of power is violation of equality clause. Two specific paragraphs from this judgment need our attention:

> "93. Indian Constitution, unlike Constitution of United States of America and Australia, does not have express provision of separation of powers. However, the structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognized separation of power as a basic feature of the Constitution and an essential constituent of the rule of law. The doctrine of separation of powers is, though, not expressly engrafted in the Constitution, its sweep, operation and visibility is apparent from the Constitution. Indian Constitution has made demarcation without drawing formal lines between the three organs legislature, executive and judiciary.
>
> 121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:
>
> (i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs - legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the

[77] AIR 2014 SC 2407.

Constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of Courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs legislature, executive and judiciary is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14 stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the Courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it *aliunde*. In other words, a Courts decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the Courts had found in the existing law.

(vii) The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are, (i) Does the legislative prescription or legislative direction interfere with the judicial functions? (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided? (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If the answer to (i) to (ii) is in the affirmative and the consideration of aspects noted in question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional".

In ***Kalpana Mehta* v. *Union of India***,[78] the Supreme Court held that "**the Constitution does not envisage supremacy of any of the three organs of the State. But, functioning of all the three organs is controlled by the Constitution. Wherever, interaction and deliberations among the three organs have been envisaged, a delicate balance and mutual respect are contemplated. All the three organs have to strive to achieve the constitutional goal set out for 'we the people'. Mutual harmony and respect have to be maintained by all the three organs to serve the Constitution under which we live**" (emphasis added).

Recently, a three-judge bench of the Supreme Court in ***Dr. Ashwini Kumar* v. *Union of India***,[79] on 5 September, 2019 through Justice Sanjiv Khanna observed that:

9. Classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in

[78] (2017) 7 SCC 302, conclusion para (viii).

[79] Miscellaneous Application No. 2560 of 2018 in W.P (Civil) No. 738 of 2016.

India and Britain, for the executive and legislative wings in terms of the powers and functions they exercise are linked and overlap and the personnel they equip are to an extent common. However, unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State – the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles.

10. Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. Beyond this, each branch must support each other in the general interest of good governance. This separation ensures the rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by the other branch. It checks concentration of power in a particular branch or an institution.

12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation'. In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/members of the legislature and the executive. The executive, therefore, performs multi-functional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e., recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. **"Office of profit" bar, as applicable to legislators and prescribed vide Articles 102 and 191, is to ensure separation and independence between the legislature and the executive** (emphasis added)

13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected

representatives are to the electorate. This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the Courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the Courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action. Neither does the Constitution permit the Courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. **Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the Court decisions. This is essence of the power and function of judicial review that strengthens and promotes the rule of law** (emphasis added)**.**

VI. ACCOUNTABILITY UNDER THE CONSTITUTION: THEORY AND PRACTICE

Merriam Webster Dictionary defines accountability as 'an obligation or willingness to accept responsibility or to account for one's actions' Cambridge Dictionary defines it as 'Someone who is accountable is completely responsible for what they do and must be able to give a satisfactory reason for it.

There are two types of accountability of the branches of the government. The first one is provided in the form of what these branches can do and cannot do. The second one is where the Constitution prescribes the method and manner in which one branch of the government to the other is made accountable. Sometimes when the limits of the powers of the three branches is not specified in the Constitution, it becomes necessary to raise the standards of accountability on ethical considerations. For example, Lal Bhahadur Shastri resigned as the Minister for Railways taking moral responsibility of a railway accident that took place in Ariyalur, Tamil Nadu. There is no specific provision in the Constitution that speaks about the accountability of individual ministers, but there is a specific provision for the collective responsibility of the Council of Ministers to the House of the People [Article 75 (3) and to the State Legislative Assembly Article 164 (2)]. However, the Council of Ministers is not one among the three branches of the government, but falls within the ambit of the executive branch. This is one area of constitutional conundrum in understanding the meaning of 'executive' as the powers of the executive are 'vested' in the President under Article 53 (1) and in the Governor under Article 154 (1).

However, the Constitution of India very clearly provides for the accountability of each of the three branches as well as the specific branch to which they are accountable. For example, the President of India could be impeached for violation of the Constitution by both Houses of Parliament in accordance with Article 61. Article 361, although provides protection to the President and the Governors for the exercise and performance of the powers and duties of their office or for any act done or purporting to be done by them in the exercise and performance of those powers and duties, it does not prohibit the rights of any person to bring appropriate proceedings against the Government of India or the Government of the State. The phrases used in this article cannot remain as an empty slogan. Not much academic or judicial interpretation have been undertaken to understand and appreciate this provision to maintain the status of the 'Executive' under the Indian Constitution. Rather, there is always deficient and defective interpretation and followed by practices that have totally diluted the status of the President and the Governors.

The judges of the Supreme Court and High Courts could be removed by the order of the President for misbehavior or incapacity in accordance with Article

124 (4). One can see a combined role played by the President and Parliament in the removal of a judge. The Parliament cannot make a law taking away or abridging the fundamental rights. If this limitation is violated, the judiciary can strike down such laws. However, it is submitted that because of the party system present in the country, none of these provisions have been effective or realised for some reason or the other.

Dato 'Param Cumarasamy as Vice-President of the International Commission of Jurists and as Former UN Special Rapporteur on Independence of the Judiciary, in his speech in November 2004 at Chennai on 'Judicial Accountability' stated that: "Accountability and transparency are the very essence of democracy. No one single public institution or for that matter, even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable".[80]

In *Bhim Singh* v. *Union of India*,[81] a constitution bench, while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. **Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication** (emphasis added).

VII. LINKS BETWEEN ACCOUNTABILITY AND SEPARATION OF POWERS

Accountability, in one sense reflects the clear existence of the concept of 'checks and balances' among the three branches of government. When the constitutional scheme fails for whatever reason, the international institutions step in to propose for the method and manner in which such accountability needs to be

[80] 195th Report of the Law Commission of India on Judges (Inquiry) Bill, 2005, January 2006, at p.50.

[81] (2010) 5 SCC 538.

enforced within the domestic jurisdiction. The World Bank, United Nations and Council of Europe have all endorsed accountability as one among the important principles of good governance. At the Commonwealth, series of decisions based on consultations have taken place and the resultant Latimer House Principles on the Three Branches of Government have been evolved over a period of time.

Accountability of the three branches of government can be at two levels. The first one is based on the constitutional provisions as to what these three branches can do and cannot do. The Constitution also provides ways and means to check any such violations by any of these organs. If one branch violates any of the constitutional provisions, the other two branches can check that branch that violates. This leads to the concept of checks and balances based on the written provisions of the Constitution. For example, the law passed by the legislature and assented to by the President or the Governor as the case may be, can be declared unconstitutional by the judiciary either for the violation of fundamental rights or violating the jurisdictional issues. Similarly, the judge of the Supreme Court or the High Courts may be removed from office by both the Houses of Parliament passing the resolutions on specific grounds and by following the procedure prescribed under Article 124 (4). Similarly, the President could be impeached in accordance with Article 61 of the Constitution for violation of the Constitution by both the Houses of Parliament. Thus, a Constitution provides the ways and means through which the accountability of each branch could be realized in accordance with those provisions. The second level of accountability is based on the working of the three branches within the framework of the Constitution thereby no giving any chance for the other branches to correct them. This involves internal control that each branch can exercise to ensure that the concerned branch would not violate the provisions of the Constitutions. Such internal control or self-imposed limitations can be based on well established constitutional conventions, thus emphasizing the moral or ethical standards to be followed by these three branches without any external checks to be exercised by the other branches. Such yardsticks are also specified by international practices endorsed by the bodies like the United Nations or any of its specialized agencies.

In this regard, it is interesting to note the observations made by the Supreme Court in *Bhim Singh* v. *Union of India*.[82] The Court upholding the Member of Parliament Local Area Development Scheme (MPLAD) held that 'concept of separation of powers inherent in the polity of the Indian Constitution. In modern governance, strict separation is neither possible, not desirable. Till principle of accountability is preserved, there is no violation of separation of powers. No rigid separation of powers is enshrined under our Constitution and overlap of few functions are not unconstitutional being violative of separation of powers till the constitutional accountability is maintained. In the present case, there is no violation of concept of separation of powers. Members of Parliament ultimately are responsible to Parliament for his action as an MP even under the scheme. All Members of Parliament be it a Member of Lok Sabha or Rajya Sabha or a nominated Member of Parliament are only seeking to advance public interest and public purpose and it is quite logical for the Member of Parliament to carry out developmental activities to the Constituencies they represent'. It is submitted that this approach is erroneous as it seeks to combine the legislative power holder with that of executive functions. This enables the law maker also to perform an executive function that is purely within the domain of the executive branch.

The links between separation of powers and accountability has been explained in some detail in the paper based on specific developments in the Commonwealth.

VIII. SEPARATION OF POWERS AND CONTEMPORARY DEVELOPMENTS

It is interesting to note that many Commonwealth countries have referred to the British parliamentary practices in the working of their respective written Constitutions. Sometimes, they have gone beyond the written provisions of their Constitutions and incorporated the British constitutional practices or conventions. Realizing that the doctrine of separation of powers has to play a meaningful role in the Commonwealth countries, many initiatives have taken place in the last three decades or so. In this regard, a discussion on separation of powers and checks and balances would not be complete without any reference to the developments taking place in the Commonwealth.

[82] (2010) 5 SCC 538.

During 1996 of the importance of the role played by judges and lawyers in 'healthy democracy' and by a meeting in February 1997 of the Heads of Government of Commonwealth African countries which sought to evaluate the state of democracy in Africa. The object of the Colloquium was to draft guidelines which would provide an operational manual of good practice with regard to the commitments contained in the Harare Declaration and Millbrook Plan of Action and which would to be implemented in every Commonwealth country. The product of the Colloquium, the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, were placed before Commonwealth Law Ministers at their meeting in Port of Spain in May 1999.They asked Senior Officials to study the Guidelines and report to the next Law Ministers Meeting.

In September 1999, the principles underlying the Guidelines were debated by judges and lawyers at a session on judicial independence held at the Commonwealth Law Conference in Kuala Lumpur. In September 2000, a meeting of Commonwealth Chief Justices commended them for consideration by Heads of Government in a statement issued at the Triennial Conference of the Commonwealth Magistrates' and Judges' Association, held in Edinburgh. The statement was subsequently endorsed by Chief Justices from 31 Commonwealth countries. In February 2001, the Pacific Island Chief Justices endorsed the Edinburgh statement and expressed support for the efforts of the sponsoring organisations.

In November 2001, Senior Officials meeting in London 'noted that the principles of good governance and judicial independence had been clearly endorsed by Commonwealth Heads of Government and welcomed the general thrust of the declaration of those principles in the Guidelines'. Subject to refinement of the text in a number of respects including those in relation to judicial appointments, they agreed that the Guidelines would be laid before Law Ministers at their next meeting.

At their Meeting in St. Vincent and the Grenadines in November 2002, Law Ministers gave detailed consideration to the Guidelines, which had been refined by a working group consisting of the sponsoring associations and the Commonwealth Secretariat. Ministers fully endorsed the importance of the issues involved in the document and 'hoped that it would be possible for Commonwealth Heads of Government to agree a statement of principles which could assist reflection on these issues'. They invited the Commonwealth Secretary-General to convene a

small group of Law Ministers to work with the Commonwealth Secretariat in order to refine and develop principles based on the Guidelines for submission to Heads of Government.

The resulting text was approved by Law Ministers and placed on the agenda of the 2003 Heads of Government Meeting in Abuja. The Principles were endorsed in paragraph 8 of the Abuja Communiqué. Thus, Heads of Government have recognised the valuable work undertaken by the Commonwealth parliamentary, legal and judicial associations to further the commitments made in the Harare Declaration and Millbrook Plan of Action in the promotion of good governance, fundamental human rights, the rule of law and the independence of the judiciary.

As a result of the 2002 Meeting of Commonwealth Law Ministers held in St. Vincent and the Grenadines in November 2002 the Commonwealth Secretary-General invited Dr. P.M. Maduna, Minister for Justice and Constitutional Development, South Africa to chair a small meeting of Law Ministers from Australia, Ghana, India, Jamaica, Kenya, Singapore and the United Kingdom to review and develop principles based on the Latimer House Guidelines. These principles were to reflect the accountability of and relationship between the three branches of government, namely: the Executive, Legislature and Judiciary. The importance attached to this undertaking was to come out with an agreed text which it was felt encapsulated the essence of these values.

At their meeting in Abuja, Nigeria, in December 2003, the Commonwealth Heads of Government fully endorsed the recommendations of the Commonwealth Principles. The communiqué indeed acknowledged that judicial independence and delivery of efficient justice services were important for maintaining the balance of power between the Executive, Legislature and Judiciary. This has given a new impetus for member states to provide an effective framework for the implementation of the Commonwealth's fundamental values, taking into account the national laws and customs. Dr. P. M Maduna, Minister for Justice and Constitutional Development, South Africa, expressed his views that these principles will be widely disseminated in all Commonwealth member states.

H.E. Rt. Hon. Don McKinnon, the then Commonwealth Secretary-General had observed that 'at the Commonwealth Heads of Government meeting in Abuja,

Nigeria, in December 2003, the Heads of Government fully endorsed the recommendations of their Law Ministers on the Latimer Guidelines, which specify the Commonwealth Principles on the accountability of and relationship between the three branches of Government. It is acknowledged that these Commonwealth Principles buttress the declarations of Commonwealth values found in the Harare Declaration and the Mill- brook Action Programme.' He went on to observe that 'each institution (executive, legislature and the judiciary) has a distinct role to play as well as each being a check or balancing mechanism for another.' These initiatives and efforts ultimately resulted in the 'Commonwealth (Latimer House) Principles on the three Branches of Government on the Accountability of and the relationship between the three branches of Government.'[83]

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values. Among various principles, three specific principles need to be mentioned here.[84] The first one is the Principle VI, under the heading Ethical Governance of the Latimer House Principles provided that the 'Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.' Principle VII under the heading Accountability Mechanism provided clearly for the executive accountability to Parliament and also specified that the Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Similarly, there is a specific mention about the judicial accountability as well.

In principle IX titled 'Oversight of Government', it was provided that 'the promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process'. The necessary steps

[83] (2003) Com. Sec. Decl., p.1.

[84] Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003, available at https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf.

to be taken to realise this were also mentioned in this principle. Thus, the accountability of each of the three branches have been broadly laid down in the Latimer House Principles. Recently, the Commonwealth Secretary-General Kamalesh Sharma had observed that 'every Commonwealth member must continuously pose itself the question as to how well do we observe the separation of powers? Do our executives respect the freedom of the legislature and the judiciary to discharge their responsibilities?' He went on to add that 'without clear boundaries between the three branches of government, standards of accountability, transparency and integrity are difficult to uphold. Opportunities for poor governance and corruption can increase, limiting the rights of citizens.'[85] Thus, the Latimer House Principles require each of the three branches of governments to maintain high standards of accountability, transparency and responsibility in the conduct of all public business.[86]

As the Latimer House Principles were endorsed by the Commonwealth Heads of Government at Abhuja in 2003 and the same was reaffirmed in Nairobi and the need for these principles to be recognized widely in the Commonwealth. To carry this forward, the representatives of the Commonwealth Lawyers' Association (CLA), Commonwealth Legal Education Association (CLEA), Commonwealth Magistrates' and Judges' Association (CMJA) and the Commonwealth Parliamentary Association (CPA) met on July 6 and 7, 2008 at the Scottish Parliament in Edinburg. As the outcome, the Edinburg Plan of Action for the Commonwealth was adopted reaffirming the Latimer House Principles and the subsequent developments. This Edinburg Plan of Action also noted that 'there is a need to make better provision for the continuing implementation and assessment of the Principles across the Commonwealth.[87] Among various issues, this Plan of Action reiterated the Latimer House Principles on the Accountability of and Relationship between the Three Branches of Governments and observed that 'Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.'[88]

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[85] https://thecommonwealth.org/agv/upholding-separation-powers , accessed on 1st June 2021.

[86] Latimer Principles, Handbook, at p. 42.

[87] commonwealth-latimer-principles-web-version.pdf, accessed on June 12, 2021.

[88] Para 2 on Good Governance and accountability of the Edinburg Plan of Action, 2008.

It is appropriate to mention here the significant role played by India in developing the Latimer House Principles on the three branches of government. If so, one is reminded of the obligations of the Parliament of India to translate these principles in the domestic sphere for implementation. Failing which, the Courts could have incorporated them in their judicial decision-making process. Yet, nothing seems to have taken place in spite of Article 253 of the Indian Constitution.[89]

IX. CONCLUSION

Although the Constitution of India paves way for the establishment of three independent branches of the government, the executive, legislative and judicial, there seems to be a restricted reading of the same during the past seventy years. The Supreme Court has always been ruling that there is separation of powers between the legislature and the judiciary but failed to recognise the separation of the executive from the other two. In other words, the Supreme Court has allowed the law making as well as the implementing (executive) functions to be exercised by the Council of Ministers. The same has also been extended to Members of Parliament and State Legislative Assemblies as well. The interpretations of the judiciary with regard to Articles 53 and 74 and the attempt to read them harmoniously have led to the concentration of law making as well as implementing powers of the executive to be with the Council of Ministers.

This has led to the reading as well as interpreting various provisions of the Constitution *via* Article 74 of the Constitution. Such interpretations have led to the misuse of Article 72, 161, 352, 356, 361, 368 and many other provisions of the Constitution. As the power to make as well as to implement is now identified with the Council of Ministers, there is very little check on their power. Only judiciary can check the powers of the Council of Ministers for violating the rights and liberties of the citizens or the other provisions of the Constitution. However, there seems to be no check on the authority of the Council of Ministers for their failure to implement the laws. As such it has resulted in many abuses of powers as well. A constitution bench of the Supreme Court in *Bhim Singh* v. *Union of India*,[90] has unanimously

[89] Article 253 - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

[90] (2010) 5 SCC 538.

held that the exercise of executive power by the Member of Parliament by upholding the constitutional validity of the Members of Parliament Local Area Development (MPLAD) scheme.

In this regard, the Constitution of India is yet to fully realize the central objective of the concept of separation of power in making the government the servant of the people. There is very little critical analysis and research undertaken by the academics as well in this field. The reasons for this as well as the reasons for not fully recognizing the doctrine of separation of powers and checks and balances under the Indian Constitution are being mentioned briefly in the following paragraphs.

1. Failure to recognize and distinguish between 'Power' and 'Function':

The phrases 'power' and 'function' have been used in various provisions of the Constitution. A plain reading of Article 53 read with Article 74 would reveal the fundamental distinction sought to be achieved, but was never realised because of the faulty interpretations given by the Supreme Court.[91] Certainly power and function in this regard cannot be treated synonymously as one part of Article 53 vests the power in the President and another part of Article 53 cannot be read so as to drain that power of the President on to some other authority by an ordinary law made by the Parliament. In other words, the power vested in the President in Article 53(1) cannot be divested of the same under clause (3) (ii) of the same Article. Clause (1) of Article speaks about 'power' while clause (3) (ii) speaks about 'function'. Identical terms have been used in Article 154 as well that speaks about the Executive power

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[91] **Article 53**. **Executive power of the Union** (1) The **Executive power** of the Union shall be **vested** in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be **vested** in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall

(a) be deemed to transfer to the President any **functions** conferred by any existing law on the Government of any State or other authority; or

(b) prevent Parliament from conferring by law **functions** on authorities other than the President.

of State. There seems to be a very thin, yet a definite distinction between these two phrases used in Article 53. To illustrate, Article 356 may be referred to clause (1) (a) to Article 356 provides for the President to 'assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State.'

In this context, the nature and scope of Article 74 is to be looked into. Accordingly, clause (l) to Article 74 provides that 'there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President who shall, in the exercise of his functions, act in accordance with such advice.' In other words, the President has his own powers provided under the Constitution of India and that in the exercise of such powers, he can act independently, without the advice given by the Council of Ministers. A strong support in favour of such an interpretation is also available in the form of Article 163. Clause (2) to Article 163 provides that 'if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought not to have acted in his discretion.' Read in this form, there are various provisions of the Indian Constitution that provide for the independent powers of the President or the Governor as the case may and the same can be exercised without the aid or advise of the Council of Ministers.

The failure to notice the specific use of the words 'power' and 'function' in Articles 53, 74, 154, 163, 356 and the like has led to the emergence of Parliamentary supremacy or cabinet dictatorship over and above the constitutional mandate. The Supreme Court also had failed to notice this specific distinction and simply endorsed the parliamentary supremacy, based on the British model. A few decisions of the Supreme Court in this regard should be mentioned here. In ***Ram Jawaya Kapoor* v. *State of Punjab***,[92] ***R. C.Cooper* v. *Union of India***,[93] ***Samsher Singh* v. *State of Punjab*** [94] and in many other cases, the Supreme Court had

[92] AIR 1955 SC 549.

[93] AIR 1970 SC 564.

[94] AIR 1974 SC 2192.

overlooked this distinction between power and function. Apart from making the position of the President or the Governor weak, the decisions in ***Swaran Singh* v. *State of Uttar Pradesh***, [95] ***Satpal* v. *State of Punjab*** [96] also indicate the colourable exercise of pardoning power on the advise of Council of Ministers. Similarly, a plain reading of Article 361 (l) would reveal that the protection of the President and Governors is provided only for the exercise and performance of the 'powers' and 'duties' of his/her office and for the discharge of his 'functions'.[97] This Article would have no relevance if the President and the Governors were bound by the advice tendered by the respective Council of Ministers in the discharge even of their powers.

An attempt can be made to highlight the distinctions between 'power' and 'functions' in this regard. In the first place, 'power' is the right, ability or authority to perform an act and ability to generate a change in legal relationships, while 'function' is an assigned duty or activity. In the second place, power is vested in an individual or a particular office bearer while functions are assigned to a body or an institution like government. Thirdly, power always has the discretion to choose and act from two or more choices or options or courses of actions, while function has no such discretion. The function so assigned has to be discharged or carried out as mandated. Fourthly, power can be exercised independently (with consultation as part of such discretion) while function is collective or consultative in character. Individual decision making with regard to a function assigned to a body is by and large prohibited as can be seen in Articles 74, 75, 78, 163 and 352. Fifthly, power is more specific or focused and can be used only for the circumstances so provided or specified (Article 72, 123) while function is a much broader term. Sixthly, power conferred on any authority cannot be delegated or assigned to any one else (except constitutionally authorized or statutorily provided for like Article 357) while function can be delegated or assigned to some one else lower in the hierarchy. Seventhly,

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[95] AIR 1998 SC 2026.

[96] AIR 2000 SC 1702.

[97] Article 361 - Protection of President and Governors and Rajpramukhs.-(1) The President, or the Governor or Rajprarnukh of a State, Shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties;

the location of power could be identified with the phrases used in the Constitution like 'discretion', 'is satisfied' (Articles 123, 213, 352, 356, 360), 'may', 'is of the opinion', 'either', 'as he thinks fit', 'it appears to the President' (Article 263). Similarly functions assigned to a body or an institution can also be identified (Article 74). However, it should also be kept in mind that sometimes there may be overlaps between these two phrases as well. Or sometimes, the function may graduate to power depending upon certain circumstances. For example, the President is mandated under Article 85 to summon each House of the Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. In translating this provision, the President is advised by the Minister for Parliamentary Affairs or someone authorized by the Council of Ministers to convey to the President that the House is ready to meet and the same may be convened. This in reality becomes the function of the President. However, if no such communication is received and the six month time provided in this Article is likely to be violated, the President can exercise this function as if it is his power to adhere to the constitutional provision.

The reasons for the failure to recognise the differences between 'power' and 'function' are many. Some of them would include: (a) the dominance of a single largest party at the centre, facilitating the prominent position enjoyed by the Prime Minister during the first four general elections; (b) the emergence of the Presidential candidates, by and large, from active politics; (c) the election of the President that works on party whips in practice; and (d) the interpretations given by the judiciary from time to time in favour of the restricted powers of the President or the Governor. In this regard, there is every need to look at this failure to notice the distinction between 'power' and 'function' as well as the consequences that it had created over the past seventy years. If this tendency is not arrested, then one branch of the government is likely to become all powerful in the years to come that would destroy the equilibrium among the three branches and then lead to tyrannical rule in the name of democracy.

2. Failure to read down the provisions in the right perspective:

Provisions containing separation of powers and checks and balances have not been fully recognized by the judiciary yet or by the branches amongst themselves.

Wherever the judiciary recognized this doctrine, it if focused more on the protection of the independence of judiciary from other branches. This has led to the Courts defining executive power as 'political executive', 'parliamentary form of government', and by comparing the office of President with that of the Crown in England and making the President a 'nominal head' by conventions and judicial observations as against the written provisions of the Constitution. These developments have specific connotation to the realization of accountability of the three branches to the Constitution and the accountability of the government to the people in general. M. N. Roy's statement that 'the people are powerless in between elections' truly reflects the helplessness of the people to make the government accountable.

3. Failure to define 'Executive power' or 'mixing executive power with legislative power':

A constitution bench of the Supreme Court in *Bhim Singh* v. *Union of India*,[98] has unanimously held that the exercise of executive power by the Member of Parliament by upholding the constitutional validity of the Members of Parliament Local Area Development (MPLAD) scheme. In this regard, the observation made by Justice P.B. Mukharji may be cited. According to him "after all executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of state in political philosophy and political science…The executive power is nothing short of the 'whole state in action' in its manifold activities. In one sense, the legislative power and the judicial power, in order to graduate from phrase to facts, have finally to culminate in executive power to become effective."[99]

4. Meaning and scope of 'aid and advice':

Articles 74 as well as 163 provide for the Executive to act on the aid and advise of the Council of Ministers, headed by the Prime Minister or the Chief Minister as the case may be. While the meaning, nature and scope of 'aid' has

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98 (2010) 5 SCC 538.

99 Mukharji, P. B, *The Critical Problems of the Indian Constitution* (Bombay University, Bombay, 1969) pp. 9 – 10.

received absolutely no attention from any commentator so far, the term 'advise' has been interpreted to be the recommendation of the Council of Ministers. In spite of the two constitutional amendments made to alter the content of Article 74, these phrases have not received the effective and meaningful discussion among the academics as well as the judiciary. These two provisions presume that the advice tendered by the Council of Ministers would be always constitutional. What happens if an unconstitutional advice has been tendered by the Council of Ministers is not clear.[100]

Making the President bound by such unconstitutional advice renders the entire constitutional structure meaningless, and particularly in the light of the oath undertaken by the President and the Governors to 'preserve, protect and defend the Constitution and the law' under Articles 60 and 159 respectively. According to Justice P. B. Mukharji, if the President were to accept the ministerial aid and advice regardless of his own independent view, then he endangers the diverse communities placed under the protection of the Constitution.[101] There is every need to look into this aspect in a detailed manner and make necessary amendments to preserve the constitutional governance in a more meaningful manner rather than making a few cosmetic changes here and there.

The binding nature of the advice tendered by the Council of Ministers at the centre as well as states has resulted in a number of violations of the provisions of the Constitution. A constitution bench of the Supreme Court itself had to lament in ***D. C. Wadhwa* v. *State of Bihar***,[102] and observed that 'the executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive.' The Court went on to observe that 'it is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be

[100] *Ibid*, p. 25.

[101] *Ibid*.

[102] AIR 1987 SC 579.

allowed to be defeated by adopting of any subterfuge. That would be clearly a fraud on the constitutional provision.' The Governor in this case was simply re-promulgating the Ordinances from time to time on the purported advice of the Council of Ministers. This decision of the Supreme Court got further strengthened in the seven judge bench decision in ***Krishna Kumar Singh* v. *State of Bihar.***[103]

Similarly, the Governors as mentioned earlier, were exercising their power to pardon only on the advice of the Council of Ministers and the Court had to step in to set such pardons aside as those decisions to pardon were taken by the Governors without application of mind and on the advice of the Council of Ministers.[104] In ***Madhya Pradesh Special Police Establishment* v. *State of Madhya Pradesh***,[105] the Council of Ministers even rejected the 'sanction' sought by the police to prosecute a couple of ministers for corruption charges. The Supreme Court had to extend the reasons to hold that the Governor's action in granting sanction was constitutional and valid as against the decision of the Council of Ministers.

These are certain exceptional circumstances when the Governors have acted either constitutionally or otherwise. Similarly, the President had also intervened as against the decision of the Council of Ministers in amending the *Postal Act*.

5. Relevance of Article 78:

Because of the emphasis given to and the prevailing interpretations in favour of the Prime Minister and the Council of Ministers under Article 74, almost no discussion took place on the relevance of Article 78. When the differences between the Prime Minister Rajiv Gandhi and the President Zail Singh surfaced, this Article was in the limelight for some time. Even the Lok Sabha, to which the Council of Ministers is made collectively responsible under Article 75(3), did not want to discuss the relationship between the President and the House of the People (Lok Sabha). Giving his ruling on March 19, 1987, the Speaker of Lok Sabha had observed that the relationship between the President and the Council of Ministers was a matter entirely between them and could not be discussed on the floor of the House. Also,

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[103] AIR 1998 SC 2288.

[104] *Swaran Singh* v. *State of Uttar Pradesh*, AIR 1998 SC 2026; and *Satpal* v. *State of Punjab*, AIR 2000 SC 1702.

[105] AIR 2005 SC 325.

such official correspondence and discussions at the highest level between the President and his advisers (the Ministers) were in their very nature, confidential, privileged and protected. He went on to observe that any debate on the floor of the House which brought in the name of the President into any controversy or which tended to discuss the relationship between the President and his Council of Ministers must be avoided at all costs in the larger interest of the nation.[106]

This stance taken dilutes the mandate of Article 75(3) to a large extent. However, thereafter, there seems to be no efforts taken by the academics, members of Parliament or the judiciary to bring to the fore the relevance of Article 78. It is only through this Article, the President could maintain some 'functional' relationship with the Council of Ministers. With the interpretations given by the judiciary with reference to Article 74, Article 78 has become virtually non-existent.

This situation has to change if constitutional governance has to take roots in India. Similarly, the links between Articles 78 and 77 must also be looked into along with Articles 74 and 75 respectively. These provisions are to be read together to understand the implications for constitutional governance in India to realize the primary accountability of the three branches of the government.

The method and means of enforcing accountability of the three branches of government as well as bureaucracy under the Indian Constitution has been very vague and has not taken effective roots yet in spite of the fact that the Constitution has completed 59 years so far. The social, economic and educational aspects of the Indian populace along with religious, cultural and lingual concerns have also contributed to this condition. Even after the report of the Vohra committee report that brought out the linkages between the politicians, bureaucrats, police and the underworld, very little realization has taken place in making the governments responsible or accountable to the people. The judicial decisions and the delay caused in access to justice, failure to implement many of the laws enacted by the Parliament and state legislatures have all contributed to this scenario. It is time that enactments like the *Right to Information Act 2005* and the *Disaster Management Act 2005* are enacted to fix the personal officer liability for their failures and similar provisions

[106] *Parliament in India, The Eighth Lok Sabha,* 1985-89: *A Study (*Northern Book Centre, New Delhi. 1991) p. 40.

are inserted in other legislation to make the bureaucracy and the political representatives accountable for both their actions and inactions. Towards this, the judiciary has the onerous task of interpreting the provisions of the Constitution on these lines.

6. Head of the State and Head of the Government:

The Constitution of India does not designate anyone as the Head of the State or as Head of the Government. However, from the Preamble (Republic), one can assume that the Head of the State is the President, who is an elected authority, whatever be the process of election. On the contrary, there is no mention about the Head of the Government in the Constitution. Therefore, in practice, the Prime Minister is popularly called as the Head of the Government at the Centre and the Chief Minister at the States. The Constitution very specifically defines them as the Head of the Council of Ministers under Articles 74 and 163 respectively.

However, in the absence of any definition in the Constitution including any mention in Article 366, reliance has to be on the provisions of Article 367 (1), that states:

> Article 367 – Interpretation: (1) Unless the context otherwise requires, *the General Clauses Act 1897*, Shall, subject to any adaptations and modifications that may be made therein under Article 372, **apply for the interpretation of this Constitution** as it applies for the interpretation of an Act of the Legislature of the Dominion of India (emphasis added).

The General Clauses Act 1897, defines the phrases 'Central Government' and 'State Government under Section 3 (8) and (60) respectively. The relevant portions of these two subsections are as follows:

> (8) "Central Government" shall,— (b) **in relation to anything done or to be done after the commencement of the Constitution, mean the President**; and shall include,— (i) in relation to functions entrusted under clause (1) of Article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;
>
> (60) "State Government",— [(c) **as respects anything done or to be done after the commencement of the *Constitution (Seventh Amendment) Act***

***1956*, shall mean, in a State, the Governor,** and in a Union territory, the Central Government; and shall, in relation to functions entrusted under Article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that Article] (emphasis added);

Therefore, one can easily arrive at the conclusion that the Prime Minister or the Chief Ministers cannot be legally and constitutionally called as the Head of the respective governments. The fundamental principle that any practice or convention contrary to a law is invalid has to be kept in mind. Thus, the prescription of Articles 74 and 163 in making them the head of Council of Ministers would continue to be in force.

The central objective of the doctrine of separation of powers is to ensure that no branch of government shall become all powerful so as to destroy liberty of individuals. In India, we have witnessed that one branch of government (Legislature) is initially recognized to have all executive powers and functions, thus reducing the constitutionally assigned executive power subservient to legislative power and recognizing the Head of the Council of Ministers holding both legislative and executive powers by practices based on the British Constitution and sometimes even against written provisions of the Indian Constitution. In realizing the responsibility of the Council of Ministers to the House of the People or Legislative Assembly, the power has been literally transferred to political parties rather than the branches of government.

To conclude, reference should be made to Article 16 of the *French Declaration of the Rights of Man 1784* that stated, 'any society in which the safeguarding of rights is not assured, and the separation of power is not observed, has no Constitution.' The sooner we realise the real significance of the doctrine of separation of powers it is better for the protection and promotion of individual liberty in the real sense of the words.

JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

- Sri. V. Sudhish Pai*

Judicial activism or judicial restraint by itself is neither a virtue nor a vice. It all depends on the context. Few developments in the superior courts of India in recent times have evoked such enthusiasm and interest and also some criticism as judicial activism.

The power of judicial review is exercised through the agency of courts. The court is no doubt an institution, but it is composed of persons who with all their diversities of outlook, talent and experience determine the course of its destiny. If most judges are more law abiding than kings were, it is, perhaps, because the appellate process achieves what it is supposed to achieve. But what of those at the judicial summit whose decisions are not subject to appellate review and correction? We cannot forget Justice Jackson's profound observation, "We are not final because we are infallible, but we are infallible because we are final."

Law including constitutional law cannot and does not provide for every contingency and the vagaries and varieties of human conduct. Many times it is open ended. The majestic vagueness of the Constitution, remarked Learned Hand, leaves room for doubt and disagreement. It is therefore said by critics and scholars that this also leaves room for, and so invites, government by judges- especially those who are free not only of appellate review, but of elections as well and have an assured tenure.

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In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State/national security, environment and development, socio-economic rights of particularly the weaker sections of society and development; the whole and its parts, the letter and the spirit. "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs.

All this throws up matters of great moment and in a way summarizes the contemporary issues and challenges for judicial review. These challenges and issues have always been there but they have acquired new dimensions and poignancy. Imbuing all acts of all authorities with constitutionalism and constitutional culture, entrenching the constitutional vision of justice -making it real and meaningful for the people, vitalizing democracy and achieving all this within the framework of separation of powers and democratic functioning is the real challenge for and the goal of judicial review in a constitutional democracy. It is also essential to ensure consistency and continuity in judicial functioning and determination. Continuity is to judicial law what prospectivity is to legislation: the means by which men know their legal obligations before they act. Both stability and change are indispensible for a healthy, vibrant society. We have to distinguish the Constitution and law in general from those passionate, personal commitments that are called justice. The courts, in our scheme of things, administer justice according to law.

The judicial role in protecting human rights, particularly life and liberty and upholding the rule of law has to be robust and activist. Judicial restraint is expected in matters of policy and legislation. The protection and enforcement of fundamental rights and freedoms is both the power and duty of the courts and the grant of appropriate remedy is not discretionary but obligatory. Even in England with no Bill of Rights it was said over a century ago: "To remit the maintenance of constitutional rights to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."(*Scott* v. *Scott* [1913]AC 417,477)

It is universally recognized that the range of judicial power exercised by the superior courts in India is perhaps the widest and the most extensive known to the world of law. The years since the late 1970s witnessed the growth of public interest litigation (PIL). PIL which was initially meant for voicing and redressing the grievances of the large sections of the society who could not themselves voice their grievances and seek their remedy in courts developed new dimensions and complexion. It became an instrument to correct inadequacies and slothfulness of the establishment. The Court stepped in to fill the vacuum left by the legislature and the executive.

One cannot miss to notice that there is a strong relationship between judicial review and the courts' positivist stance on the one hand and the contemporary political situation and events on the other. It may be said that the judiciary has become the arbiter of the entire corpus of rights which determines the quality of living. It is an enormous responsibility. The Court undertook the exercise and duty of legal control of government and fashioned the tools and techniques for such legal control. The law regarding *locus standi* has been liberalized and procedural requirements relaxed and made flexible. Access to justice has been rendered easier. It was held that the courts cannot countenance a situation where observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. Over the years PIL has notched up several achievements to its credit and has matured over an extensive canvas. Judicial activism in the area of human rights has been facilitated in a large measure by PIL; so also in the area of environmental law. Another area of judicial activism is regarding good governance and accountability of public authorities.

Judicial activism/intervention cannot be personalized, it must be institutional. It is a basic postulate that the law must be certain and not become vulnerable to the predilections of individual judges, however well meaning. For this, the decision ought to be based on well recognized judicial principles which should be capable of uniform application to different situations. It is this which gives legitimacy to the Court's rulings and commands respect and allegiance to the law.

However, there are occasions when the divide between law and policy is almost obliterated. Judicial activism has the potential of involving political choices and imparting a political flavour to the judicial process. It is important to recognize

that there are various areas and situations which do not admit of adjudicative disposition and are not judicially manageable, that judicial power also has its limitations and that the Court is not a panacea for all problems of society and the failure of other branches of Government. PIL is not a pill for every ill. It is necessary to remind ourselves that the people have no more wish to be governed by judges that to be judged by administrators. Otherwise judicial activism might well incur the criticism of having become judicial despotism. Legal control of government should not become judges' control. If it is believed that law is only policy made by courts then it carries the dangers of what Thomas Jefferson called the despotism of the oligarchy. Professor Robert McClosky said that the expression 'judicial activism' is a slippery word and it may mean the Court's propensity to intervene in the governing process. In many ways PIL imposes a burden on as well as poses a temptation for the judge. It has been said in a lighter vein that PIL is something like a child discovering a hammer and trying to pound everything.

Dr. A.S. Anand, C.J. warned that judicial activism is not an unguided missile, that Courts must be careful to see that by their over-zealousness they do not consciously or unconsciously cause uncertainty or confusion in the law in which event the law will not develop along straight and consistent path and the image of the judiciary may get tarnished and its respectability eroded. It cannot be forgotten that both certainty of substance and direction are indispensable for the development of the law and invest it with the credibility which commands public confidence in its legitimacy.

Constitutional choices have to be made, so also policy initiatives and choices and legislation consequential to or supportive thereof. Whose right is it to choose and experiment and may be err? Should judges exercise the 'sovereign prerogative of choice'? That should belong to and be exercised by the executive and legislative branches of government. Only in case of illegality or unconstitutionality should the court intervene, i.e., only in cases that leave no room for reasonable doubt. The Constitution outlines principles rather than engraving details and offers a wide range for legislative discretion and choice. And whatever choice is rational and not forbidden is constitutional. Governmental power to experiment and meet the changing needs of society must be recognized. To stay experimentation may be fraught with adverse consequences. In the exercise of the high power of judicial

review, judges must ever be on the guard not to elevate their prejudices and predilections into legal principles and constitutional doctrines. It has been rightly remarked "How easy the job of activist judges….. No great effort, intelligence or integrity is required to read one's merely personal preferences into the Constitution; a great deal is required to keep them out." No one does this perfectly; some are more capable of objectivity and detachment.

Judicial activism and judicial restraint arise and are relevant only in the area where judicial discretion exists and that is, as Aharon Barak cautions, only where there is a choice between more than one reasonable and legal alternative.

"The task of accommodating judicial review with democratic governance is inherently problematic…. Within a system of free government the Court fulfills an important though limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excesses of majoritarian democracy. Judicial review becomes controversial only when the Court thwarts popular will or goes too far and too fast with its construction of the Constitution. Judicial aggression in constitutional politics is lamentable and objectionable. Yet far from being antithetical judicial review is essential to the promise and performance of free government."

The power of judicial review extends over a broad range of public issues. The court touches many aspects of public life. But as has been said it would be intolerable for the court finally to govern all that it touches, for, that would turn us into a Platonic kingdom contrary to the morality of self government.

One cannot forget or overlook the criticism that judicial activism will sometimes result in democratic debilitation. When a society leaves all or its important decisions to the judiciary it is a weak society which misses the excitement of democracy and of sorting out things by the democratic process. The exact limits of the adjudicative methods cannot be fixed and rigid. But if they are totally forsaken the judge loses credibility as a judge. The courts' activism nurtures great hopes and arouses great expectations which may remain unfulfilled and engender a critical sense of disenchantment and desperation. When a people despair of their institutions, force may get ahead masquerading as ideology.

There is no doubt that "in the exercise of their powers of judicial review, courts should be as wise and statesmanlike as their capacities and temperaments

permit- wise as judges, wise in their concern the effectiveness of their interventions into public affairs, and wise too in adapting the Constitution to changing conditions…." Justice Stone's admonition-"the only check upon our own exercise of power is our own sense of self restraint" bears constant recall. But he made clear that self restraint is not an excuse for inaction; it is rooted in a respect for the dignity and high purpose of the other branches of government and a sympathetic understanding of the problems they must try to resolve.

If judicial modesty and restraint are not accepted and if judicial activism or aggression is to be the rule in matters of policy and law making, some basic issues remain. Is government by judges legitimate? Democratic processes envisage a 'wide margin of considerations which address themselves only to the practical judgment' of a legislative body representing a gamut of needs and aspirations.

The legislative process, it is trite, is a major ingredient of freedom under government. Politics and legislation are not matters of inflexible principles or unattainable ideals. As John Morley acutely observed, politics is a field where action is one long second best and the choice constantly lies between two blunders. Legislation is necessarily political requiring accommodation, compromise and consensus. The legislative process does not seek the final truth, but an acceptable balance of community interests. To intrude upon such pragmatic adjustments by judicial fiat may frustrate our chief instrument of social peace and political stability.

If the Court is to be the ultimate policy making body, that would indeed be judicial imperialism without political accountability. The inputs that the judiciary can get would be inadequate and not reflecting the diversity of interests and "inadequate or misleading information invites unsound decisions." Moreover, such a system will train and produce citizens to look not to themselves for the solution to their problems but to a small and most elite group of lawyers who are neither representative nor accountable. This cannot be the democracy or the rule of law to which we are wedded. Maybe it is not unrealistic to doubt or despise the political processes and it may also be that the people cannot be fully trusted with self government. But it would be naïve to believe that guardianship is synonymous with democracy.

These days, however, it is not uncommon for the Court to undertake virtually an exercise of full fledged legislative power as also executive power and travel

into domain clearly not its own. In the process of this new found tendency to legislate or issue directions touching matters of law and policy, many constitutional limitations are breached. Actions, legislative and executive, are tested and corrected and remedied by the judiciary. But judicial action which partakes of both executive and legislative character leaves one aghast. If the salt has lost its savour wherewith can it be salted?

Government is man's unending adventure. No system is perfect. Some free play in the joints is necessary and legitimate. The actual unfolding of democracy and the working of a democratic constitution and institutions under it may suffer from inadequacies and imperfections. But all that cannot be sought to be addressed and redressed by judicial drafting or re-drafting of legislative provisions or formulating policy. There is valid reason and justification as to why law making, formulation of policy and laying down principles and guidelines for exercise of rights and imposition of liabilities should be left to where it rightly belongs- the legislatures consisting of elected representatives of the people.

Quite a few instances of what may be called judicial expansionism or judicial overreach or even judicial despotism come to mind. Apart from the *Second Judges'* case (1993)4 SCC 441 and the *NJAC* case (2016) 5 SCC 1, *Jagadambika Pal* (1999) 9 SCC 95, *Jharkhand Assembly* (2005) 3 SCC 150, *CBI* case (2010) 3 SCC 571, *Salwa Judum* (2011) 7 SCC 547, *Black money judgment* (2011) 8 SCC 1, *Sahara* case (2014) 8 SCC 470, *BCCI* case (2015) 3 SCC 251 are some of the telling examples. It is interesting that in many of these judgments the court refers to earlier decisions recognizing and emphasizing the importance of the doctrine of separation of powers in our constitutional scheme. And yet in giving its verdict the Court sidesteps the principle of restraint inherent in the doctrine and enlarges the field of checks and balances. *BCCI* is an instance of the Court assuming power and also one of abdicating its essential power and function. The Court observed that it was not proper to clutch at the jurisdiction of BCCI to impose a suitable punishment, yet it directed a committee to do that and declared that the order of the committee shall be final and binding upon BCCI and the parties concerned. It delegated and out- sourced its power to adjudicate, pronounce definitive binding judgments and impose punishment which it is not competent to do. Such delegation is unknown to law. Jurisdiction cannot be conferred except by law.

The Court appears to view its expanding role as a natural corollary of its obligation regarding justiciabilty and enforcement of socio- economic rights and good governance. While in some ways this may be heartening in the present context of failure of the other wings, the more vital question is about the propriety of and legal support for such action of the Court overriding express constitutional and statutory prohibitions and diluting or even obliterating the doctrine of separation of powers under the guise of judicial review of executive action or inaction.

To ensure constitutional governance is part of the duty and function of the judiciary. In that sense judicial review and judicial activism is a duty. But this should not degenerate into private benevolence and the judges' personal opinions and preferences should not be raised to constitutional principles. It is to be remembered that it is for the government to govern; it is for the judiciary to check and ensure that the government is governing lawfully, but not whether it is governing wisely and well. Courts are concerned only with the legality and constitutionality of any action-legislative or executive-not with its wisdom and efficacy. 'Unconstitutionality and not unwisdom is the narrow area of judicial review.' For the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court. This idea has been very effectively and elegantly articulated in many judgments by Justice Krishna Iyer, perhaps the most radical and activist judge. He also observed that courts adopt a policy of restrained review when the situation is complex and intertwined with social, historical and other substantially human factors. If the courts were to test not only the legality of any action, but also its correctness and wisdom, then the law maker and the administrator would have to be endowed with the power of prophecy to foresee what the courts are likely to uphold at a future date. For the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court.

"It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of

this type must be decided solely on the basis whether the Constitution forbids it."[*Anwar Ali* Sarkar AIR 1952 SC 75, para 83 @ 103]

PIL was originally conceived as a jurisdiction firmly grounded in the enforcement of basic human rights of the disadvantaged unable to reach the court on their own. This judicial activism in dispensing social justice has, over the years, metamorphosed into a correctional jurisdiction that the superior courts now exercise over governments and public authorities. The people of India seem to have become accustomed to seeing the Supreme Court correcting government action in even trifling matters which should not be its concern. These micro managing exercises are hung on the tenuous jurisdictional peg of Art. 32 read with Arts. 21 or 14 and Art. 142. No legal issues are really involved in such matters. The Court is only moved for better governance and administration and it does not involve the exercise of any judicial function. Art. 142, it should never be forgotten, is a source of power only for doing complete justice in the cause or matter before it. That power is bounded by the requirement that the Court act within its jurisdiction and it should be exercised in accordance with law. It is not a source of unlimited power, not a *carte blanche* for the Supreme Court to implement what it considers its vision of justice, regardless of concerns of legitimacy and institutional competence and prestige.

In regard to the exercise of the power of judicial review in policing governance, we may usefully refer to what the Supreme Court enunciated recently: Jurisdiction of the Court under Art. 32 is not a panacea for all ills but a remedy for the violation of fundamental rights. The judicial process provides remedies for constitutional or legal infractions. The Court must abide by the parameters governing a nuanced exercise of judicial power. When issues of governance are brought before the Court, the invocation and exercise of jurisdiction must depend upon whether such issue can be addressed within the constitutional or legal framework. Matters of policy are committed to the executive. The Court is concerned with the preservation of the rule of law. It is unrealistic for the Court to assume that it can provide solutions to vexed issues which involve drawing balances between conflicting dimensions that travel beyond the legal plane. Matters to which solutions may traverse different fields cannot be regulated by the Court by issuing mandamus. Courts are concerned with issues of constitutionality and legality. Every good

perceived to be in societal interest cannot be mandated by the Court. An issue whose solution does not lie in a legal or constitutional framework is incapable of being dealt with in terms of judicially manageable standards. The remedies for perceived grievances regarding matters of policy and governance lie with those who have the competence and the constitutional duty in that behalf. [*Santosh Singh* v. *Union of India* (2016) 8 SCC 253].

The authority of the courts rests upon the public belief that courts apply law and not emotion or passion. But when judicial activism spans into areas not marked for courts, judges try to frame doctrine to dispose of matters on what sound as legal grounds. The case gets over, the doctrine remains. Lawyers and lower courts will rely upon it and new cases will be decided in accordance with it. As the doctrine was created in the first place to achieve something that the existing law or legal principles did not permit, judicial power will have expanded to yet new area. Decisions are precedents; doctrines created are applied to new cases and what may very likely begin as an attitude of 'let us do it this one time' grows into and becomes a distortion of constitutional government. That indeed is the danger of unbridled judicial activism or expansionism which will tend to become judicial despotism undermining the neat but delicate constitutional balance. And that is what courts must wisely avoid and resolutely set their face against.

Thus, while one might agree that in the contemporary Indian context principled judicial activism is a necessary constitutional obligation, the decisions arrived at and the directions/redress given have to be on a principled, institutionalized basis, always bearing in mind that judicial response to various fact situations should be guided by wise discretion; and that even the cause of reform is best served by a sense of restraint and moderation. As held by the Supreme Court the essential identity of the institution as a court should be preserved, and if its contribution to the jurisprudential ethos of society is to advance our constitutional objectives, it must function in accord with only those principles which enter into the composition of judicial action and give to it its essential quality.

Legislative determination of disputes/ rights has been held to be illegal and impermissible. *Ameerunnisa* (AIR 1953 SC 91), *Ram Prasad Narayan Sahi* (AIR 1953 SC 215), and *Indira Gandhi* (AIR 1975 SC 2299) are some of the telling cases. By the same logic and reasoning judicial legislation which is judicial

determination of policy and law is difficult to be sustained and justified jurisprudentially. Indeed the profound observation in *Indira Gandhi's* case puts the matter in the proper perspective. "It is one of the basic constitutional principles that just as courts are not constitutionally competent to legislate under the guise of interpretation so also neither Parliament nor State Legislatures perform an essentially judicial function. .....None of the three constitutionally separate wings of the State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its constitutionally assigned sphere or orbit of authority into that of the other. This is the logical meaning of the supremacy of the Constitution."

All claims by the court regarding the power to make plenary legislation appear to be nothing more than mere *ipse-dixit*. It is really begging the question. There is no support for this in the Constitution or the law, there is no jurisprudential foundation for the exercise of such power. One recalls Sydney Harris' statement: Once we assuage our conscience by calling something a 'necessary evil', it begins to look more and more necessary, and less and less evil.

This is nothing to say about the need and the desirability of such measures. The question is one of legitimacy and propriety. Robert Bork's profound statement comes to mind: "... the desire to do justice whose nature seems obvious is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem; and a faint crack develops in the American foundation. A judge has begun to rule where a legislator should."

Any support or justification for a constitutional adjudication and even more for judicial legislation will have to be premised on sound legal reasoning. It cannot be sought to be justified for the reason that it produces welcome and desirable results. If that is done, law will cease to be what Justice Holmes named it, the calling for thinkers, and become merely the province of emoters and sensitives. Then naturally there are no rules, only passions. Legal reasoning rooted in a concern for legitimate process rather than desired results restricts judges to their proper role in a constitutional democracy. That marks off the line between judicial power and legislative power.

The summons to a better understanding of all this presses for an answer.

The judiciary fulfils an important role acting as an auxiliary precaution against the abuse of governmental power and excesses of majoritarian democracy. Judicial review provides the sober second thought of the community – that firm base on which all law should rest. But there is need to recognize that judicial power and process also have their limitations. "The Courts' deference to those who have the affirmative responsibility of making laws and to those whose function is to implement them has great relevance in the context and when to this is added the number of times that judges have been over ruled by events, self limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. The attitude of judicial humility and restraint is not an abdication of the judicial function; it is a due observance of its limits."

The courts will have to win public acceptability and esteem by exacting high standards of professional competence and moral integrity. As the late lamented Justice Khanna always reminded us, echoing the sentiment of Justice Holmes, the courts like every other human institution must earn reverence through the test of truth. The best and complete answer is the self imposed discipline of enlightened judicial restraint. The rarest kind of power in our troubled world, it is said, is one recognized but not exercised. Yet that is the sort of example we have a right to expect from the organ of the State that must define the limits of all organs including its own.

The last word may belong to the Supreme Court: "In a democracy based on the rule of law, the Government is accountable to the legislature and, through it, to the people. The powers ....are wide to reach out to injustice.....But the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, Judges walk the path on a road well travelled. When judicial creativity leads Judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of

law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of Government. Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process. This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or the Constitution." [*Union of India* v. *Rajasthan High Court* (2017) 2 SCC 599].

These are very telling and profound words, the idea so wisely and neatly articulated. But the problem always is in its application, even by the highest court. It can only be hoped that the judiciary and particularly the Supreme Court is always conscious of this principle and its decisions are informed by this attitude and it adheres to it in letter and spirit. That alone will give the institution and its work both legitimacy and respectability.

But the difficulty always has been that more often than not there is complete mismatch between what the Court lays down and what it practises. It is difficult to find an answer as to how the nation has to cope with such unconstitutional assumption of power. Any suggested remedy is perhaps worse than the malady. The problem with all suggestions to counter the Court if and when it behaves unconstitutionally is that they would create a power which may tend to destroy the Court's essential work which is vital in a constitutional democracy. The only safeguard against the excesses or abuse of power is the building of a consensus of how judges should behave and conduct themselves in their work, a consensus which by its intellectual and moral force, disciplines those who are subject, and rightly so, to no other discipline.

Under no Constitution can the power of the Court go so far to save the people from their own failure. "The essence of self-government after all, is self-government-not a nursemaid who lets the children play, if they behave. Freedom includes freedom

to make mistakes- a far too important function to be exercised by guardians. To rely upon others to save us from our faults is to repudiate the moral foundations of freedom. Surely all this is implicit in democracy. …" And democracy is a beckoning goal, not a safe harbour. Buddha's last words to his disciples, "Look not for refuge to anyone besides yourselves", come home with a strange poignancy.

The oft quoted observation of Hughes, CJ 'that the Constitution is what the judges say it is', made much before his appointment as a judge, is clarified by his pronouncement in *Carter* v. *Carter Coal Co* (1936) 298 US 238(318) that it is not the function of the Court "to amend the Constitution by judicial decisions." It is significant that Frankfurter, J. posited in *Graves* v. *New York* 306 U S 466,491-92(1939) (concurred by the other judges) that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Our Supreme Court also cautioned judges to solemnly remind themselves of the statement of the historian of the U S Supreme Court, Charles Warren that however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. And Bhagwati, J. said in *S. P. Gupta* v. *Union of India*: "We (the Judges) can always find some reason for mending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation"(AIR 1982 SC 149 para 1). Equally profound is what Hugo Black, J. said: "The public welfare demands that constitutional cases must be decided according to the terms of the Constitution itself, and not according to judges' view of fairness, reasonableness or justice. I have no fear of constitutional amendments properly adopted, but I do fear the rewriting of the Constitution by judges under the guise of interpretation." These are telling reminders to the judiciary.

Power is of an encroaching nature, wrote Madison in *The Federalist*. Judicial power is no exception to this truism. Public law ought to, in principle, respect conventional limitations on judicial activism, they are critical to the functioning of a democratic state. Two recent decisions, one of our Supreme Court-*Dr. Ashwani Kumar* v. *Union of India* (2019 SCC Online SC 1144) cautioning restraint and how separation of powers and restraint ensure the rule of law and give legitimacy to the working of all wings and the other of the UK Supreme Court-*R(on the application of Miller*) v. *The Prime Minister* [2019] UKSC 41 exercising the

power of judicial review to uphold fundamental constitutional principles, provide typical examples of commendable judicial restraint and healthy judicial activism.

"Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision making, just as there are to decision making by the courts."(Lord Bingham) Bridging the gap between law and society is a central task of a judge. This calls for balancing different values. As Aharon Barak points out, "A judge must maintain the delicate balance, something that requires some measure of activism and some measure of restraint."

The theory of separation of powers has been envisaged and adopted basically to preclude the exercise of arbitrary power. Some friction and tension between the three wings of government is inevitable. The churning process largely ensures that the people are saved from autocracy. What is essential is for all to appreciate this truism and function accordingly.

The exercise of the power of judicial review has to be robust and balanced. What is of utmost importance is that "in the last analysis, the people for whom the Constitution is meant, should not turn their faces away from it in disillusionment for fear that justice is a will-o'-the wisp."

SOCIAL JUSTICE AND VULNERABLE PART OF HUMAN SOCIETY*

- Dr. M. Veerappa Moily**

Introduction:

Any discourse on 'Justice' is an invitation to a very complex range of debates on the most imponderable issues of man's eternal ethical quest. Scholars from John Rawls to Amartya Sen have treated us to an inexhaustible array of social and ethical conundrums. No theory of justice is intelligible except in the context of its times. The expression 'social justice' enables the Courts to uphold legislations, to remove economic inequalities; to provide a decent standard of living to the working people; to protect the interest of the weaker sections of the society.

Doctrine of Equality is the essence of democracy and is a basic feature of the Constitution.

Constitution of India:

Welfare State: The Preamble to the Constitution enunciates achievement of socio-economic goals, to secure to all the citizens of India – social, economic and political justice; liberty of thought, expression, belief, faith and worship, equality of status, and opportunity; and to promote among them fraternity so as to secure the dignity of the individual and the unity and integrity of the nation. In consonance with the modern belief of man, the Indian Constitution has set up machinery to achieve the goals of, social, economic and political democracy. The Supreme Court declared: "The basic framework of socialism was to provide a decent standard of

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** Former Union Minister and Former Chief Minister of Karnataka.

life to the working people and especially to provide security from cradle to the grave".[3]

Vulnerability refers to the inability to withstand the effects of a hostile environment. And, vulnerable are those who are exposed to the possibility of being attacked or harmed, either physically or emotionally; Women, Children, **OBC, SC,** ST, Minority, **Differently Abled, Senior Citizens, Victims of Substance Abuse,** unhealthy, Illiterate, unorganized workers, poor migrants, people living with HIV/ AIDS, sexual minorities (LGBT), poor in general.

Untouchability and its Abolition:

When Dr. B.R. Ambedkar said that the Constitution was designed on the basis of the individual and not the group, what spurred his remarks was the life he had before his status as the indomitable politician and scholar was recognised. He was an untouchable *Dalit* by caste, and thus had suffered a great deal in the charged Hindu society of the day. The untouchables were those at the bottom of the social rung as per the established *Varna* system of caste order and those who fell completely outside its four fold structure.

Article 17 of Constitution of India made any disability arising out of untouchability an offence, and makes the Constitution unique for such explicit abhorring of social practices as a means of realising an egalitarian setup. The lacunae in that legislation led to its overhaul and it came to be the *Protection of Civil Rights Act 1955*. The continuation of atrocities in spite of the legislative protections of the *Indian Penal Code 1860* and *the Civil Rights Act 1955* led to the enactment of the *Scheduled Castes and Tribes (Prevention of Atrocities) Act 1989*.

Akin to the express prohibition of untouchability, the Constitution also provides a right against exploitation wherein forced labour and child labour is prohibited through Article 23 and 24 respectively. SC /ST, One sixth of India's population live a precarious existence, shunned by much of Indian society because of their rank as 'untouchables' or *Dalits*. Article 38 of the Constitution is perhaps the strongest indicator of India's commitment as a welfare state, and also of its socialist leanings.

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[3] *D.S. Nakara & Others* v. *Union of India* AIR 1983SC 130.

The frame work of the Constitution of India contains a host of social justice features, arising out of the historical injustice meted out to certain sections of society.

Children form a very vulnerable part of human society. They deserve to be valued, nurtured and protected. So pathetic is the condition of children in the world that the United Nations formulated "The Convention on the Right of the Child (CRC) for nations to prevent the most vulnerable in human society, the children.

India has the highest case of working children. Despite Constitutional guarantee of civil rights, children face discrimination on the basis of caste, religion and ethnicity. Even the basic need for birth registration that will assure them nationality and identity remain unaddressed.

Women face double discrimination being members of a specific caste, class or ethnic group apart from experiencing gendered vulnerabilities. Women have low status as compared to men in the Indian society. They have little control over the resources and important decisions related to their lives. In India, early marriage and childbearing affects the health of the women adversely.

Constitutional Provisions relating to Women

Art. 15(3) of India Constitution allow the state to make special provisions for women and children. Several Acts such as *the Dowry Prevention Act, 1961* have been passed including the one of the *Protection of Women from Domestic Violence Act*, 2005.

The Criminal Law (Amendment) Act, 2013 (Nirbhaya Act) is a legislation passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, which provides for amendment *of Indian Penal Code, Indian Evidence Act*, and *Code of Criminal Procedure*, 1973 on laws related to sexual offences. This is landmark legislation.

The decision to provide for equal share in parental property for the women was passed by UPA II and this has been upheld by the Supreme Court of India. According to Finnis, the requirements of justice is "an ensemble of requirements of practical reasonableness that hold because one must seek to realize and respect human goods not merely in oneself and for one's own sake but also in common, in community."[4]

[4] John Finnis, *Natural Law and Natural Rights*, 2nd ed. Oxford University Press, at.161.

The Judiciary should be an arm of the social revolution upholding the equality that Indians had longed for during colonial days but remained elusive. Richard Kay puts it well when he distinguishes the *extraordinary decision* of a constituent from the other regular public decision that it take[5]. A constitution becomes the slate upon which hopes and aspirations of a state come to be written down, providing a unique and important status to the event that is making a constitution.

Morality is a philosophical term whose connotation changes with the changing time and changing needs of the society. Preamble of our Constitution contains the most impeccable goals whose realisation requires greatest commitment to morality. The scope of constitutional morality is not limited only to follow the constitutional provisions literally, but it is so broad that it includes commitment to inclusive and democratic political process in which both individual and collective interests are satisfied. It encompasses ensuring the Constitutional values like rule of law, social justice, democratic ethos, popular participation in governance, individual freedom, judicial independence, egalitarianism, sovereignty and so on. While it is clear as to what Constitutional morality means, practical percolation of these values in governance and citizen entitlements require a sensitive State apparatus; Parliament that is representative in a true sense; Executive that is responsive and empathic; and judiciary that is vigilant and empowering.

According to Dr. Ambedkar, Democracy in India was only, as he put it, 'top dressing on Indian soil, which is essentially undemocratic. Our people have 'yet to learn' constitutional morality. He further says that the maintenance of democracy requires that we must 'hold fast to constitutional methods of achieving our social and economic objectives.

Pascal said: "Justice without power is unavailing; power without justice is tyrannical. Justice without power is gainsaid because the wicked always exist, power without justice is condemned. We must therefore, combine justice and power making what is just strong and what is strong just".

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[5] Richard Kay, Constituent Authority,59 Am.J.Comp.L.715 2011 available at https://opencommons.uconn.edu/law_papers/274.

Constitutional Provisions relating to Socially & Educationally Backward Classes (SEOBCs)

A society is just, when all its components are in a state of harmony. A society which keeps a large section of its people in a state of denial or deprivation or where all its citizens do not enjoy equality of opportunity to develop themselves can never be in a state of stable equilibrium. Providing assured access to higher education is the best way to empower the excluded sections of society and is the most painless way to redress their historic wrongs. In works of Plato, Education enables us to "prepare a citizen, by the light of knowledge and not by rule of custom" and further that Education "seeks to tune in the feelings and imagination of youth, as one would tune a lyre with many vibrating strings." Education enables us to bring the individual "to resonate in unison with society".

The constitution does not define the term backward classes. It is up to the center and the states to specify the classes that belong to this group. However, it is understood that classes that are not represented adequately in the services of the state can be termed backward classes. Further, the President can, under Art. 340 can constitute a commission to investigate the condition of socially and educationally backward classes. Based on this report, the President may specify the backward classes.

Safeguards relating to Educational & Public Employment

Article 15 of the Constitution of India prohibits of discrimination on grounds of religion, race, caste, sex or place of birth. Similarly Article 16 provides for equality of opportunity in matters of public employment. Art. 15 (4): "Nothing in this article or in article 29(2) shall prevent the state from making any provisions for the advancement of any socially and economically backward **classes** of citizens or for Scheduled Castes and Scheduled Tribes." This clause started the era of reservations in India. You may please note that Art. 15(4) talks about backward classes and not backward castes thus caste is not the only criterion for backwardness and other criteria must also be considered.

Though India prides itself as being one of the largest reservoirs of technically trained manpower (in gross numbers), the reality is that 35% of India's population in age group of 20-25 aspires for higher education but the

present enrolment into higher education, is only 9% to 11% as against 45% - 85% in the developed countries .

Oversight Committee: Reservation in Higher Educational Institutions

Karnataka has been a successful pioneer in its mission to implement reservations to Backward Classes right from the Justice Millers Commission in 1915, under erstwhile Mysore State, and then on the Havanur Commission and ultimately setting up the Chinnappa Reddy Commission, the implementation of schemes of OBCs have been quite smooth.

The Oversight Committee to monitor implementation of reservation in Higher Educational Institutions was constituted in May 2006 by Government of India under my Chairmanship. The Committee inter-alia looked into the implementation of 27% reservation for the OBCs in institutes of higher learning and Assessment of additional infrastructure and other requirements for increasing the overall availability of seats to a level so that the present level of seats available to the general category students does not decline. Initially there were some bottlenecks. But later on almost all students belonging to the category secured first class or distinctions.

The Report seeks to go into the nitty gritty of implementation of 27% reservation for OBCs, without any decline in the present level of seats available to the general category students. Implicit in the mandate is an expansion in annual intake level of 54%. An effort was made to attempt a single phase implementation in one go, beginning with the year 2007-08. After very detailed deliberations with the five groups and also with heads of the concerned institutions, it became quite evident that such an expansion of intake without commensurate expansion of faculty and infrastructure would be self-defeating. The Committee recommended phased implementation, setting institution wise timelines, taking their constraints into account.

Besides the many out-of-the-box innovative ideas concerning faculty and infrastructure related issues, I believe three of our recommendation, which cut horizontally across the five groups are critical to this establishment of the goal of an inclusive society, in pursuit of excellence.

"Expansion, Inclusion and Excellence" has been the credo of the Oversight Committee. Even though there was no basic data of OBCs, during UPA-II, a number of programmes like the reservations and welfare programmes were

launched for the OBCs. The OBC census in the country was halted in 1931. As a result the welfare programmes were not reaching out to the deserving people. UPA-II intended for steps for enumeration of OBCs in the census.

Art. 15 (5): This clause was added in 93rd amendment in 2005 and allows the state to make special provisions for backward classes or SCs or STs for admissions in private educational institutions, aided or unaided.

Constitutional Provisions relating to Persons with Disability and the Old

In India, the growing number of elderly is a matter of serious concern for government as well as policy planners. The vulnerability among the elderly is not only due to an increased incidence of illness and disability, but also due to their economic dependency upon their spouses, children and other younger family members.

Entry 24 in list III of Schedule VII of Constitution of India deals with the "Welfare of Labour, including conditions of work, provident funds, liability for workmen's compensations, invalidity and Old age pension and maternity benefits. Further, Item No. 9 of the State List and Item No. 20, 23 and 24 of the Concurrent List relates to old age pension, social security and social insurance, and economic and social planning.

Article 41 of the Directive Principle of the State Policy has particular relevance to Old Age Social Security. According to this Article, "the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public

Constitutional Provisions relating to Children

Art. 21 A: Education up to 14 yrs has been made a fundamental right. Thus, the state is required to provide school education to children. In the case of *Unni Krishnan* v. *State of AP*[6], Supreme Court held that right to education for children between 6 to 14 years of age is a fundamental right as it flows from Right to Life.

Art. 24: Children have a fundamental right against exploitation and it is prohibited to employ children below 14 years of age in factories and any hazardous processes. Recently the list of hazardous processes has been updated to include domestic, hotel, and restaurant work.

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[6] 1993 SCR (1) 594.

Art. 45: Urges the state to provide early childhood care and education for children up to 6 years of age.

Right to Education:

The Right of Children to Free and Compulsory, Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.

Article 21A and the *RTE Act* came into effect on 1 April 2010. The title of the *RTE Act* incorporates the words 'free and compulsory'. 'Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing education. 'Compulsory, education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group. With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the *RTE Act*.

National Policy for Children:

On April 18th, 2013 the Union Cabinet approved the National Policy for Children to help in the implementation of programmes and schemes for children all over the country. The policy acknowledges the child as an individual and the subject of his/her own development, displays an assurance and sense of purpose. The Policy lays down the guiding principles that must be followed by National, State and Local governments in their actions and initiatives for affecting children. The policy identified Survival, Health, Nutrition, Education, Development, Protection and Participation as the undeniable rights of every child, and has also declared these as key priority areas.

***The Juvenile Justice (Care and Protection of Children) Act,* 2015**

The Act received parliamentary approval on 22 December, 2015, replacing the pre-existing *Juvenile Justice (Care and Protection of Children) Act*, 2000. The Act was enacted to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this law.

The Land Ceiling Act and the Land Reforms Act was considered to be a revolutionary measure which has been pursued by both Government of India and the state governments in the 70s. We could combat the menace of naxalism effectively with the implementation of these Acts.

During the 70s a number of measures *like the Bonded Labour System (Abolition) Act, 1976 and Debt Liquidation Act,* and several other measures were undertaken under the 20 Point Programme to curb the unrest in the society. Supreme Court decision particularly on the tribal rights and forests again enraged the tribals and provoked them to join the naxal movement.

During UPA-I, the government thought it fit to bring about settlement of titles of tribals who occupied the forest lands and this settlement helped in reducing the naxal activities. A major reform brought by UPA-II on the new land acquisition provided the adequate succor to the land losers helping them to get market rates. The percolation of developmental works in the most backward areas also prevented the spread of naxlism.

Fort the first time in the world the *New Companies Act* was passed during UPA-II which also provided for creation of a fund by the respective corporates under Corporate Social Responsibility. This was meant to take care of the weaker sections and the vulnerable in the society. But the governments have been deploying these funds as a supplement to their own welfare programmes and consequently, defeating the very purpose of setting aside the CSR fund.

The Government of Karnataka implemented a number of development and welfare programmes in the most backward districts of Pavagada of Tumkur district, Raichur and Gulbarga bordering Andhra Pradesh. This prevented the naxals from expanding their area of operation beyond Andhra Pradesh.

UPA II enacted *the Mineral Development Act,1957* which also provided for mineral development fund. The Act was to replace the existing *MMDR Act* was termed historic because it proposed sharing of mining profits with tribal and other local communities in the mining areas to be spent by the respective mining companies in the respective mining districts, to reduce the conflicts with the tribals.

In Brother Karamzov, the Grand Inquisitor asks the question "whether to leave the determination of what is right to the freely questioning masses and risk unrest, turbulence, riot, murder and war, or to take choice out of the hands of the masses, stilling their unrest by bread, the circus, a myth, a hierarchy and the infallibility of a doctrine enforced by imprisoning and torturing the disobedient." Even though, we are making rapid progress in technology, man is still chained to the ground from where he is incapable of escaping to breathe fresh air. We need to build architecture of justice to respond to the aspirations of the underprivileged.

Rule of Law and Architecture of Justice:

Jean Jacques Rousseau wrote in the starting lines of his book "social contract" "man was born free, and is everywhere in chains."[7] In our country, in some parts, even though feudal system was in vogue, yet Rule of Law was the foundation on which the judicial system worked.

For example, in the State of Tamil Nadu, the famous Chola King Manu Needhi Chozhan who ruled South India around 250 BC, believed in even justice towards friend and foe on occasions of dispute at law. Legend is that he had hung a giant Bell in front of his palace and announced that anyone seeking justice could ring the bell and voice will be heard. One day, it so happened that a young calf had got crushed under the wheels of his chariot, in which his only son, young Prince Veedhividangan, was going around the city. The mother of the calf, which helplessly watched its little one die, walked to the palace gates and rang the huge bell, demanding justice from the king. The king came out and saw the cow, he learnt from his courtiers about the death of the young calf under the wheels of his son's chariot. Unrelenting from his promise for justice, he ordered his own son to be killed for his recklessness. The prince was killed the same way the calf had died, being crushed under the wheels of his chariot. The king went through the same pain the cow had as he witnessed his son die and thereby, being just at all costs.

[7] Jean Jacques Rousseau, *Social Contract*, (Penguin, 19680).

As a testimony of this gesture of equal justice, the statue of Manu Needhi Chozhan was installed at the gate of the court premises of Madras High Court at the point of entry of Judges who enter their chambers. They are reminded of their duties to be discharged with utmost sense of equality of justice with purity and sanctity.

Another example we find in the history is about Mogul Emperor Jehangir, who ruled North India between 1569 to 1627 AD. He had also hung a bell with a rope at his palace gate. One day, a lady named Mehrunissa rang the bell. The Emperor came out and heard her woes. Her husband had been killed by an arrow shot by the Emperor himself while he had gone for hunting. Emperor Jehangir immediately asked the woman to kill him by the arrow in the same way in which her husband had been killed. The woman forgave the Emperor. The rest is history. There may be many more such examples in our country but this shows that there had been a desire to apply the principles of Rule of Law as the situation warranted.

The Magna Carta declared that **'**to no one will we sell, to no one will we deny or delay rights or justice**'**. Are we not sinners to ignore these tenets of justice? It is said that the poor are systematically impoverished by the present institutional arrangements and have been so impoverished for a long time during which our advantage and their disadvantage have been compounded. This demonstrates the hard fact that countries are advanced, but basic rights are trampled down mercilessly.

'Access to Justice' therefore is a crucial pre-requisite for ensuring the 'Rule of Law'. During the framing of the Constitution, Dr. Subbarayan of the Madras constituency in the Constituent Assembly explained this relationship between the 'rule of law' and 'access to justice': "If there is anything which I would like to cling to in the future of this country, it is this rule of law. Professor Dicey in his Law of the Constitution has explained this position fully and I think we have provided in the Constitution, in the powers vested both in the Supreme Court and the High Courts of this country for any citizen to have his right established as against the government of the day, whether Central or Provincial, so that there is no question of encroachment of rights, and the judiciary has been left independent enough to fulfil this task."

Nevertheless, the stark reality is that due to a combination of poverty and illiteracy plaguing large parts of the Indian population, 'access to justice' has remained

elusive to the masses. This is reflective of a broader vicious circle. The Constitution has guaranteed to every citizen various fundamental rights. The Government, in its welfare role, has tried to alleviate poverty through various schemes. Yet, the enforcement of these rights often requires the intervention of Courts. On the other hand, the non-enforcement of the rights also reduces a person's ability to approach Courts in the first place.

The three biggest impediments to ensuring access of justice are the huge backlog of cases, lack of awareness about legal rights and the financial inability to seek effective representation. These are inextricably linked with upholding the 'rule of law'. I also believe that the lower judiciary can significantly contribute towards the removal of these impediments.

Mr. Justice Kapadia gave an important suggestion that focus should be on the expeditious disposal of those cases which are more than five years old – "*Five plus free' should be the initiative*." Framing of the Constitution of any country should be based upon accessibility and inclusive justice. Supreme Court of India once declared "the basic framework of socialism was to provide a decent standard of life to the working people and especially to provide security from cradle to the grave".

Dr. B.R. Ambedkar held on whether the nation possessed constitutional morality necessary to sustain a democratic constitution? The answer to this is yet to be given by Law makers and judiciary! For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but the adaptability of its great principles to cope with current problems and current needs.

We need to protect and nurture institutions to promote democratic polity. We have the living examples of South Korea, South Korea nurtured its institutions and sustained democratic polity, while North Korea demolished institutions and lost the democratic polity. Both nations possess same demography. India should draw lessons from the above. We need to uphold the value system in legislature, judiciary and executive to fulfil the constitutional aspirations of the nation to create a just society.

We have a Constitution which is unparallel in the world which has built architecture of constitutional morality. The Constitution was founded by best of the revolutionaries, best of brains and brilliant minds! The social legislations passed by

Parliament and interpreted by visionary judiciary, have spread wide canvas of social justice. What we lack is the responsible executive and governance to implement them.

The cult of violence and hatred will harm the Rule of Law which is the soul of democracy. The most affected people will be persons belonging to the vulnerable sections of the society. We need a combined effort of legislative, executive, judiciary and media to curb such environment of anarchy with firm decisions and actions. 74 years after independence, India is the world's largest economy, having third largest purchasing power! But inequality haunts us. The richest 1% in India owns 58.4% of the country's wealth, the bottom 10% of our nation owns 0.2% of wealth. The rich are getting richer at much faster rate than the poor. In the period between 2005 and 2016 we have, indeed, lifted some 270 million people above poverty line. India is ranked second in the world in terms of farm output, first in the world in net cropped area, second largest producer of wheat and rice. But India is still languishing at 102 out of 117 countries in the Global Hunger Index, below that of Nepal, Pakistan and Bangladesh.

India should enter into a progressive era of its own, in which perils of inequality and crony capitalism are decisively behind.

Dr. Ambedkar ultimately emphasises that people must not be content with a mere *political democracy,* but rather strive for a *social democracy* with underlying principles of *equality, liberty and fraternity."Political democracy cannot last unless there lies at the base of…social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life…*

…They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy …

Without equality, liberty would produce the supremacy of the few over the many.

Without fraternity, liberty would produce the supremacy of the few over the many.

Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them."

TEXTUALISM IN CONSTITUTIONAL INTERPRETATION: FACETS, CANONS, ANTINOMIES AND SIGNIFICANCE

Prof. (Dr.) P. Ishwara Bhat*

I. Introduction

Generally, text of a constitution is its authentic source of meaning. A meaning attached to the text is the "starting point"[1] for judicial reasoning and the lodestar for navigating the constitutional discourse. When the plain meaning attributable to the text is clear and unambiguous, courts fix that meaning and decide the case in that light. But the problem is that in most of the cases, words are not crystal clear, especially when the Framers distil and pour value, aspiration or social thought into them. Since the Constitution is expected to "endure for ages"[2] by accommodating social and economic development, and not just meeting the exigencies of transient times, the words chosen are usually conveniently vague, and hence, the meaning is flexible. As a result, exclusive adherence to the text without recourse to other sources of meaning becomes a challenging task. Further, experience has shown that literal or plain meaning attributed by a clause-bound strict interpretation of the Constitution has inflicted great injury to the cause of liberty, equality, welfare and democracy. But text also hints at the spiritof the Constitution,plurality of values,

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1 Akhil Reed Amar, "Textualism and the Bill of Rights" 66 *George Washington Law Review* (1998) pp.1143-47. David A Strauss qualifies this observation by saying that today since the text and the precedents constitute common law constitution, the analysis starts with the common law understanding of the constitutional principle rather than the text. David A Strauss, "New Textualism in Constitutional Law" 66 *George Washington University Law Review* (1998) pp. 1153-1154.

2 Chief Justice John Marshall in *McCulloch* v. *Maryland*, 17 US 316 (1819).

and structure of constitutional system. Reliance on text avoids vicissitudes of subjective meanings attributed in the law-making process, promotes rule of law and predictability, and helps in upholding constitutionalism. Using the text for expounding these factors puts textualism in right perspective and functioning, and sheds its unpopular image. Since alternative principles of interpretation *viz.*, purposive, structural and progressive constructions make a creative use of the words used in the Constitution, they also become part of textualism in general sense. The present paper undertakes a comparative study of the Indian and US constitutional experiences pertaining to the topic. It examines its various facets, explains its essential canons and assesses its contribution to constitutional jurisprudence. It throws light on antinomies between intentionalism and textualism, legal formalism and legal realism, and formalistic textualism and flexible textualism which are coming within the domain of textual interpretation because the nuances of textualism can be better understood by focusing on contradictions within which the approach shall steer through.It argues that true textualism does not operate in isolation, that it lends assistance to other modes of interpretation and avoids extremities.

II. Textualism: Theoretical Roots, Meaning and Types

Analytical jurisprudence posits that law as a command of the sovereign is to be understood in accordance with the words used in the statute.John Austin treated 'judicial legislation'as a 'subordinate source of law' and said, "Generally the new rule (law made by judge) is not introduced professedly, but the existing law is professedly ascertained by interpretation or construction…"[3] He thought that judicial arbitrariness could be controlled by the working of the system of hierarchy of courts, the bar and judicial self-discipline that judiciary is acting sufficiently for the general interests that would have been otherwise responded by the legislature.[4] Hans Kelsen argued that a constitution in a material sense stood superior to ordinary legal norms, and consequently, the judicial and administrative decisions in the course

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[3] John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (John Murray: London, 1873 4thedn. Revised by Robert Campbell, 1954) pp.548-549; Wayne Morrison, *Jurisprudence: From the Greeks to Post-modernism* (Cavendish Publishing Ltd., 1997, Special Indian edn., 2011) pp. 241-242.

[4] *Ibid*, at p. 668.

of application of general law shall conform to the Constitution.[5] A constitution remains valid by the very fact that it belongs to the legal system and gives a basis for it.[6] Its existence as *grund norm* is accepted as a matter of normativity.[7] This gives little scope for the judiciary to probe into factors of its genesis and suggests to ascertain the meaning within the constitutional frame. Felix Frankfurter had expressed that he did not care about intention of the legislature but was concerned with knowing what the words mean.[8] Oliver Wendell Holmes preferred to ask what the statute means instead of asking what the legislature meant.[9] Textual interpretation, which emerged as positivism's principal tool, began to cast influence on constitutional interpretation in America. In evolving the concept of textualism and its varieties, the juridical developments spanning over two centuries have contributed considerably to the constitutional jurisprudence.

Some of the US Supreme Court judgments of 19th century reflect plain meaning textual interpretation of the Constitution. In *Barron* v. *City Council, Baltimore,*[10] the Court headed by Chief Justice Marshall declined to hold the Fifth Amendment due process protection of property right applicable against the state authorities as the language of the Bill of Rights referred only to the Congress as the burden-bearer of rights and there was nothing to indicate that state governments were bound by the Bill of Rights. The Court did not act upon the supremacy clause under Article VI of the US Constitution. This was a plain meaning approach and clause-bound interpretation that obstructed the application of precious rights and liberties against the States. In *Dred Scott* v. *Sanford,*[11]the Court held that enslaved

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[5] Hans Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge, 1949 Indian edn., MPP House, 2021) pp.124-125; 136.

[6] Hans Kelsen, *Pure Theory of Law* Tr. Max Knight (University of California Press, Berkeley 1967, MPP House, 2021)pp. 197-8; 221-224. Also *see* Michel Troper, "The Logic of Justification of Judicial Review" 1(1) *International Journal of Constitutional Law* (2003) pp.99-121 at107.

[7] Brian H Bix, "Kelsen, Hart and Legal Normativity" 34 *Journal for Constitutional Theory and Philosophy of Law* (2018) available at https://doi.org/10.4000/revus.3984.

[8] Felix Frankfurter, "Some Reflections on the Reading of Statutes" 47 *Columbia Law Review* (1947) pp. 527, 538.

[9] Oliver Wendell Holmes, *Collected Legal Papers* (1920) p.207.

[10] 32 US (7 Pet) 243 (1833).

[11] 60 US (19 How) 393 (1857); also *See, The Slaughterhouse Cases* 83 US [16 Wall]36 (1873).

black men were not free citizens of US and hence not entitled to privileges and immunities of US citizens. Infliction of another blow of the textual (plain meaning) approach upon civil liberties took place in the *United States* v. *Cruikshank*,[12] a case decided after the Fourteenth Amendment.Overruling the conviction of defendants who involved in racial violence against the African Americans who participated in election, the Court held that the First and Second Amendment rights were not available for citizens against the States and that the due process and equal protection clauses in the Fourteenth Amendment were available only against the States and not against the private actors. In the *Civil Rights* cases,[13] the Court held the Thirteenth and Fourteenth Amendments did not empower the federal government to enact the provisions of *Civil Rights Act 1875* which outlawed the private actors to racially discriminate in providingaccess to accommodation, public transport and theatres.The majority (8:1) reasoned that individual invasion of individual rights is not the subject matter of the Fourteenth Amendment; that every act of private discrimination did not amount to slavery; and that equality stops favourite treatment to any class. The majority's reasoning was an example of clause-bound strict interpretation. In contrast, Justice Harlan observed in his sole dissent: 'It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.' He referred to the purposes of these amendments to extend liberty and equality to satisfy the goals mentioned in the preamble. He also gathered help from the precedents which encouraged legitimate state actions supporting the spirit of liberty and which recognized public interest involved in the use of property that has consequence upon the community at large. Thus, combining the text with the purpose and structure of the Constitution or with thehistory and contemporary social thoughts is the way shown by Justice Harlan in mellowing down the harsh consequences of clause-bound strict interpretation. This approach was continued in his great dissent in *Plessy* v. *Ferguson*[14] also. In this case while the majority abstained from reading in Fourteenth Amendment an intention to abolish social inequality and colour distinctions, Justice Harlan, in his sole dissent, argued for human concept of

[12] 92 US 542 (1876).

[13] *United States* v. *Stanley*, *United States* v. *Ryan*, *United States* v. *Nichols*, *United States* v. *Singleton*, and *Robinson et ux.* v. *Memphis & Charleston R.R. Co*. 109 US 3 (1883).

[14] 163 US 537 (1896).

equalitywhich was a notion central to republican system.[15] In interpreting a federal law outlawing import of labour for the service in US in the light of equality clause and religious freedom as not prohibiting hiring of any alien for church service in US, the Court in the *Church of the Holy Trinity* case[16] avoided the fallacy of strict interpretation by ruling that a thing which may be within a statute may not be within the spirit of the statute or intention of its makers.This invoked the structural or original intention approach.Subsequently, during the substantive due process approach, hesitation in incorporation of federal bill of rights upon states and approval of anti-sedition law had also used clause-bound literal interpretation of some or other provision of the Constitution.[17] The constitutional developments during 1950-1980 introduced formal equality rule in vital spheres like education by rejecting the separate-but-equal doctrine,[18] expanded the scope of due process protection,[19] interpreted liberty to include privacy and other rights by making use of more than one constitutional principle or value[20] and reviewed the exercise of President's power.[21] The above trajectory of doctrinal development exhibited the harms of clause bound literal interpretation and persuasive suggestion made by the liberal thinking judges to look into the other or entire provisions of the Constitution or into the spirit of the supreme law in order to give a fair interpretation.

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[15] "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colour-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his colour when his civil rights as guaranteed by the supreme law of the land are involved." Per Justice Harlan

[16] *Church of the Holy Trinity* v. *United States* 143 US 457 (1892).

[17] In *Lochner* v. *New York*, 198 US 45 (1905) the glorified position given to freedom of contract and due process protection of employers' property was preference of right to property over liberty and welfare of workers.

[18] *Brown* v. *Board of Education* 98 L Ed US 347; 347 US 483 (1954).

[19] *Mapp*v. *Ohio*, 367 U.S. 643 (1961).

[20] *Griswold* v. *Connecticut*, 389 US 479 (1965); *Roe* v. *Wade*, 410 US 113 (1973).

[21] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (asserting that the enumerated powers should have "the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism").

It is in the light of above constitutional development, more particularly in response to the original intention theory followed in the *Church of Holy Trinity* case,[22] Justice Antony Scalia wrote a scholarly article on textualism.[23] He rejects a narrow understanding of textualism reducing it to "wooden", "unimaginative" and "pedestrian".[24] Textualism is not equivalent to strict constructionism. He said, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[25] A judge shall be exposed to social purposes and the requirements of changing times. He stated, "To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws." The position obtaining here is acceptance of what is called, the "golden rule of interpretation". He gives the example of *Smith* case where the majority upheld conviction of a defendant who had offered to give an unloaded fire-arm in exchange for cocaine on the ground that he had "used a firearm during and in relation to a drug trafficking crime".[26] Justice Scalia dissented to the strict-construction textualism. His partial dissent in *Casey* that omission in the Constitution to explicitly mention specific right to terminate pregnancy gives rise to an inference that there is no such constitutional right is also an example of textualism.[27] John F Manning identifies it with the "basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be)."[28] The shift from 'resistance to legislative history' to supremacy of letter over

[22] *Church of the Holy Trinity* v. *United States* 143 US 457 (1892).

[23] Antonin Scalia, "Common-Law Courts in Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in *A Matter of Interpretation: Federal Courts and the Law* 3, 23 (Amy Gutmann edn., 1997).

[24] *Ibid*, at p.23.

[25] *Ibid*, at p.23.

[26] *Smith* v. *United States*, 508 US 223 (1993).

[27] *Planned Parenthood* v. *Casey*, 505 US 833 (1992); also *see District of Columbia* v. *Heller*, 554 US 570 (2008).

[28] John F Manning, "Textualism and Legislative Intention" 91(2) *Virginia Law Review* (2005) pp.419-450 at 420.

spirit of the law is a development that took place at the end of 20th century. Called as new textualism, it called for lesser reliance on policy arguments and spirit of the law, and laid greater attention on plain words in the Constitution or laws because the letter of the law is product of political compromise.[29]

Walter Murphy and others write, "textualism refers to an insistence on the literal meaning of a provision in the face of contrary claims that the text must mean more or less than it expressly says."[30] Justice Hugo Black chose the path of strict adherence to the text. The words "Congress shall make no law…" under the First Amendment meant according to Justice Black total prohibition of all laws abridging the freedom of speech of any kind in any circumstance.[31] This gave enhanced protection to freedom of speech. In *Griswold*, he wrote dissent against inclusion of right to use contraceptives as a part of liberty and argued that such change in the Constitution should be through the process of amendment as contemplated in the Constitution.[32] Thus, textualism may work as a double edged sword insofar as any concept is concerned depending upon the question which aspect, i.e., libertarian or regulatory. Textualists like Judge Robert Bork have approached the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", as not a substantive source of rights but only a 'blot of ink'.[33] But purposive constitutional interpretation by invoking the spirit of the Constitution and identifying its purpose, marched ahead in identifying the undisclosed premises of the Constitution and emanations from enumerated rights. Structuralism as an important method of interpretation addressed the issues of division and separation of powers, plurality of sources of rights and the need to read the Constitution holistically.[34] For both the

[29] *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000); also *see* for discussion, John F Manning, "Federalism and Generality Problem in Constitutional Interpretation" 122 *Harvard Law Review* (2009)pp. 2003-2067 at 2014.

[30] Walter Murphy, James E Fleming, Sotirious A Barber and Stephen Macedo, *American Constitutional Interpretation* (Foundation Press, New York, 3rdedn., 2003) p.391.

[31] *Adamson* v. *California* 332 US 46 (1947); *Dennis* v. *US* 341 US 494 (1951).

[32] *Griswold* v. *Connecticut*, 381 US 479 (1965).

[33] Robert Bork's testimony before Senate in 1987. *See* Murphy, *et al*., p. 392.

[34] According to Laurence Tribe, "To understand the Constitution as a legal text, it is essential to recognize the sort of text it is: a constitutive text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions and practices, at once legal and political, and to define the rules governing those institutions and practices." Laurence Tribe, "Taking Text and Structure Seriously: Taking Free-Form Method in Constitutional Interpretation" 108 (6) *Harvard Law Review* (1995) 1221 at 1235.

approaches, text of the Constitution supplied the inputs and insights. Textualism did not isolate the text from the surrounding context but cared only about "objective" meaning of the text.[35] Thus, literal textualismin addition to its own method, collaborated with progressivism and structuralism, and there emerged three strands of textualism: (i) plain meaning textualism but not necessarily clause-bound textualism or strict construction textualism; (ii) purposive textualism; and (iii) structural textualism. Further, scholarly writings have identified three sets of antinomies between which the discussion veers: intentionalism and textualism, formalism and realism, and formalistic textualism and flexible textualism. Before plunging into discussion of these facets and aspects, the theoretical orientation in India and Canada may be analysed.

The Indian constitutional jurisprudence theorized textualism in its own way in the light of actual experience. The major stream of judicial reasoning in *A K Gopalan* was clause-bound textualism and exclusion of the Article 19-based arguments in interpreting 'procedure established by law' under Article 21. But the case is not an example of pure theory of literal and strict constructionism. The relationship between Article 21 and 22 was used to nullify legislative effort of keeping the administrative information on preventive detention secret, and thus make the right of making representation effective. It also required the law under Article 21 has to be valid law in the light of Article 13. But it did not go beyond that to attract discussion on the effect of law on all relevant fundamental rights. Clause-bound textualism prevailed in interpreting provisions on property right by not including '*ryotwari*' within the ambit of 'estate'. But property right jurisprudence grew by increased application of structuralism (the triangle of Article 14, 19 and 31) and ignoring both purposivism and intentionalism. The worst example of clause-bound strict textualism can be found in the *Habeas Corpus* case, where the Supreme Court interpreted suspension of fundamental rights through presidential order during emergency under Article 359 as excluding the jurisdiction of High Courts under Article 226 to review detention and provide remedy in case of arbitrary detention. The sole dissenting judgment by Justice H R Khanna harped on integrated reading of rule of law, spirit of the Constitution and application of international human rights in addition to the long-followed precedents about High Courts' jurisdiction. In the post-emergency

[35] Caleb Nelsen, "What is Textualism?"91(2) *Virginia Law Review* (2005) 347 at 348.

era, the Judiciary employed structural textualism in *Maneka Gandhi* case with marvellous result.[36] In *Francis Coralie Mullin* and its progeny, additional tool of purposivism was employed by probing into the spirit of the Constitution.[37] While strict textualism relating to the Directive Principles of State Policy had obstructed the social progress, overcoming of it through structuralism yielded appreciable crop of positive rights. Thus, shift from clause-bound strict constructionism and embracing of other shades of textualism is the major development. In *Peerless General Finance and Investment* case, Justice Chinnappa Reddy observed, "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."[38] Context is a wide concept to include background, social purpose, instant necessity and implications of other provisions of the Constitution among which the concerned clause is couched. The modified version of this approach in recent times links purpose also so that the trio is text-context-object.

Canada has mixed experience about application of textual approach to constitutional interpretation. A brief reference in the Preamble to form "a Constitution similar in Principle to the United Kingdom" was sufficient for the Judiciary to import whole idea of implied Bill of Rights to the Canadian soil.[39] But this involved combining the text with purpose and progressivism. In contrast, literal interpretation of Section 132 of the *Constitution Act, 1867* in the *Labour Convention* case[40] had denied legislative power of the federal legislature to implement treaties in case the legislative power falls in the provincial list. The Privy Council's decision made the Federal government to seek the cooperation of provinces to implement the treaties in such circumstances. In order to obviate from the difficulty federal

[36] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

[37] *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* AIR 1981 SC 746; also *see infra* Section III. B and C.

[38] *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd*. (1987) 1 SCC 424: (AIR 1987 SC 1023).

[39] *A G Canada and Dupond* v. *Montreal* [1978] 2 SCR 770; P W Hogg, *Canadian Constitutional Law* vol. II (Thomson Reuters, 5thedn., 2017)pp. 34-12.

[40] *A G Canada* v. *A G Ontario* (Labour Convention) 1937 AC 326.

government in *Crown Zellerbach*[41] based its legislative power of controlling marine pollution under national concern branch of 'peace order and good governance' clause of Section 91 instead of pressing upon Section 132. The reliance on structural interpretation to overcome the effect of literal interpretation can be found here. Canada has used progressive rule of interpretation with a metaphor of 'living tree' as a major tool of constitutional construction with a laudable result.[42] Further, purposive interpretation has been fruitful in the charter jurisprudence. Thus, in Canada too there is increased inclination to use the constitutional text along with the factors relevant for purposive and structural interpretation.

The impossibility of clause-bound interpretation is a matter that demands pragmatic consideration and inevitably calls for an application of non-literal rules in addition to plain meaning of words. Such non-literal rules are not alien to the canons of interpretation evolved in traditional domain of literal interpretation itself. When we examine the following categories of canons and maxims of textual interpretation[43] this point becomes clearer.

Category-A

(1) Plain meaning of words in the Constitution shall be followed when the language is clear and there is no scope for ambiguity.
(2) Words in the Constitution must be understood in their natural or popular sense.
(3) Technical terms in the Constitution shall be understood in its technical sense.
(4) The maxim of '*Expressio unius est exclusion alterius*' is applicable in constitutional interpretation in suitable circumstances.

Category-B

(5) In order to resolve conflicts between two or more words or different provisions, departure from obvious meaning is permissible if it is essential to avoid monstrous absurdity.

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[41] *R* v. *Crown Zellerbach* [1988] 1 SCR 401.

[42] *Edwards* v. *A G Canada* [1930] AC 114.

[43] For discussion of these canons, although not in the same order, *see* Durga Das Basu, *Commentaries on the Constitution of India*, Justice S S Subramani,(Ed.) (Lexis Nexis, New Delhi, 9thedn., 2014) pp.238-275; Chester James Antieu, *Constitutional Construction* (Oceana Publications, Inc., New York, 1982) pp.11-30.

(6) Seemingly conflicting provisions are to be harmonized to give effect to all provisions.

(7) Every word, phrase, clause and sentence shall be given due effect. The Constitutional provisions and amendments shall be read as a whole, and not in isolation.

(8) Ordinarily, specific provisions prevail over general provisions. Provisions later in time prevail over the earlier conflicting ones.

(9) Words in the Constitution shall be interpreted with reference to associated words (*Noscitur a sociis*).

(10) Meaning of general words is limited by preceding specific illustrations (*Ejusdem generis*).

Category-C

(11) Constitution should be read in a sense most obvious to the common understanding at the time of its adoption.

(12) Reading the Constitution according to the contemporary exposition by judges at the time of its making is the best and strongest method. (*Contemporanea exposition est optima et fortissima in lege*)

Category - D

(13) The Constitution shall be reasonably construed so as to avoid absurd and unjust consequence.

(14) Interpretation of the Constitution shall not be too literal, and a little play at joints makes machine work.

Category – E

(15) When the context and purpose of using same words in different parts are different, same meaning shall not be attributed.

(16) It is by keeping in mind the general purpose of the Constitution that particular provisions are to be interpreted.

Canons in category -A suggest linguistic coherence and adherence to certainty in order to promote clarity and satisfaction of legitimate expectations. Canons in

Category-B imply plurality of principles, contexts and norms and call for structural interpretation.The Category C canons insist on looking at the original intention. The Category-D canons aim at progressivism. Canons in Category-E direct towards upholding the spirit and purpose of the Constitution. Thus, these canons and maxims defy the clause-bound strict construction textualism as the exclusive method, and propose to employ purposive, progressive and structural textualisms. The contribution of these canons to constitutional jurisprudence will be briefly assessed in Section IV *infra*.

It is now time to shed light on justifications for, and criticisms on textualism. First, its features such as simplicity and determinacy are points of advantage.[44] These give certainty of meaning and predictability of its application. As Neil Gorsuch wrote, "Textualism offers a known and knowable methodology for judges to determine impartially . . . what the law is."[45] Secondly, it answers the question of legitimacy of judicial review by confining its role to the bare minimum of interpreting popularly chosen words of the Constitution in a popular sense only. In contrast, judiciary acting on the basis of new social or economic theory or its own philosophy is characterised as slipping to undemocratic move.[46] Thirdly, ascertaining the original intention becomes fallacious exercise as the views expressed are individual views and collective voice cannot be made out.The legislative process, because of lack of adequate discussion on the floor of the House, hasty passing of Bills, callous approach at committee stage and inadequate interaction with public at large, has failed to keep intact the chain of law-society interaction.[47] Textualism avoids such misleading discourse.

Criticisms against textualism are several. First, its claim of simplicity and determinacy is doubtful as both the majority and dissenting judges put forward textualist arguments in support of their rival propositions. In *Bostock,* the majority

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[44] Walter Murphy, James E Fleming, Sotirious A Barber and Stephen Macedo, American *Constitutional Interpretation* (Foundation Press, New York, 3rdedn., 2003) p.391.

[45] Neil Gorsuch, *Republic, If You Can Keep It* (2019) pp.131-2.

[46] Justice Oliver Wendell Holmesdissent in *Lochner* v. *New York* 198 US 45 (1905) considered that constitutional interpretation shall not advance any economic or social theory as the Constitution is not professing it.

[47] Walter Murphy,*et al.*, *op cit*, 404.

of the US Supreme Court relied on textualism (formalistic) to conclude that discrimination on ground of sexual orientation is also sex discrimination and comes under statutory prohibition.[48] The dissenting judges used flexible textualism to hold that the law is not applicable to discrimination on account of sexual orientation because 'sex' is not equivalent to 'sexual orientation' or employed purposive interpretation. Second, textualism can be criticised for its conservative outlook and obstruction to progressive development of the Constitution.[49] Thirdly, it fails to consider the plurality of factors whichcompel an interpreter to omit monolithic instrument approach and consider the structure of the whole system comprehended by the Constitution. Emergence of purposivism and structuralism is in response to the failure of strict literal construction in protecting human rights and welfare. Further, it can be criticised for its formalistic character. But formalism is not *per se* bad as it has potentiality of projecting procedural fairness.

The above pros and cons of textualism have nudged for appropriate combination of textualism with purposive, progressive and structural interpretations. These aspects can be discussed in detail in Part III.

III. Focus on the Facets of Textualism

A. Plain meaning textualism

Traditionally, the central idea of textualism is that where the language of the Constitution is clear and unambiguous, plain meaning shall be attributed to the words employed in the Constitution.[50] As Jaimini says in his *Mimamsa*, "when the language of a text is clear and unequivocal and admitted only one meaning then such language is considered to be declaring of the intention of the law givers and

[48] *Bostock* v. *Clayton County* 140 S Ct. 1731 (2020).

[49] The two Indian cases much criticized for this reason are *A K Goplan* v. *State of Madras*, AIR 1950 SC 27; *ADM Jabalpur* v. *Shivkanth Shukla*, AIR 1976 SC 1207.

[50] *Board of County Commissioners* v. *Rollins* 130 US 662 (1889); *Reid* v. *Covert* 354 US 1 (1957); *Jaishri Laxmanrao Patil* v. *State of Maharashtra* CA No. 3123 of 2020 judgment dated 5, May, 2021 majority view.

should be accepted as decisive."[51] This begs the crucial and controversial question when is a confusion really an ambiguity.Since the Constitution is enacted by the whole body of people or made in the name of "We the People" and for their welfare, and their constant compliance is sought, the simplest meaning understandable to people shall be brought out by the courts to make them binding upon the people.[52] Because of the special status of the Constitution that it is the supreme law of the land, an embodiment of generally accepted values, "a permanent and paramount law settled by the deliberate wisdom of the nation"[53] and that it governs every day affair of people and polity, the ordinary principles of statutory interpretation will have to be modified to accommodate flexibility.[54] For example, when the Constitution grants power on an authority with broad outline through general clauses and limits its extent, constitutional construction shall fill in the details.[55] Such a leeway may not be forthcoming in interpretation of ordinary statutes. But this does not authorise judges to "correct the supposed errors or supply the omissions" as Gwyer CJ viewed.[56] Proceeding on these lines Chief Justice Kania observed in *A K Gopalan*,

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[51] Cited by Paras Diwan, "Introduction" P. N. Sen, *General Principles of Hindu Jurisprudence* (Tagore Law Lectures pp.1891-92, Allahabad Law Agency) p.23. This can be illustrated by the Garhapatyanyaya. There is the vedic verse: "*Aindryagarhapatyamupatishthate*", which means "By the Mantra addressed to Indra establish the household fire." This verse can possibly have several meanings *viz.* (1) worship Indra (2) worship *Garhapatya* (the household fire) (3) worship both, or (4) worship either. However, since the word '*Garhapatyam*' is in the objective case, the verse has only one meaning, that is, 'worship Garhapatya'. The word '*Aindrya*' means 'by Indra', and hence the verse means that by verses dedicated to Indraone should worship Garhapatya. The word '*Aindrya*' in this verse is a Linga, (in Mimansa Linga means the suggestive power of a word), while the words '*GarhapatyamUpatishthate*' are the *Shruti*. According to the Mimansa principles, the Shruti (literal meaning) will prevail over the Linga (suggestive power). *See* K L Sarkar, *Mimansa Rules of Interpretation* (Tagore Law Lectures, Calcutta University, 1909) *B Premanand* v. *Mohan Koikal* 2011 AIR SCW 2546 para 36-37.

[52] Justice Lamar in *Board of County Commissioners* v. *Rollins* 130 US 662 (1889); in *United States* v. *Sprague* 282 US 716 (1931) Justice Roberts stated, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

[53] Chief Justice Kania in *A K Gopalan* v. *State of Madras*, AIR 1950 SC 27 para 26.

[54] Durga Das Basu, *Limited Government and Judicial Review*, (S.C. Sarkar& Sons Pvt. Ltd. 1972).

[55] Chief Justice Hughes in *Home Building & Loans Association* v. *Blaisdell* 290 US 398 (1933).

[56] *In Re The Central Provisions and Berar Act* XIV of 1938, 1939 F.C. R. 18 at p. 37. (A.I.R. (26) 1936 F.C.R.).

> There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion, it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a statute on that ground alone.[57]

Another aspect of plain meaning textualism emphasised in *A K Gopalan* is to give effect to every word used in a clause. Kania CJ observed, "Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning."[58]According to him, the use of words "throughout the territory of India" under Article 19 (d) had naturally meant inter-state and intra-state movements, which was made further clear by mentioning the grounds of restrictions like interest of general public (to deal with circumstances like epidemics, riots, etc,) and Scheduled Tribes. Hence, it did not attract the situation of a person in detention.

According to the Court, use of words "procedure established by law", unlike the expression "due process of law" had set specific standard referring to legislative prescription and could not connote vague notions of natural justice as the latter do not establish the legal procedure. About simple grammatical meaning to be attributed to any clause we find an example in *A K Gopalan*, the Court's treatment of Article 22 (7) (a) which refers to Parliament's power to prescribe by law "the circumstances under which, and the class or classes of cases in which, a person may be detained beyond three months…". According to Kania CJ, "The use of the word "which" twice in the first part of the sub-clause, read with the comma put after each, shows that the legislature wanted these to be read as disjunctive and

[57]*A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 Para 26.

[58]*Ibid*, Para 8.

not conjunctive."[59] In contrast, Justice Fazl Ali in dissent, looked into the possible consequence of detention beyond three months and dispensing with the scrutiny by Advisory Board, and held that the Parliament was expected to act in a responsible manner and not mechanically, and hence, the word 'and' is to be understood in 'and' sense but not in 'or' sense.[60] The antinomy between textualism and intentionalism can be located in the standpoints of Kania CJ and Justice Fazl Ali with opposite result, and no attempt was made to resolve it by recourse to CAD, legislative history or purposive interpretation. Justice Fazl Ali also held that 'may' is to be understood in 'shall' sense because of Parliament's responsibility to deal with extraordinary circumstance.

The inherent limitations of the plain meaning textualism as applied by the majority in *A K Gopalan* were that it did not give attention to other provisions like Article 19 and 14 at least in constructing procedural fairness nor it did undertake purpose related inquiry. But once it engaged in purpose scrutiny of right to make representation against detention and examined under that light the statutory prohibition of disclosures of grounds by the detaining authority, it could nullify such law.It is the development on lines of structural textualism and purposive structuralism that brought revolutionary results in *Maneka* and other cases.[61] Justice B K Mukherjea was aware of structuralism as evident from his observation: "It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers."[62] But he found Article 19 and 21 dealing with different aspects or phases of civil liberty which did not pose the problem of mutual repugnancy.

Plain meaning textualism was invoked in the *Habeas Corpus* case[63] to counter the argument that suspension of right to move any court for the enforcementof fundamental right through Presidential order issued under Article 359 (1) did not

[59]*Ibid*, Para 34.

[60] *Ibid*, Para 84.

[61]*Maneka Gandhi* v. *Union of India* AIR 1978 SC 597; *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* AIR 1981 SC 746.

[62]*A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 para 167-168.

[63]*A D M Jabalpur* v. *ShivkanthShukla* AIR 1976 SC 1207.

apply to right to life and personal liberty because it is alternatively claimable on the basis of common law right which is anterior to the Constitution or under rule of law which excluded *malafide* exercise of power or through application of international human rights or at least the law of preventive detention. The majority upheld the plain meaning argument and ruled that Article 21 is the sole repository of right to life and personal liberty and that suspension of its enforcement came in the way of writ jurisdiction under Article 226 not only for the purpose of enforcement of fundamental right but also for any other purpose. Chief Justice A N Ray observed, "The expression "for any other purpose" in Article 226 means for any purpose other than the enforcement of fundamental rights."[64] Similar view was expressed by Justice P N Bhagwati.[65] In contrast, the sole dissenting judgment of Justice H R Khanna rejected the literal interpretation approach and based his reasoning in the concepts of rule of law, human rights, liberty anterior to law and the spirit of constitutional democracy. Thus, the dichotomy between textualism and intentionalism continued.

The notoriety of the above two cases brought out the disadvantages of plain meaning textualism as the sole method of constitutional interpretation. Subsequently, using it as one of the alternatives, applying it when it is suitable in a specific circumstance, and reducing its rigorous consequence by employing other methods is a strategy which brought a comfortable position in constitutional development. A couple of judgments that illustrate plain meaning textualism's appropriate application can be considered in this regard.

The question in *M. T. Khan*[66] was whether Governor of a State can appoint more than one Advocate General under Article 165, which says, "The Governor of each State shall appoint a person who is qualified to be appointed as a Judge of a High Court to be Advocate General for the State." The appointment of two Additional

[64]*Ibid*, para 101.

[65]*Ibid*. Justice P N Bhagwati observed, "If we look at the substance of the matter and analyse what is it exactly that the High Court is invited to do, it will be clear that what the applicant wants the High Court to do is to examine whether the executive has carried out the obligation imposed upon it by Article 21 not to deprive a person of his personal liberty except according to the procedure prescribed by law and if it finds that the executive has failed to comply with this obligation, then to strike down the order of detention."Para 550.

[66]*M T Khan* v. *State of Andhra Pradesh* 2004 AIR SCW 504.

Advocate Generals had been upheld by the High Court on the ground that as per Section 13 of the *General Clauses Act*, which shall be applicable for the interpretation of the Constitution as per Article 367 unless the context otherwise requires, words in the singular shall include plural. Further, the practice of appointing Additional Advocate Generals in other States, the increased workload and the abstinence on the part of Additional Advocate Generals from exercising constitutional or statutory functions were also cited as the additional reasons in support of the High Court judgment. The Supreme Court disagreed with the High Court about application of the *General Clauses Act*, as the context required otherwise. It held that only the Advocate General, and not the Additional Advocate General, could perform constitutional functions like addressing the legislature under Article 177 or statutory functions under CPC, CrPC and the *Advocates Act*.[67] The Court observed,

> It is a well-settled principle of law that the provisions of the Constitution shall be construed having regard to the expressions used therein. The question of interpretation of a constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well capable of being given more than one meaning. Literal interpretation of the Constitution must be resorted to. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the constitutional scheme, the question of application of the principles of interpretation of a statute would not arise only.[68]

In *Kuldip Nayar* case,[69]a question was raised whether the election of MPs from State Legislative Assemblies to the Council of States under Article 80 (4)

[67] *Ibid*, para 10: "The constitutional scheme, thus, is that when a constitutional post is required to be filled up by a person having the qualification specified therefor, he would alone perform the duties and functions, be it constitutional or statutory, attached to the said office. The Constitution does not envisage that such functions be performed by more than one person. The reason therefor is obvious. If more than one person is appointed to discharge the constitutional functions as also the statutory functions, different Advocate-Generals may act differently resulting in a chaos." Per Justice V N Khare.

[68] *Ibid*, para 13.

[69] *Kuldip Nayar* v. *Union of India*, 2004 AIR SCW 504; after quoting from *G. Narayanaswami* v. *G. Panneerselvam* this Court held that "… It may be desirable to give a broad and generous construction to the constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results." para 201.

was required to be conducted by secret ballot. Noticing that there was no express requirement to that effect and that in the elections to the positions of President and Vice President under Articles 55 (1) and 66 (3) there were express requirements of secret ballot, the Court held that the requirement of secret ballot cannot be read into a clause when it was not there.[70]

In the matter of consultation of state legislatures on the issue of territorial formation or reorganization of states under Article 3, in *Babulal Parate*[71] and *Pradeep Chaudhary*,[72] plain meaning textualism has obstructed advancement in effective people's participation in a crucial issue relating to federalism. The repeated practices of formalistic consultation of state legislatures but ultimate parliamentary decisions irrespective of views expressed by the members in the state legislature established a kind of convention that consultation is not concurrence. Although this gives justification for a result different from the Court's approach about 'consultation' requiring consent in the matter of judicial appointment,[73] there is no reason why structural textualism could not be applied.[74] The historical reasons for Parliament's paramount powers in the matter of territorial formulation or reorganization of states

[70] *Ibid*. "It follows that for 'secret ballot' to be the norm, it must be expressly so provided. To read into Article 80(4) the requirement of a secret ballot would be to read the words "and the voting at such election shall be by secret ballot" into the provision. To do so would be against every principle of Constitutional and statutory construction. This involved application of the maxim '*expressio unius est exclusion alterius'*.

[71] *Babulal Parate* v. *State of Bombay* (1960) 1 SCR 605. "The constituent Assembly of India, deriving its power from the sovereign people, was unfettered by any previous commitment in evolving a constitutional pattern suitable to the genius and requirements of the Indian people as a whole. Unlike some other federal legislature, Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the Legislature or Legislatures of the States concerned having only the right to an expression of views on the proposals."

[72] *Pradeep Chaudhary* v. *Union of India*, (2009) 12 SCC 248. "`Consultation' in a case of this nature would not mean concurrence. It only means to ask or seek for the views of a person on any given subject. The views of the State Legislature certainly would be taken into consideration but the same would not mean that the Parliament would be bound thereby." Per S B Sinha J.

[73] *Supreme Court Advocates on Record Association* v. *Union of India*, 2015 AIR SCW 5457; *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268; *Special Reference No.1 of 1998, Re.* (1998) 7 SCC 739.

[74] ChintanChandrachud, "Constitutional Interpretation" in Sujith Choudhry, Madhav Khosla and Pratap Bhanu Mehta (Ed.) *Oxford Handbook of Indian Constitutional Law* (Oxford University Press, New Delhi, 2016) pp. 73-93 at 90-91.

do not continue at present. Further, purposive textualism also asks for determining such issues by underscoring the popular base for federalism.

In *Ashok Tanwar*,[75] plain meaning textualism was applied to determine that under Article 217 the requirement of consultation in the appointment of a judge did not include the appointment of a presiding officer of State Consumer Disputes Redressing Commission and that the requirement of consultation under Section 16 of the *Consumer Protection Act* did not carry the same meaning of consultation under Article 217. The Court also said that the power of Acting Chief Justice under Article 223 included the power of involving in consultation in the appointment under Section 16.

Plain meaning textualism was crucial in *A. S. Vimalakshi* case[76] in understanding the extent of Governor's power or special responsibility under Article 371-J (1) (c) for equitable opportunities and facilities for the people belonging to the said region, in matters of public employment, education and vocational training, subject to the requirements of the State as a whole.Here, the claim of 8 percent reservation for Hyderabad-Karnataka (HK) people in the opportunities of employment and education in the State as a whole.As per Article 371 -J (2) (b) the order passed under Article 371-J (1) (c) may specifically provide for identification of posts or classes of posts under the State Government and in any body or organisation under the control of the State Government in the Hyderabad-Karnataka (HK) region and reservation of a proportion of such posts for persons who belong to that region by birth or by domicile and for appointment thereto by direct recruitment or by promotion or in any other manner as may be specified in the order. This is a particularized form of benefit by creating local cadres within HK region and making proportionate number of employments available to people who are born or having domicile in the region. The question whether Article 371-J (1) (c) is controlled byArticle 371 -J (2) (b) came up before the Karnataka High Court. The Court held that it was not so controlled because the latter is illustrative of the former. The former stated the general policy while the latter particularised a specific pattern. Hence, it could not control the general norm.The policy to provide reservation to

[75]*Ashok Tanwar* v. *State of Himachal Pradesh*, AIR 2005 SC 614.

[76]*A. S. Vimalakshi* v. *State of Karnataka*, AIR Online 2019 Kar 1201.

HK people in posts outside HK can coexist with the policy of local cadre posts in HK and filling of those posts only from the locals. A plain meaning textualism helped in unfolding the implications of Article 371-J.

In the*Maratha reservation* case[77] also, plain meaning textualism played a significant role. The case involved interpretation of Article 342-A (1) and (2) read with Article 366 (26C) which were inserted by the *Constitution (102nd Amendment) Act, 2016*. In order to fall in line with the patterns of National Commission for Scheduled Castes and National Commission for Scheduled Tribes, for meeting the requirement under Article 340 (1) and the observations in *Indra Sawhney* case, the amendment inserted Article 338-B for constituting the National Commission for Backward Classes (NCBC) to investigate and monitor all matters relating to the safeguard of the socially and educationally backward classes and making various recommendations for their protection.Under Article 348-A (6) and (7) the President shall cause the reports submitted by the NCBC laid before the Parliament if the recommendation is relating to the Union, and before the concerned State Legislature if the recommendation is relating to a State. Under Article 342-A (1) the President is vested with the power of bringing public notification specifying socially and educationally backward classes in relation to any State or Union Territory after consulting with the Governor of the concerned State. Parliament has the power under Article 342-A (2) to include or exclude any socially and educationally backward class from this Central List. Article 366 (26C) defines socially and educationally backward classes as are deemed so under Article 342-A for the purpose of this Constitution.The State of Maharashtra enacted a law recognising Marathas as backward class on the basis of State Backward Class Commission report and provided for reservation in educational institutions and public employment far exceeding 50 per cent limit prescribed in *Indra Sawhney* case. The Bombay High Court upheld the constitutionality of the Maharashtra law by reasoning that the State Government's power under Articles 15 (4) and 16 (4) to provide for special provision and reservation was not disturbed by Article 342-A and Art. 366 (26C) and that the extent of reservation exceeding 50 per cent was falling within the concession for extraordinary circumstance contemplated under *Indra Sawhney*

[77] *Jaishri Laxmanrao Patil* v. *State of Maharashtra* CA No. 3123 of 2020 judgment dated 5th May, 2021.

judgment. The Supreme Court by 3: 2 majority overruled the High Court judgment on both the points. The majority judgment rendered by Justice Ravindra Bhat, concurred by Justices L NageswaraRao and Hemant Gupta reasoned that the primary rule of interpretation is following a plain meaning of the clause if there is no ambiguity, and that in the instant case the Central List of SEBC under Article 342-A (1) read with Article 366 (26C) made it final and applicable upon the States, and the States had no power to bring a separate list. In *parimateria*, it was similar to the language used in Articles 338 and 338-A which provided for the President's power to notify the lists of SC and ST and as per judicial decision[78] States have no power to alter such lists. Before passing the 102nd Amendment, the matter of State losing its power had been discussed in the Parliamentary Committee where the dissenting opinion of the opposition party members had raised objection and the ruling party members assured that State's power is not lost. The proposed clauses (4) and (5) which intended to recognise powers of States to make list were rejected by the Committee. The legislative history did not convince the majority to override the clear provision in Article 342-A which declares that the Central List, which is prepared after due consultation with states, could be altered only by the Parliament. Any contrary view would be going against well settled meaning of similar provision governing SC and ST. The exhaustive definition of SEBC in Article 366 (26C) also supported literal interpretation. Justice Ravindra Bhat observed, "There have to be strong, compelling reasons for this Court to depart from the interpretation which has been hitherto placed on the definition clause."[79] Although states which had enjoyed the power for a long time had lost their powers under Articles 15 (4) and 16 (4) after the 102nd amendment, it became a logical consequence of plain meaning that could be attributed to Article 342-A.[80] The majority did not agree with an argument that Central List was only for the purpose of central services in view of

[78] *E V Chinnaiah* v. *State of Andhra Pradesh*, (2005) SCC 394.

[79] *Jaishri Laxmanrao Patil* v. *State of Maharashtra* CA No. 3123 of 2020, para 161.

[80] *Ibid*, "By introduction of Articles 366 (26C) and 342A through the 102nd Constitution of India, the President alone, to the exclusion of all other authorities, is empowered to identify SEBCs and include them in a list to be published under Article 342A (1), which shall be deemed to include SEBCs in relation to each state and union territory for the purposes of the Constitution. The states can, through their existing mechanisms, or even statutory commissions, only make suggestions to the President or the Commission under Article 338B, for inclusion, exclusion or modification of castes or communities, in the list to be published under Article 342A (1)." Per Justice RavindraBhat.

the clear language of Article 342-A. Justice Ravindra Bhat observed, "Such an interpretation with respect, is strained; it deprives plain and grammatical meaning to the provisions introduced by the 102nd Amendment, has the effect of tying the hands of the Central Government, and at the same time, grants the states unlimited latitude in the manner of inclusion of any class of citizens as backward."[81]

In contrast, the minority view expressed by Justice Ashok Bhushan and Abdul Nazeer tried to base their argument on legislative history, purposive interpretation and structuralism. While legislative history did not give clear indication in favour of retention of state power, the other two arguments had some strength, albeit not convincing. The purpose of promoting social justice through local participation would not like a dictation from the above. But in view of participation by the state legislature at the time of scrutiny and approval of the report of the NCBC, this argument does not carry any weight. The next argument that plurality of power holders in a federal structure in decision making process in the light of Article 12 and a long practice and political reality in exercise of power underlying Articles 15 (4) 15 (5) and 16 (4) and the idea of collaborative federalism as developed in *NCT* case suggest for structural interpretation permitting sharing of powers.But this argument also fades away in front of unambiguous scheme of Article 342-A. Justice Nageswara Rao rejects these arguments at the threshold by stating, "I am convinced that there is no reason to depart from the text which is in clear terms and rely upon the legislative history to construe Article 342 A contrary to the language."[82] In the name of purposive interpretation an interpreter has no justification in using the words in the Constitution as clay for moulding according to his whims and fancies, he said citing from Aharon Barak.[83]

B. Purposive Textualism

Purpose is an important aspect of context, expression of a goal, and is the reason that drives a principle into functioning.[84] While interpretation means bringing

[81] *Ibid*, Para 149.

[82] *Ibid*, Para 16.

[83] *Ibid*, Para 7.

[84] For a discussion on purposive interpretation, subjective, objective and ultimate purpose *see* Aharon Barak, *Purposive Interpretation in Law* (Tr. Sari Bashi, Princeton University Press, 2005, Universal Law Publishing Co, 2007) pp.85-88.

out the intention of particular legal instrument, intention connotes both purpose and meaning.[85] Thus, meaning of a word, clause or provision is combined with the purpose with which it is used. Incongruence of meaning with the purpose results in absurdity. One of the canons of textual interpretation is that an unreasonable interpretation which produces absurd and unjust consequences shall be avoided. Justice Story both in his judgment and book emphasised on reasonable interpretation which does not strain words beyond their natural sense and avoids undue restriction or enlargement of meaning.[86] Justice O W Holmes was also against that interpretation which is too literal and disallows even a little play in joints that may bring machinery of government into halt.[87] Such an approach requires due consideration of purpose.

In a constitution that aims at social transformation with explicit commitment to justice, human rights, welfare and multiculturalism, the sources that guide the purpose are many. Subjective purpose visible in the CAD, history or ethos is not a safe and clear guide because of the multitude views emerging from different sources. In contrast, objective purpose connotes the interests, goals and values which the constitutional text intends to realise. Value orientation in the Constitution is the consequence of purposive discourse. Numerous constitutional jurists– Ronald Dworkin, Peter Hogg, Laurence Tribe, Aharon Barak, Story, H M Seervai, Durga Das Basu, etc - have emphasised on relying upon the text of the Constitution either as the starting point or major plank of reasoning in identifying the purpose of words and individual clauses used in the Constitution.[88] Judges who declined to treat the

[85] Justice Jagannadha Rao in 183rd *Law Commission Report*; also *see* Justice L. Nageswara Rao in *Jaishri Laxmanrao* v. *Chief Minister,* para 10.

[86] *Martin* v. *Hunter's Lessee* 14 US (1 Wheat) 304 (1816); Joseph Story, *Commentaries on the Constitution of the United States* (1st edn., 1833) p. 404.

[87] *Bain Peanut co* v. *Pinson* 282 US 499 (1930).

[88] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) p.291; Peter W Hogg, *Constitutional Law of Canada* vol. II (Thomson Reuters, 5th edn., 2017) pp. 36-30; Laurence Tribe, *American Constitutional Law* vol. I (Foundation Press, New York, 2000) pp.32-33; Aharon Barak, *Purposive Interpretation in Law* (Tr. Sari Bashi, Princeton University Press, 2005, Universal Law Publishing Co, 2007) p. 207; Joseph Story, *Commentaries on the Constitution of the United States* (1st edn., 1833) p. 404; H. M. Seervai, *Constitutional Law of India* vol. I (Universal Law Publishing Co, 4th edn., 1997) pp. 172-173: Durga Das Basu, *Commentary on the Constitution of India* vol. I, S.S.Subramani (Ed.) (Lexis Nexis, New Delhi, 9th edn., 2014 rept. 2020) pp. 252-3.

Constitution as a 'mathematical formula' but recognised it as a living institution, and gathered support from history and experiences of life, concentrated on textual base of purpose.[89] The ultimate purpose that balances between these two approaches is also not oblivious to purpose. This answers the critical objection that literal meaning of the words does not measure the purpose or scope of its provisions. Between textualism and purposivism the relation is one of mutual support. The Courts have searched for purpose within the text of the Constitution for the sake authentic and stable guidance. As can be seen from the following illustrative cases, this approach has yielded rich constitutional jurisprudence of reinforcing basic constitutional values, shaping of welfare rights, unenumerated rights, representation-reinforcing principles and giving respectable status to the Directive Principles of State Policy.

In *Kesavananda*,[90] the majority judges who interpreted the power to "amend" "any provisions of this Constitution" as not including the power to abrogate or destroy any basic structure of the Constitution arrived at that conclusion by resort to purposive interpretation. After discussing the intention of the constitution makers to reconcile the urge for change and need for continuity, the views of political philosophers about desirability of retaining ideal features and the possible consequence of abuse of power, Justice H R Khanna observed, "The words 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that Article, repeal the existing Constitution and replace it by a new Constitution."[91] Justices K S Hegde and Mukherjea focused on the indispensable character of Part III and Part IV for ushering in social transformation, gathered from the Preamble the basic objectives, referred to the foundation of Constitution in social philosophy and justified limited meaning of the terms amend and amendment.[92] After discussing the permanent features of federalism in other jurisdictions and their parallels in India

[89] Justice O. W. Holmes in *Gompers* v. *United States* 233 US 604 (1914).

[90] *Kesavananda* v. *State of Kerala* AIR 1973 SC 1461.

[91] *Ibid*, para 1438.

[92] *Ibid*, para 662-668.

and by treating the objectives in the Preamble as basic structure, Chief Justice S M Sikri concluded, "the expression 'amendment of this Constitution' in Art. 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest." Justices Shelat and Grover made use of the text of Article 368 (2) proviso to point out its inadequacy in protecting fundamental rights and enforcing directive principles and pointed out the need for basic structure doctrine.[93] Justice K K Mathew traced the purpose of law and state as discussed in legal philosophy and drew support for non-abrogation through constitutional amendment in the language of Article 368.[94] Once the doctrine of basic structure was built on the basis of broad purpose of the Constitution, using this doctrine against textual scheme of Clauses (4) and (5) of Article 368 inserted by 42nd Amendment was a grand judicial action in *Minerva Mills* case. Clause (5) had the potentiality of demolishing the values enshrined in the Preamble. Categorically reasoning that after *Kesavananda* there was no doubt about the limited character of power to amend the Constitution, Chief Justice Y V Chandrachud in *Minerva Mills* case[95] observed that the power to destroy was not a power to amend. Since the Constitution had conferred a limited amending power on Parliament, Parliament could not under the exercise of that limited power enlarge that very power into an absolute power. The donee of a limited power could not by the exercise of that power confer the limited power into an unlimited one.

Maneka Gandhi case became a trend setter on both procedural and substantive rights by initiating the debate on the very utility of law and procedure unless it promotes justice.[96] The purpose-oriented analysis on the quality of 'life'

[93] *Ibid*, para 514, 515.

[94] *Ibid*, para 1707 – 1732.

[95] *Minerva Mills Ltd*. v. *Union of India* (1981) 1 SCR 206; also see *B R Kapur* v. *State of Tamil Nadu*, 2001 AIR SCW 3720.

[96] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597; *Bachan Singh* v. *State of Punjab* AIR 1980 SC 898; *Mithu* v. *State of Punjab*; *M. H. Hoskot* v. *State of Maharashtra*, (1979) 1 SCR 192: (1978 Cri LJ 1978), *Hussainara Khatoon & Others* v. *Home Secretary, State of Bihar* (1980) 1 SCC 81 : (1979 Cri LJ 1036), *Sunil Batra & Others (I)* v. *Delhi Administration* (1979) 1 SCR 392 : (1978 Cri LJ 1741) and *Sunil Batra & Others (II)* v. *Delhi Administration* (1980) 2 SCR 657 : (1980 Cri LJ 1099).

undertaken in *Francis Coralie Mullin* enabled the Supreme Court to decide that it is more than animal existence, and "included the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."[97] The textual resources like Preamble and the Directive Principles of State Policy helped in locating the purpose as can be identified from the language used.[98] The method of tracing various shades of positive right of life such as food, health, environment, education, livelihood, etc, was by linking the unnamed right to the purposes of human dignity and well-being.[99] In *Gian Kaur* case,[100] the purpose of 'Protection of life and personal liberty' mentioned in the marginal note was the basis for the Court's decision that Article 21 could not comprehend right to die as the word 'protection' is antithetical to destruction. Significance of text for identifying the purpose and ascertaining the meaning of the word in that light is visible here. Right to privacy was also developed by drawing support from dignity of the individual enshrined in the Preamble.[101]In the matter of social justice through affirmative action, it was held in *M. Nagaraj* that the mode of interpretation shall be purposive and conducive to ensure that the constitution endures for ages to come.[102] The triple factors of compelling reasons *viz.*,

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[97] *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* AIR 1981 SC 746, para 7.

[98] "Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable fair and just procedure established by law which stands the test of other fundamental rights."

[99] *Kishen Pattanayak* v. *State of Orissa*, 1989 Supp (1) SCC 258; *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, AIR 1996 SC 2426: 1996 (4) SCC 37; *M C Mehta* v. *Union of India*, AIR 1987 SC 965 (Oleum gas leak case); *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858; *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545: (AIR 1986 SC 180).

[100] *Smt. Gian Kaur* v. *State of Punjab* AIR 1996 SC 946.

[101] *Justice K.S. Puttaswamy (Retd.)* v. *Union of India* (Constitution Bench), AIR 2018 SC sup 1841 : 2019 (1) SCC 1; *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*, AIR 2017 SC 4161: (2017) 10 SCC 1.

[102] *M Nagaraj*v. *Union of India*, AIR 2007 SC 71.

backwardness, inadequacy of representation and overall administrative efficiency, which were emphasised in *M. Nagaraj* had rootedness in the text.

S. R. Chaudhuri[103] and *NCT Delhi*[104] are the two prominent cases that extensively dealt with the importance of purposive interpretation.The first case involved interpretation of Article 164 (4). This clause allows temporary deviation from the requirement that ministers shall be members of either House of the legislature. The Supreme Court examined the issue from the perspective representative government and democracy and held that repeated appointment of non-legislator minister was derogatory to the Constitution. The Court referred to the words "Democratic Republic" and "We the People of India" in the Preamble to point out that will of the people cannot be subordinated to political expediency, and observed, "Articles 164(1) and 164(4) have therefore, to be so construed that they further the principles of a representative and responsible Government. The legitimacy of the law would be to ensure that the role of the political sovereign - the people - is not undermined. All Ministers must always owe their power directly or indirectly, to them, except for the short duration as envisaged by Article 164(4). The interpretation, therefore, must be such that expectation of the Founding Fathers and constitutionalists are fulfilled rather than frustrated."[105] The judgment clearly indicates the use of text in ascertaining the purpose and interpret the provision in that light so that object may be promoted.[106]

In *NCT Delhi* case[107] the bone of contention was interpretation of Article 239-AA (4) and its proviso, which states that the Lieutenant Governor (LG) shall act according to the aid and advice of the Council of Ministers in exercise of any of

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[103] *S R Chaudhuri* v. *State of Punjab* 2001 AIR SCW 3070; also *see B R Kapur* v. *State of Tamil Nadu*, 2001 AIR SCW 3720.

[104] *Government of NCT Delhi* v. *Union of India* Civil Appeal No. 2357 of 2017, 4-7-2018.

[105] *Ibid*, para 38.

[106] "Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve." para 33.

[107] *Government of NCT Delhi* v. *Union of India* Civil Appeal No. 2357 of 2017, 4-7-2018. Also *see Government of NCT Delhi* v. *Union of India* (two judges Bench) AIR Online 2019 SC 540.

the powers on which the Legislative Assembly has competence under Article 239-AA (3) whereas the proviso provided for LG's power to refer "any matter" to the President concerning which he has difference with the Council of Ministers. This attracted the issues relating to parliamentary democracy and federalism. Extensively discussing the concepts and applying the doctrine of purposive interpretation, the five judges bench Court concluded that the LG was bound by such advice and that "any matter" of difference cannot include trivial matters. The Parliament's overriding legislative power in Article 239-AA (3) and absence of such overriding executive powers on the part of the Union government on the one hand and President's power of taking over the administration of the state in case of failure of constitutional machinery which suggested about corrective measure from the side of the centre showed that the purpose of Article 239-AA (4) was to allow adequate leeway in the government of NCT Delhi suiting to the framework of representative government. The Court made use of the text and the purpose together to resolve the dispute.

Purposive interpretation is intermingled with progressive and generous interpretation and has produced finest results in other jurisdictions as well. The experience in US and Canada pertaining to expansion of constitutionally conferred rights has witnessed use of language of the constitutional text.

C. Structural Textualism

Structuralism builds strength by reinforcement of relations. The juxtaposition of words, clauses, articles, chapters and Parts of the Constitution and coexistence of several concepts and ideas such as federalism and separation of powers provide a great scope for mutual relations, which can be richly harnessed by constitutional interpretation.[108] Overarching of these pluralistic factors occurs through use of the text. The shift from isolationist textualism to structuralism is a revolutionary development in the Indian constitutional jurisprudence. The recognition and application of the golden triangle of Articles 14, 19 and 21, which harvested laudable crop of civil liberties, was by use of the constitutional text.[109] But its over-extension to the

[108] For application of this principle in the US *see McCulloch* v. *Maryland* (1819) 5 Wheat 316; *Texas* v. *White* (1868) 7 Wall 700; Charles Black, *Structure and Relationship in Constitutional Law* (Louisiana State University Press, Baton Rouge, 1997) Murphy, *et al*., (Eds.) pp. 417-419.

[109] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

task of the identification of basic structure violation is out of place.[110] Preamble's link with various parts of the Constitution has inspired conceptual growth of many ideas and mechanisms.[111] Combination of 'life' with 'dignity' has a great result. The abandonment of low-key approach to the Directive Principles of State Policy because of their non-enforceable character,[112] and shift towards treating them as complementary to fundamental rights involved intelligent use of the text of Part III as well as Part IV.[113] Treating them as conscience of the Constitution is a by-product of grafting them.[114] Synergy emerged by connecting welfarism with federalism, ethnic pluralism and democracy.[115] Democracy gathered strength from decentralisation.[116] Rule of law and judicial review acted as omnipresent sentinel, always alert and active, supporting other structures of the Constitution.[117]Cultural factors of religion and language got strength through rights and policies. The beauty of constitutional structuralism is that it built up not only self-sustaining force through the basic structure doctrine but also began to address weaker points in the country's socio-economic structure.[118] In the matter of providing basic necessities of life to the starving masses, educational empowerment to the backward classes, protection to women targeted by sexual exploitation, care to be accorded to children who are in need of care in protective institutions and outside, and removal of caste-based atrocities, structuralism travelled beyond the lines of text, and entered the social

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[110] Such an attempt was done in *I. R. Coelho* v. *State of Tamil Nadu*, AIR 2007 SC 861 and *M. Nagaraj* v. *Union of India* AIR 2007 SC 71.

[111] *Kesavananda* v. *State of Kerala*, AIR 1973 SC 1461; *Nandini Sundar* v. *State of Chhattisgarh*, AIR 2011 SC 2839 *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* AIR 1981 SC 746.

[112] *State of Madras* v. *Smt. Champakam Dorairajan*, AIR 1951 SC 226.

[113] *Chandra Bhavan Boarding and Lodging, Bangalore* v. *State of Mysore*, (1970) 2 SCR 600: (AIR 1970 SC 2042).

[114] *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789: 1980 (3) SCC 625.

[115] P Ishwara Bhat, "Why and how Federalism Matters in Elimination of Disparities and Promotion of Equal Access to Positive Rights and Welfare?"54 (3) *Journal of the Indian Law Institute* (2012).

[116] *Bhanumati* v. *State of Uttar Pradesh*, (2010) 12 SCC 1 : (AIR 2010 SC 3796).

[117] *Indira Nehru Gandhi* v. *Rajnarain*, AIR 1975 SC 2299.

[118] *B K Pavitra* v. *State of Karnataka*, AIR Online 2019 SC 275 para 111 and 118 view of Justice DY Chandrachud.

field.[119] This is more visible in judicial *suo motu* remedies during COVID-19.[120] Theoretically, this is a coherent development because the very social structure has three layers: value structure, intellectual structure and infrastructure. Any kind of inadequacies, unfair situations and exploitations at the level of infrastructure, and the perversities of social belief and practices in the intellectual world call for remedial intervention by the value structure of the constitutional architecture.[121]Thus, structural textualism has great transformation potentiality.

The point made out in this section is that textualism is not a monolith whole. It has multiple strands. It is a concept open to interact and integrate with other approaches. The inherent defects of plain meaning strict textualismget cured with such collaborations. While purposive, progressive and structural interpretations have independent philosophical terrain, in the process of interpretation which is essentially a language-based exercise, they lean on the text for support, inspiration and moral justification.

IV. Inferences from Application of Textualism's Canons

The purpose of this section is not to exhaustively explain the five categories of canons listed in *supra* section II. It intends to illustrate with few examples by way of sample how value-based interpretation could also be helped by these canons without treating them as what Nelsen calls, "canonical".[122] The most fruitful rule in this regard is the principle that the Constitution shall be read as a whole with same sanctity and without giving undue weightage to any part or provision. This canon made the Supreme Court in *Maneka Gandhi* case[123] to go for an integrated reading of Articles 14, 19 and 21 which brought a revolutionary change in the substantive

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[119] *Swaraj Abhiyan* v. *Union of India*, AIR 2016 SC 2829; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241*; Re Exploitation of Children in Orphanagesin the State of Tamil Nadu* AIR 2017 SC 2546; *State of Karnataka* v. *Appa Balu Ingale*, AIR 1993 SC 1126.

[120] *In Re: Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic* (*SuoMotu* Writ Petition (C) No. 5 of 2020); *In Re: Contagion of Covid 19 virus in prisons* (*Suo Motto* Writ Petition (Civil) No. 1 of 2020*); In Re Contagion of Covid -19 Virus in Children Protection Homes*, *Suo Moto* Writ Petition (Civil) No. 4 of 2020.

[121] P Ishwara Bhat, *Law and Social Transformation in India* (Eastern Book Co., Lucknow 2021) Ch 1.

[122] Caleb Nelson, "What Is Textualism?" 91*Virginia Law Review* 347 (2005) at 386.

[123] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

law on positive rights and procedural safeguards. Reading Part III and Part IV together as the conscience of the Constitution and reading Part IV objectives into the veins of specific provisions like Articles 14, 19, 21, 23, 24, 29, 32 demonstrated expansion of the content and scope of rights.[124]

In *Indira Gandhi* case,[125] law under Article 329 (b) was kept outside the scope of Parliament's powers regarding privileges. The Court observed, "The well-recognised rule of construction of statutes, which must apply to the interpretation of the Constitution as well, is: '*Expressio Unius Est Exclusio Alterius*'. From this is derived the subsidiary rule that an expressly laid down mode of doing something necessarily prohibits the doing of that thing in any other manner."[126] The Court's use of the canon did not cause any damage as it did not obstruct application of the basic structure doctrine.

Rule of harmonious construction was explained by Justice Kasliwal in his dissent in *St. Stephen College* case[127] to mean that when there is a general provision and special provision on the same subject, the conflict is to be resolved by making special provision to prevail over the general one. He was identifying Article 29 (2) as a limitation prevailing over right under Article 30 (1). Justice Jagannath Shetty for the majority attempted at balancing between the two by a 50: 50 formula: "The collective minority right is required to be made functional and is not to be reduced to useless lumber. A meaningful right must be shaped, moulded and created under Article 30 (1), while at the same time affirming the right of individuals 'under Article 29 (2). There is need to strike a balance between the two competing rights. It is necessary to mediate between Article 29 (2) and Article 30 (1), between letter and spirit of these Articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."[128]In

[124] *Minerva Mills* v. *Union of India*, *National Textile Workers Union* v. *P R Ramakrishnan*, (1983) 1 SCC 228 : (AIR 1983 SC 75);*Randhir* v. *Union of India*, AIR 1982 SC 879; *M C Mehta* v. *Union of India*, AIR 1987 SC 965 (*Oleum gas leak* case); *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, AIR 1996 SC 2426: 1996 (4) SCC 37; *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545 : (AIR 1986 SC 180), *BandhuaMuktiMorcha, M C Mehta* v. *State of Tamil Nadu*, *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, 2005 (8) SCC 534 : (AIR 2006 SC 212).

[125] *Indira Nehru Gandhi* v. *Rajnarain*, AIR 1975 SC 2299.

[126] *Ibid*,para 588.

[127] *St. Stephen College* v. *University of Delhi* AIR 1992 SC 1630, para 128.

[128] Para 96.

Kihoto Hollohon case,[129] application of harmonious construction in the sphere of anti-defection law, particularly in interpreting the words "any direction" in the definition clause, had kept its operation outside the law-making function. This had laudable result of confining the scope of anti-defection law to the game of making and unmaking governments. Justice M. N. Venkatachaliah observed, "We approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning."[130] In building the jurisprudence of constitutional democracythis approach had really helped.

In *Subramanian Swamy* case[131] the issue was whether the doctrine of *noscitur a sociis* should be applied to the expression "incitement of an offence" used in Article 19(2) of the Constitution so that it gets associated with the term "defamation". The Court held that since the word 'defamation' was unambiguous, the question of tracing its association with "incitement of an offence" and reading narrowly under its light does not arise. This approach helped in balanced protection of right to reputation *vis-a-vis* freedom of speech and expression. In *Rajasthan State Electricity Board* case[132] while interpreting the words "other authorities" under Article 12 the Court examined whether the maxim of '*Ejusdem generis'* is applicable, but found that since there was no common genus the said maxim could not be applied. This approach avoided narrow interpretation of "State" and expanded the burden and reach of rights.

On the whole, canons of textualism cannot be considered as coming in the way of progressivism; but are supplying valuable tools of reasoning and analogies.

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[129] *KihotoHollohon* v. *Zachilhu* 1992 AIR SCW 3497; also *see Parkash Singh Badal* v. *Union of India*, AIR 1987 Punj and Har 263.

[130] *Ibid*, para 49.

[131] *Subramanian Swamy* v. *Union of India*, AIR 2026 SC 2728.

[132] *Rajasthan Electricity Board* v. *Mohan Lal*, AIR 1967 SC 1857.

V. Antinomies in Textual Method of Interpretation

Antinomies are binaries with contradictory propositions that have equal justifications. The three types of antinomies between which the legal reasoning veers in the sphere of textualismare:intentionalism and textualism, legal formalism and legal realism, and formalistic textualism and flexible textualism.

Intentionalism searches for meaning of words in the Constitution or statute from the views expressed by the Framers or legislators. Textualism finds it difficult to gather accurate meaning from the legislative intention in view of pluralistic views of legislators, complexity of legislative process and difficulty in ascertainment of collective intention. Thus, intentionalism tries to capitalise the idea whereas textualism anchors a meaning to verbal reality.[133] Between the idea and reality, falls the shadow. The grey area of their interaction makes the exploration of constitutional exegesis a challenging task. Taken to the logical end, the two concepts are not compatible. But when objective intention is built by focusing on the whole legislative body's deliberations, which after undergoing elaborate filtering process, expresses in the form of legislation the point made out is nearer to what liberal textualists argue for, *viz*., reading the text in context. According to Caleb Nelson, textualists by engaging in 'imaginative reconstruction' of the legislative intention by probing how the legislature would have decided the interpretive question and by applying suitable canons to avoid absurdity are reasoning in a way similar to that of intentionalists.[134] John Manning tests this proposition in the light of case law and concludes that textualists like Justice Antonin Scalia did not go for reasonable man's estimation of possible legislative action whereas Justice Stevens in his dissent objected to use of "thick grammarian's spectacle and ignoring the Congressional purpose".[135] Manning refers to the overall approach of the US Supreme Court and points out that the search for legislative intention has been in the content of internal

[133] According to Caleb Nelson, the difference between the two consists in use of different methodologies and different approaches when methodology runs out. Textualism leans towards 'ruleness' in finding the meaning while intentionalism focuses on subjective view of the Framers. Caleb Nelson, "What Is Textualism?", 91 *Virginia Law Review* 347 (2005) at 417.

[134] *Ibid*.

[135] John F Manning, 'Textualism and Legislative Intention' 91(2) *Virginia Law Review* (2005) pp.419-450; *West Virginia University Hospitals* v. *Casey* 499 US 83 (1991); *Babbitt*v. *Sweet Home Chapter of Communities for a Greater Oregon* 515 US 687 (1995).

legislative history and within the textual belief of legislative supremacy.[136] Thusthe meeting point between the two antinomies is in the social context of law making process.

In India, the dichotomy between intentionalism and textualism was addressed in *NJAC* case.[137] The case involved a question on validity of the 99th Amendment which excluded the role of Chief Justice of India to have consultation in the matter of appointment of Judges of the Supreme Court (Article 124 [2] proviso), Chief Justice and Judges of High Court (Article 217[1]) and transfer of High Court Judges (Article 222[1]). In earlier cases the Court had consistently held that in view of the intention of the Constitution Makers expressed in CAD and long practice consistently followed for a long time resulting in constitutional convention, the primacy of the CJI in the process of consultation and obtaining of his concurrence had become mandatory requirement. Whether removal of such a position had abrogated the basic structure of the constitution was the question before the Court. The Court by 4: 1 majority struck down the 99th Amendment as unconstitutional as it offended the basic structure.[138] The plain meaning of "consultation" would ordinarily mean "exchange of views and opinions". In an initial case, effective consultation was insisted necessitating mutual communication of all information between CJI and the Union Government.[139]On the basis of views expressed in CAD especially by Dr. B R Ambedkar and others[140] to the effect that for maintaining independence of judiciary primacy of the executive could not be permitted and CJI as head of the judiciary had a prominent role; that the members of the Constituent Assembly clearly refused to vest an absolute and unfettered power to appoint Judges of the Constitutional Courts in any one of the branches of government; and that as recognised in practice, the initial view was overruled and the concurrence of CJI became a must for appointments and transfers under Articles 124, 217 and 222.[141] It is pertinent to note that the intention was to have concurrence by the CJI

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136 *Ibid*, Manning 450.

137 *Supreme Court Advocates on Record Association* v. *Union of India* 2015 AIR SCW 5457.

138 *Ibid*.

139 *S.P. Gupta* v. *Union of India*, 1981 Supp. SCC 87: (AIR 1982 SC 149)(Seven Judges Bench).

140 CAD 24th May, 1949.

141 *Supreme Court Advocates-on-Record Association* v. *Union of India*, (1993) 4 SCC 441: (AIR 1994 SC 268) (Nine Judges Bench); Special Reference No. 1 of 1998, (1998) 7 SCC 739 (AIR 1999 SC 1) (Nine Judges Bench).

but the text stated "consultation". The Court reasoned on the basis of value of independence of judiciary and CAD to establish this position, but also provided for collegium in order to have control mechanism within.

Legal formalism v/s legal realism is another set of antinomies that opens up another dimension to the discussion on textualism. Richard Posner considers these two concepts as belonging to the realm of common law but not dependable rules of interpretation.[142] The former stands for judicial self-restraint, conservative and authoritarian stance, operating rigorously with ivory tower approach. The latter has two strands of meaning: cynical, manipulative and political on the one hand, progressive, humane and clear-eyed on the other.[143] Form is also a friend of liberty as is realism. According to Posner, in cases of textually not clear words, the predicament of judiciary is comparable to that of a soldier in the battlefield addressed by his superior commander in an unclear voice.[144] Use of vague words – many a times, deliberately vague – makes the judiciary to map various shades of meanings attributable to the word. As demonstrated in cases relating to equal protection clause in the US, formalism came in the way of expansion of the right whereas realism employed in *Brown* and its progeny made it highly flexible.[145] Being part of the common law and product of experience-based reasoning, realism works within the framework of form. Whether either of the two is logically correct or philosophically sound or otherwise is to be determined by time, the ultimate jurist, as per Posner.[146]

In India, the Rubicon of formalism was crossed by Judiciary when it excluded the requirement of standing to sue in the context of enforcement of fundamental rights under Article 32. Interpreting the words "appropriate proceedings" to connote that which is appropriate to the proceeding rather than the other way round, the challenge of formalism was met and the substance of realism was achieved.[147]

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[142] Richard A Posner, "Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution" 37 (2) *The Case Western Reserve Law Review* (1986-87) pp.179-217.

[143] *Ibid*, pp. 180-181.

[144] *Ibid*, pp. 190-192.

[145] *Ibid*, pp.213-216; *Brown* v. *Board of Education* 98 L Ed US 347; 347 US 483 (1954).

[146] *Ibid*, p.217.

[147] *Bandhua Mukti Morcha* v. *Union of India* AIR 1984 SC 802 at 813-4.

Formalism was relied upon in *M.Nagaraj* – presence of backwardness supported by quantifiable data, inadequate representation in public service and protection of administrative efficiency – in order to uphold the realist balance between formal and substantive equality.[148] In *S R Chaudhuri*,[149] which is discussed earlier, the formal condition upon non-legislator minister to become a legislator within six months in order to continue in office was interpreted to mean as providing for one time opportunity only without scope for reappointment. The reality that in practice such reappointments make deep inroad to democracy was kept in mind in rigidifying the formality. In a number of cases judicial activism has gone for laying down guidelines or directions as a temporary legal measure until the legislature enacts a law to govern the field.[150] Formalism of recognising legislative role and realism of providing effective remedy with substantive principles on the basis of constitutional provisions could fill the interstices of law. Thus, the interface between formalism and realism has been a rich resource for expounding the Constitution.

The third set of antinomies *viz*., formalistic textualism and flexible textualism is operating within textualism itself.[151] The US Supreme Court's majority judgment (6:3) in *Bostock*[152] used formalistic textualism in interpreting the provision of *Civil Rights Act, 1964* to decide that termination of an employee on account of his/her sexual orientation (LGBT) amounted to discrimination on the basis of sex. The majority judges parsed the language, focused on the semantic context and did not bother about the purpose or social context of the law. In contrast, the dissenting judges looked into the social context and purpose of the legislation enacted in 1964 and employed flexible textualism to conclude that "sex" did not ordinarily mean "sexual orientation" in 1964, but only referred to the biological distinction between male and female. Both the approaches, formalistic and flexible, come under the

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148 *M. Nagaraj* v. *Union of India* AIR 2007 SC 71; (2006) 8 SCC 212.

149 *S R Chaudhuri* v. *State of Punjab*, AIR 2001 SC 2707; (2001) 7 SCC 126.

150 *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011; (1997) 6 SCC 241; *Lakshmikanth Pandey* v. *Union of India*, AIR 1984 SC 469; (1984) 2 SCC 244.

151 "Formalistic textualism emphasizes semantic context and downplays normative and consequential concerns, while flexible textualism allows interpreters to make sense of the statutory language with an eye to social context, normative values, and practical consequences," views Tara Leigh Grove, "Which Textualism?"134 *Harvard Law Review* (2020) 265 at 290.

152 *Bostock*v. *Clayton County* 140 S Ct. 1731 (2020).

broad concept of textualism, but have different results. Tara Leigh Grove views that the difference between the two arose because the former tried to avoid absurdity of meaning and the latter tried to read in a sense most obvious to the common understanding at the time of its adoption.[153] Both are canons of textual interpretation, and the tension is traceable to the choice of different canons. He states, "Textualism turns out not to be a coherent, unified theory."[154] Grove argues for opting formalistic textualismon account of risks to the Supreme Court's sociological legitimacy, influence of political pressure and possibility of judiciary working under such influence.[155]

To give an Indian example, one can refer to the *Maratha reservation* judgment.[156] The issue was scope and reach of the Central list of SEBC framed by the NCBC and notified by the President under Article 342-A (1) after due consultation with the concerned Governors. More specifically, the question was whether the Central list is binding upon the states in spite of the principle stated in Article 342-A (1) and Article 366 (26C) to the effect that the list of SEBC is "for the purpose of this Constitution" or whether they have the power of formulating a list of their own.The minority view on this point, expressed by Justices Ashok Bhushan and Abdul Nazeer, states that the Central List is "*prepared for services under the Government of India and organisations under the Government of India*"[157] and declares, "Since the 26C has been inserted in the context of Article 342A, if the context is list prepared by the State and it is State List, definition under (26C) shall not govern."[158] It is submitted, the words emphasised above are used on the basis of assumption and have no constitutional basis under the 102nd Amendment. The idea of 'State list' is also based on assumption as there is no mention of State list at all in the Amendment. Hence it was fallacious to regard that "the context provides otherwise" to limit the scope of clause (26 C) of Article 366

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[153] Tara Leigh Grove, "Which Textualism?" 134 *Harvard Law Review* (2020) p.265.

[154] *Ibid*, p. 279.

[155] *Ibid*, pp. 307, 299-306.

[156] *JaishriLaxmanraoPatil* v. *Chief Minister, State of Maharashtra* Civil Appeal No. 3123 of 2020 judgment of the Supreme Court dt. 5.5.2021.

[157] *Ibid*,para 438.

[158] *Ibid*, para 444 Conclusion (30).

to "Central List" whereas its scope is comprehensive enough to cover "for the purpose of this Constitution."On the other hand, under Article 338-B, if the NCBC report is relating to any matter with which any State Government is concerned, a copy of the same shall be forwarded to the State Government for laying before the State Legislature for acceptance, non-acceptance or any recommendation. Further under Article 342-A (1) the President shall consult the Governor of the concerned State before notifying the list of SEBC for the purpose of this Constitution. These provisions make it clear that States participate in the process of finalisation of the list, and it is not something imposed from the above. The idea contemplated by Dr. B R Ambedkar, to which Justice Ashok Bhushan refers, that determination of the list of backward classes shall be done by local government is satisfied by this process. Subsequent changes in the Central List can be made only by the Parliament under Article 342-A (2). The process involved in making and notifying the list and the role of the State Government in this matter are similar (*pari materia*) with those prescribed for the list of SC and ST under the Constitution. Incompetence of State legislature in altering the list of SC has been clearly established in *E V Chinnaiah* case.[159] In fact, the minority judges used the views expressed by dissenting members of the Parliamentary Committee, a statement made by the Union Minister in the House and the view of an individual member in CAD for assuming about "State List", which was totally absent in the Amendment. They also referred to the purpose of Articles 341 and 342, *viz.*, exclusion of political disturbance of the lists of SC and ST and similar purpose attached to the Central List under Article 342-A. In other words, they were using 'intention' behind the scheme in interpreting the text. As a result, they read into the scheme a set words which were not there. This is an example of flexible textualism, but supported by far-fetched reasoning when the plain meaning of the text was clear. On the other hand, the majority's reasoning was based on rational analysis of the text, coherent in all respects and convincing. Justice L Nageswara Rao held, "There is no obscurity in Article 342A (1) and it is crystal clear that there shall be one list of socially and educationally backward classes which may be issued by the President. Restricting the operation of a list to be issued under Article 342A (1) as not being applicable to States can be done only by reading words which are not there in the

[159]*E V Chinnaiah*v. *State of Andhra Pradesh* (2005) SCC 394.

provision."[160] Harmonious construction of Article 342A (1) and (2) and plain meaning of Article 366 (26C) made this point clear, according to the learned judge. He emphasised on the basic principle that when there is no ambiguity words are to be understood in their natural and plain sense; that the purpose of a constitutional provision shall be deciphered in the words used in the Constitution; and that 'purpose' gathered from extrinsic source shall not be inconsistent with the explicit language of the constitutional provision.[161]

Justice Ravindra Bhat in his elaborate and well-reasoned judgment held that after the 102nd Amendment the President has the sole power in notifying the list which could be altered by the Parliament, and States have no power of making the SEBC list.[162] For his conclusion he gave the following reasons: firstly, the 102nd Amendment is not bringing mere "cosmetic change" of establishing NCBC, and it is improper to reduce its scope to functions listed in Article 338-B.[163] Any interpretation which allows alternative list by the States will render Article 342-A and 366 (26C) nugatory. This goes against a basic canon of textual interpretation.[164] Secondly, the amendment "brings about a total alignment with the existing constitutional scheme for identification of backward classes, with the manner and the way in which identification of SCs and STs has been undertaken hitherto".[165]

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[160] *Ibid*, para 23 L Nageswara Rao J.

[161] *Ibid*, paras 9 to 12.

[162] "By introduction of Articles 366 (26C) and 342A through the 102nd Constitution of India, the President alone, to the exclusion of all other authorities, is empowered to identify SEBCs and include them in a list to be published under Article 342A (1), which shall be deemed to include SEBCs in relation to each state and union territory for the purposes of the Constitution. The states can, through their existing mechanisms, or even statutory commissions, only make suggestions to the President or the Commission under Article 338B, for inclusion, exclusion or modification of castes or communities, in the list to be published under Article 342A (1)." Para 188.5 (i).

[163] *Ibid*, para 159 and 167.

[164] *Balram Kumawat* v. *Union of India*, (2003) 7 SCC 628: "Reducing the legislation to futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve."

[165] *Ibid*, para 160.

The language of Articles 338 and 338 A has the clear meaning of providing single list and finality, which has been used in Article 342-A. Being *pari materia*, same meaning shall be attributed here also. Further contemporary judicial decisions at the time of enactment of 102nd Amendment suggest the factors of single list and finality. It shall be presumed that the Amendment makers acted under that impression. Thirdly, the definition clause which uses the word "means" shall be understood in absolute or exhaustive sense.[166] Reinforcement of this by inserting "deemed to be" in Article 348-A (1) does not keep any class outside the list for exercise of State's jurisdiction. The words "for the purpose of this Constitution" also connote single list applicable for both the Union Government and State governments.[167] About the implications of these words the Judiciary in a series of earlier cases has given an understanding that the castes or tribes mentioned in the list are the exclusive categories which cannot be politically disturbed except by the Parliament through law.[168] Again, plain meaning textualism which identifies unequivocal sense of the words used has been relied upon. Fourthly, if the intention of makers of the Amendment is to be given due consideration, the omission of proposed amendments to the draft Article 342-A to incorporate clauses (4) and (5) providing for powers of the State to make its own list, rejection of the dissenting view of opposition party members in the Parliamentary committee and use of the language of Articles 338 and 338-A shall be taken as expressing the clear intention of the makers, whose product is in the form of the 102nd Amendment.[169] Fifthly, the word "Central" in the expression Central list is to be understood in the light of General Clauses Act read with Article 367 to mean list prepared under Article 342-A (1) and it cannot be understood as confining to the purposes of services under the Union Government only.[170] Sixthly, the argument alleging destruction of federal

[166] *Punjab Land Development and Reclamation Corpn. Ltd*. v. *Presiding Officer*, Labour Court, (1990) 3 SCC 682.

[167] *Ibid*, para 165.

[168] *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S. Medical College* 1990 SCC (3) 130; *Action Committee on Issue of Caste Certificate to Scheduled Castes & Scheduled Tribes in the State of Maharashtra & Anr.* v. *Union of India & Anr* (1994) 5 SCC 244; *Bir Singh* v. *Delhi Jal Board* (2018) 10 SCC 312. *Basavalingappa* v. *Munichinnappa* 1965 (1) SCR 316.

[169] *Ibid*, para 106-8.

[170] Para 153: "The other interpretation, with respect, would be unduly narrow and restrictive; it would have the effect of adding words such as to the effect that the Central List, would "apply in relation to the Central Government". Such an addition of terms, with respect, cannot be resorted to, when interpreting a Constitutional amendment, the amended provisions clearly state that the determination is for the purpose of the Constitution…"

feature was answered by reference to the scope for State's participation in making representations to the NCBC, discussing its report in the State legislature, recommending modification and persuading the Governor in the process of consultation. All the six points relied upon are based on well-known canons of textual interpretation, reflecting formalistic textualism, which is more convincing than dissenting judges' flexible textualism and the effort of adding new clause in the name of interpretation. In view of politicisation of reservation through agitation and abuses, the majority judgment is on right direction. If there is any real grievance, amendment to amendment may be a right path and not tinkering through judicial amendments.

The discussion on antinomies points out the basic cleavage between ideology and pragmatism and challenges faced in reconciling between the two. While silence between these two extremes is to be filled interstitially, the constitutional language is the starting point for interpretation and continuously guide the exploration of meaning. This takes us to a discussion on textualism's relation with other principles of interpretation available in the tool box of constitutional jurisprudence.

VI. Significance and Relations with other Tools of Interpretation: Towards Conclusion

Text of the Constitution is the primary material from which we gather its meaning. Its language is a repository of its intention. Its words are framework of concepts. Although constitutional dynamics beckons for nudging towards progressive movement, the reasoning for expansion and innovation of concepts in changing times hinges upon the constitutional language. Hence, textualism enjoys primacy in the tool box of constitutional construction but does not foreclose purposive, progressive, structural or historical methods of interpretation.[171]A historical probe is to unearth the evolution of specific principle capsulized in a set words, merging substance with text. The reverse engineering with which linguistic, legal, philosophical and sociological study which a teaxtualist engages is an interdisciplinary study, which Benjamin Cardozo advised for judges involving in judicial reasoning. How a particular textual form of legal principle, say for example, rule of law, due process of law or equal protection, evolved through historic times is both a story of the text and of the society.

[171] In this sense "all approaches to constitutional meaning are textual". *See* Murphy, *et al*., *op cit.* 393.

A study of the purpose with which a concept and its framework in the form of words evolved gives insight about birth of the text in a context. The effort of picking a purpose in the words strengthens the process of constitutional construction. Purposive textualism, as discussed earlier, is both a source and product of synergy. Purpose and text are also related to the structure. The juxtaposition of words, clauses, articles, chapters and parts of the Constitution allows weaving of relations to draw best out of that resource of meaning. Structural textualism has brought revolutionary changes through the golden triangle of Article 14, 19 and 21; by creative and integrated reading of part III and Part IV; by integrating amending power with basic features of the Constitution; blending democracy with federalism; and constructing inbuilt mechanism against abuse of power through mutual checks and balances. In all these spheres, it is the text which has helped the interpreter's intelligent choices. Thus, it is not possible to consider textualism as incompatible with other methods of interpretation. Being a basic principle of construction it assists the other principles.

Plurality of canons of textual interpretation has provided dynamism of interaction between various strands, tension to be resolved through balancing and convenience of choosing appropriate tools from the rich tool box of constitutional interpretation. The working of antinomies has blurred the distinctions and relations between key concepts.

Text has provided a basis for fascinating debate because primarily a constitution is an endeavour to build the nation through words. When the unscrupulous power holder tries to escape by a spread of mat over values, words crawl beneath it to undo the escape; and words do not hesitate to crawl even beneath the floral decorationto set right the things when the latter threaten the paramount values.[172] The story of constitutional textualism is veritable story of constitutionalism itself.[173]

[172] A proverb in Kannada.

[173] Laurence Tribe, *American Constitutional Law* (Foundation Press, New York, 3rdedn.,2000) p. 32.

CONTOURS OF POWER OF PARDON IN INDIA

-Prof. (Dr.) G. B. Patil*

I have always found that mercy bears richer fruits than strict justice
-Abraham Lincoln.[1]

Introduction

Human beings are neither angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self destruction. Taking human nature as it is, complete elimination of crime from society is not only impossible but also unimaginable. Criminals are very much part of our society and we have to reform and correct them and make them sober citizens. Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions. That is why every civilised state has a provision to pardon offenders in their criminal justice system to be exercised as an act of grace and humanity in proper cases. As long as people have been thinking about punishment, they have been thinking about the remission of punishment.[2] Mercy is God's grace, a gift to the mankind which gives all an equal chance to mend ways and to correct a deviant behaviour. The power of pardoning offenders has been a privilege enjoyed by the Sovereigns around the world since time immemorial.[3]

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1 Abraham Lincoln, 16th U.S President.

2 Moore, Kathleen Dean, *Pardons: Justice, Mercy, and the Public Interest*, (Oxford University Press,New York 1989), p.15

3 The Old and New Testaments make references to "divine pardon." References to the prerogative of mercy have also been made in the Mosaic Law, Greek Law and Roman Law. For more information, *See* generally William F. Duker, *The President's Power to Pardon:A Constitutional History,* 18 *Wm. & Mary L. Rev.* 475(1977).

Granting mercy has historically been the personal prerogative of the Crown, exercised by the monarch on the basis of advice from the Secretary of State for the Home Department.[4] This practice is based on the understanding that the sovereign possesses the divine right and hence, can exercise this prerogative on the ground of divine benevolence.[5] Further, the No one shows mercy because he has to. It just happens, the way gentle rain drops on the ground. Mercy is a double blessing. It blesses the one who gives it and the one who receives it. It's strongest in the strongest people. It looks better in a king than his own crown looks on him. The king's scepter represents his earthly power, the symbol of majesty, the focus of royal authority. But mercy is higher than the scepter. It's enthroned in the hearts of kings, a quality of God himself. Kingly power seems most like God's power when the king mixes mercy with justice. So although justice is your plea, Jew, consider this. Mercy has a quality of being selfless and abundant. It does not judge anyone just as the rains from heaven fall on the entire earth be without any discrimination. Mercy is called twice blessed since it blesses both the person who receives mercy as well as the one who shows mercy. But mercy is more powerful than any earthly control. It is a quality attributed to the God who is the king of all kings therefore anyone who shows mercy raises himself and likens himself to God himself. We all have to face our fate one day. If you show mercy today you will see mercy shown to you when your time comes. If you see merit in my plea withdraws your claim for the pound of flesh.

The Power of Pardon was historically vested in the British monarch. At common law, a pardon was an act of mercy whereby the king "forgiveth any crime, offence, punishment, execution, right, title, debt, or duty." This power was absolute, unfettered and not subject to any judicial scrutiny. The power of pardon is part of constitutional scheme in all modern civilized societies.[6]

In ancient Rome, Circa 403 B.C., a process known as 'Adeia' facilitated a democratic pardon for individuals, such as athletes, orators and other powerful figures, who were successful in obtaining the approval of at least 6000 citizens by

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[4] B. V. Harris, *Judicial Review of the Prerogative of Mercy*, Public Law 386 (1991).

[5] G. B. Wolfe, *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability n Massachusetts*, 27 B.C. Third World L.J. 417 (2007).

[6] *Kehar Singh* v. *Union of India*, AIR 1989 SC 653.

way of secret ballot.[7] Although the source of this power to pardon was not an executive privilege, it is not difficult to see the similarities in the ancient concept of Adeia and the contemporary practice of pardon, which also often takes into consideration factors such as the public opinion in relation to the individual sought to be pardoned. Another ancient practice analogous to the power of pardon existed in ancient Rome, where instead of executing an entire army of transgressors, the Romans would execute every tenth condemned troop member.[8] The reasons for carrying out such a practice appear to be largely political, and hence, it is more difficult to draw parallels from this practice to the contemporary practice since it is not clear whether mercy was the intended motive.

Since ancient times, a number of theories[9] have been propounded concerning the purpose of punishment. Those theories may be broadly divided into two classes.[10]The view of one class of theories is that the end of criminal justice is to protect and add to the welfare of the State and Society. The view of the other class of theories is that the purpose of punishment is retribution. The offender must be made to suffer for the wrong committed by him. Pardon is deeply rooted in our

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[7] R. Nida and R. L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the President's Self-Pardon Power,* 52 *Okla. L. Rev.* 197 (1999).

[8] *Supra, note 7.*

[9] For safe, orderly, peaceful and prosperous society to exist and flourish – the following tools of theory are found to be good guides Deterrent theory-"I do not punish you for stealing the ship, but so that the ship may not be stolen," the central cynosure of the theory, not only to prevent the wrongdoer from doing a wrong, but also to make him an example for others, calculated to curb criminal tendency in others, at times, severe punishments like death by stoning or whipping, mutilation of limbs etc. are awarded even to minor offences; Preventive theory- Concentrates on the prisoner to prevent him from repetitive endeavors, to ward off recidivism, offenders disabled by punishments like death, exile or forfeiture of office and incarceration; Reformative theory-"Condemn the Sin, not the Sinner" -Mahatma Gandhi, Reformation process is like a surgeon operating on a person to remove the pain., Retributive theory-"Tooth for Tooth, Eye for Eye, Limb for Limb and Nail for Nail," is the principle of this theory. Earlier, legal sanctions grounded in vengeance and retaliation - revenge is justice gone wild, found to be archaic, inhuman and barbaric-modern human rights philosophy condemns this cruel concept; Expiatory Theory-"To pay for the sin committed," Repentance, compunction, atonement and reparation - conscience oriented cleansing of hearts, Offender to serve the victims and their dependents to compensate the deprivation

[10] Utilitarian class and Retributive Class

Anglo-American tradition of law, and is the historic remedy for preventing miscarriage of justice where judicial process has been exhausted. It is an unalterable fact that our judicial system like the human beings, who administers it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of subsequently discovered evidence establishing their innocence.[11]

Capital Punishment or the death penalty remains a controversial subject in India. Despite the global move towards abolition, India retains such punishment. Yet although the death penalty was the default punishment for murder in the early post-independence years, changes in law and shifts in sentencing ensured that by the 1970s the death penalty had become an exceptional punishment.[12] This shift was formalised by a landmark judgment of the Supreme Court in 1980 where the Court observed that the death penalty should be awarded only in the 'rarest of rare' murder cases.[13] Although most death sentences in India are awarded for murder, capital punishment can be awarded in India for a large number of other offences under the *Indian Penal Code (IPC)*.[14]

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[11] *Herrera* v. *Collins*, 506 US 390 (1993).

[12] For details of this shift *see* Bikram Jeet Batra, 'Of Strong Medicine and Weak Stomachs: The Resort to Enhanced Punishment in Criminal Law in India' in Kalpana Kannabiran and Ranbir Singh (ed.,), *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, (Sage Publications, Delhi 2008).

[13] *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898.

[14] The *IPC* provides for capital punishment for the following offences, or for criminal conspiracy to commit any of the following offences (S.120-B): Treason, for waging war against the Government of India (S.121); Abetment of mutiny actually committed (S.132); Perjury resulting in the conviction and death of an innocent person (S.194); Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (S.195A); Murder (S.302) and murder committed by a life convict (S. 303) Abetment of a suicide by a minor, insane person or intoxicated person (S.305);Attempted murder by a serving life convict (S.307(2)); Kidnapping for ransom, (S.364A), Dacoity with murder (S.396). A person who inflicts injury in a sexual assault which results in death or is left in a "persistent vegetative state" may be punished with death under the *Criminal Law Act, 2013*. According to the 2018 Criminal Law Ordinance, a person who is liable for raping a girl who is below 12 years of age may be sentenced to death or sent to prison for 20 years along with fine. The 2018 amendment also specifies the death penalty or life imprisonment for a girl's gang rape under the age of 12.

The extreme penalty can also be awarded under a number of other legislations.[15] The issue of death sentence has become complex due to the emergence of the concept of human rights and dignity[16] on a national as well as international level.[17] The abolition of capital punishment assumed so much of the importance in these days because it affects the most valuable fundamental rights of a human being, namely, "right to life". This right is the basic of all other human rights. In other words, it can be said that these other rights are nothing but for the better enjoyment of one's right to life. This is the reason almost all the Constitutions of the nations provides the right to their people.[18]

Need and Significance of Power of Pardoning

The societies around the world felt the need of injecting flexibility into the administration of criminal justice by offering a broad cushioning to the power of executive clemency. Indeed, for an ideal society, where all laws are just and perfect in their operation, the institution of clemency may be unnecessary. But it may not

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[15] Laws relating to the Armed Forces, for example the *Air Force Act 1950*, the *Army Act 1950* and the *Navy Act 1950* and the *Indo-Tibetan Border Police Force Act 1992*; *Defence and Internal Security of India Act 1971* ; *Defence of India Act 1971* (S.5); *Commission of Sati (Prevention) Act 1987* (S.4(1)); *Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985*, as amended in 1988 (S.31A); *Terrorist and Disruptive Activities (Prevention) Act 1987* (TADA) (S.3(2)(i)); *Prevention of Terrorism Act 2002* (POTA) (S.3(2)(a)); *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989* (S.3(2)(i)); *Explosive Substances Act 1908*, as amended in 2001 (S.3(b)); *Arms Act 1959 (as amended in 1988)*, (S.27); *Unlawful Activities Prevention Act 1967* (as amended in 2004) (S.16(1)). In addition there are a number of state legislations that allow for capital punishment to be imposed.

[16] The Right to life includes the "right to die with human dignity" and capital sentence nullifies this purpose. *See* Article 1 of protocol to the American Convention on Human Rights.

[17] Article 4 of protocol to the American Convention on Human Rights, Article 1 of Protocol No.6 to the American Convention on Human Rights; Second optional protocol to the International Covenant on and Civil and Political Rights, 1989; E.U. Policy towards the "third world" countries on Death Penalty, 1998; U.N. Resolution 287 (XXVI) passed in December 1971; U.N. Assembly Resolution 32/61 of 8th December 1977; Recommendation 1246 (1994), adopted on 4th October 1994 by Parliamentary Council of Europe.

[18] *See* Article 3 of Universal Declaration of Human Rights, 1948; Article 6 of International Covenant on Civil and Political Rights 1979; Article 4 of American Convention on Human Rights, 1978; Article 6 and 7 of Rome Statute of the International Criminal Court, 1998; International Convention on the Elimination of all forms of Racial Discrimination 1965; Article 4 of African Charter of Human Rights and People's Right, 1981; Article 2 of European Convention on Human Rights, 1949; Article 5 of Arab Charter on Human Rights, 1994.

be good to an imperfect world since the criminal law prevailing therein may only deal with general patterns of anti-social behaviour without considering every conceivable situation which may occur in the diverse circumstances of the life. Further, the application of the criminal law by the Courts was not necessarily wise or correct in any given case. It was rightly observed by Justice P.N. Bhagwati, that a significant number of accused in India are illiterate and poor. They do not afford to engage effluent lawyers for their defence. Moreover, they do not have the knowledge of law and professional skills to defend themselves before the court, while an experienced prosecutor conducts the prosecution. Though, the accused has right to free legal aid at the state expenses,[19] yet this right is of no value if competent lawyers are not selected to defend him.[20]

As a corrective and curative measure the power to pardon seems to be indispensable to prevent the gullible from becoming a prey to the vindictiveness of accusers, inaccuracy of testimony, and the fallibility of jurors and courts.[21] Resultantly, institutional machinery of the State permits the executive for reconsideration of a penal sentence pronounced in the judicial process. The age of the accused, his impeccable past, the circumstances surrounding the commission of the crime, the number of years he has spent in jail as an under-trial, his present physical condition are some of the factors which may guide the Executive Head while considering the request for pardon which when granted may be conditional or unconditional.

There are many views regarding the rationale behind granting pardon to the accused individuals. The Hegelian view advocates that pardons are justified only when they are 'justice-enhancing', that is, in certain cases justice may not be

[19] Article 39A of the Constitution of India, Section 303 and 304 of the Code of Criminal Procedure, 1973; *Hussainara Khatoon* v. *State of Bihar*, (1980) ISCC98105, *Khatri II* v. *State of Bihar* (181), SCC 627, The Legal Service Authority Act, 1986.

[20] Mostly free legal aid is provided to an indigent accused by inexperienced lawyers who are new entrants at bar as dealing with complex case would give them exposure before the court. These lawyers lack capability to deal with complex cases like murders. Moreover, the funds provided to them by the state government are very insufficient. Therefore, they do not pay head to the case. Moreover a mistake committed by them at the trial stage could be very rarely corrected at the appellate stage. In such a situation the life of an accused would be jeopardized.

[21] David B. Hill, "The Pardoning Power", *The North American Review,* Vol.154, No.422, Jan (1892).

served without the grant of pardon due to the unduly harsh nature of the sentence or due to an individual being sentenced wrongly.[22] The provision should be exercised with equanimity towards one and all without distinctions on the basis of gender, age, caste, community, language or geography. As per this view, the grant of pardon in cases where a larger goal of justice is not sought to be achieved would be unwarranted. The Hegelian view may be linked to the larger philosophy of retribution the retributive school of thought believes that pardon is only justified as an extra-judicial corrective measure to remedy any failure of the system, such that the ultimate aim of the accused receiving just deserts may be secured.

The philosophy of retributivism only concerns itself with the goal of enhancing justice and no further.[23] In contrast to the retributivist view is the school of thought based on rehabilitation and redemption, which believes that pardons may be justified even when the goal is 'justice-neutral', that is, not necessarily concerned with the aim of securing remedial justice.[24] For example, the redemptive philosophy gives importance to the post-conviction achievements of the accused, which the retributivists refuse to consider relevant. The redemptive school of thought justifies pardon on the grounds of public welfare and compassion.[25]

The observations made by learned H. M. Seervai are apt:

> "Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws are not always just and the lights are not always luminous. Nor, again are Judicial methods always adequate to secure Justice. The power of pardon exists to prevent injustice whether from harsh, unjust laws or from judgments which result in injustice; hence the necessity of vesting that power in an authority other than the judiciary has always been recognized."[26]

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[22] M. Strasser, "The Limits of Clemency Power on Pardons, Retributivists, and the United States Constitution", 41 *Brandeis L. Jl.* 85 (2002).

[23] *Supra* note 5

[24] *Ibid*.

[25] *Ibid*.

[26] Seervai, H.M., *Constitutional Law of India: A Critical Commentary'*, Vol.2, 4th ed., (Universal Law Publishing Co.2004) .

There are occasions when justice and humanity demanded that mercy be shown in the matter of sentence. The Presidential power acts as a safety valve in exceptional cases where the legal system fails to deliver a morally or politically unacceptable result and to secure public welfare. Further, the power of pardon is virtually the only tool to reconsider and, in appropriate cases, reduce a sentence, once final. Moreover, it is strongly felt that, it aids to vindicate cutting of king-size Indian prison population. Accordingly, the concept of pardon remains expedient and valuable today:[27]

- It is founded on consideration of public good and is to be exercised sparingly on the ground of public welfare, which is the legitimate purpose of all punishments, by a suspension as by an execution of the sentences;
- It may substantially help in saving an innocent person from being punished owing to miscarriage of justice or in cases of doubtful conviction;
- The hope of being pardoned itself serves as an incentive for the convict to behave himself in the prison institution and thus, helps considerably in solving the issue of prison discipline;
- It is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person.

The Constitution of India is designed, reflecting afore cited ideologies, to bestow the power to grant pardon, reprieves and respites on the President and the Governor of States, vide Articles 72 and 161 respectively.

In addition to these constitutional provisions, the Criminal Procedure Code, 1973[28] in Sections 432, 433, 433A, 434 and 435 provides for pardon. Sections 54 and 55 of the IPC confer power on the appropriate government to commute sentence of death or sentence of imprisonment for life as provided therein.

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[27] The Law Commission of India in its 35th Report on Capital Punishment (1967), Vol.1, pp.317-18 para, 1025 examined the question at great length and not recommended any change in the scope of these powers.

[28] (i) Section 432, *Cr.P.C, 1973* provides power to suspend or remit sentences.
(ii) Section 433, *Cr.P.C, 1973* provides the power to commute sentence.
(iii) Section 433A *Cr.P.C, 1973* lays down restrictions on provisions of remission or commutation in certain cases mentioned therein.
(iv) Section 434 *Cr.P.C, 1973* confers concurrent power on the central government in case of death sentence.
(v) Section 435 *Cr.P.C, 1973* provides that the power of the state government to remit or commute a sentence where the sentence is in respect of certain offences specified therein will be exercised by the state government only after consultation with the central government.

Power to Pardon: The Constitutional Scheme

The Constitutional power to grant of pardon, remissions, suspension of sentence, etc, conferred on the President or the Governor, as the case may be, are detailed as under :

Power of President to Grant Pardons

Article 72 of the Constitution of India enjoins that Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases–

1. The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence

   a. In all cases where the punishment or sentence is by a Court Martial;

   b. In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

   c. In all cases where the sentence is a sentence of death

2. Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

3. Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

Power of the Governor to Grant Pardons

Article 161 of the Constitution deals with the power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases –

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

A Comparative Analysis of the Scope of Article 72 and 161

A cursory look at Article 72 and 161of the Constitution of India would reveal that the nature of power of pardon bestowed to the President is far superior to the

Governor. The President or the Governor, as the case may be, may exercise their power in this behalf, subject to the laws made under Union List and the State List respectively. The ambit of their power is widely demonstrated therein. Thus, the power conferred on the executive authority is co-extensive with legislative authority.[29] In other words, the President shall act in consonance with the, but confining to the offences covered under, laws enacted by Parliament as per the Union list and whereas the Governor of a State shall act in tune with laws enacted by State legislatures under the State list. They do have concurrent power of clemency in respect of matters in Concurrent list, but subject to the limitation on executive power contained in Articles 73(1)(a)[30] and 162[31] respectively.

On conjoint reading of Articles 72 and 161 reflects two distinctive factors in relation to the power of the President and the Governor, they are –

Firstly, the President can pardon punishments or sentences inflicted by Court Martial,[32]whereas, the Governors have no such power.

Secondly, Article 72(1) (c) expressly provides that the President's power extend to pardoning sentences in all cases where the sentence is one of death.

However, the proviso contained 72 in Article 72(3),[33] ravels a question - whether the Governor of a State does have a power to pardon a sentence of death? The answer is divergent, some authorities is of the view that in a case of death sentence, the Governor has no power of pardon but he can only remit, suspend or commute the sentence of death and others speaks that he has power to pardon the death

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[29] *Supra* note 26 at p. 2101.

[30] The extent of executive power of the Union: (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend: (a) to the matters with respect to which Parliament has power to make laws.

[31] The extent of executive powers of the State extends to all matters in which State legislature can make laws. However, it cannot encroach upon matters in the Union list or any other matters entrusted with the Union by way of Central Law. The State executive can thus, not encroach upon matters legislated by the Union but even this does not imply that there is a rigid division between the three agencies of the State as is the case with the Union executive. Since there are times when even the executive is entrusted with legislative or judicial functions.

[32] Sub-clause (a) of clause (1) of Article 72.

[33] Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

sentence. Although Article 161 is silent on this score both the President and the Governor of a State, correspondingly, are competent to exercise the power to pardon, under Articles 72 and 161, for an offence relating to a matter to which executive power of the State extends.

The Constitution of India doesn't envisage any hierarchy of powers between the President and the Governor, the rejection of one mercy petition does not exhaust the power of the President or the Governor[34] and that there is nothing to debar the President and the Governor from reconsidering mercy petition in view of the changing circumstances.

Generally, convicts take a serial approach. Firstly, they prefer petition to the Governor, if they succeed the matter ends. On failure, they approach the President. The Constitution doesn't prescribe number of times the convict may approach the Governor or the President seeking mercy. The conventional understanding is that a de-novo attempt would be considered on the change of circumstances or conditions i.e. on the rise of 'new matters' New revelations, even hearsay ones, delay etc. have been treated as new issues which makes a fresh mercy petition worthy.

An absurd situation has arisen recently in India. Yakub Memon was convicted and sentenced to death for the serial blasts that rocked Mumbai in early 1993. As the day of execution neared, a flood of petitions was filed with the President and the Governor. Soon after the Governor rejected it, a new one was filed with the President. The Governor's rejection was deemed to be a 'near circumstance' for approaching the President. Soon after the President rejected it, Memon's lawyers approached the Supreme Court arguing that his petition was wrongly rejected. The Court dismissed the matter. This was again urged as a new ground and a new mercy petition was filed before the Governor.

Should there be limits to the number of times a person may petition the Governor or the President, and seek a review of those executive decisions? The Constitution doesn't lay down any limits. What is achieved by allowing the same convict to approach, repeatedly, both the Governor and the President on the same matter is not clear.

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[34] *G.Krishta Goud and J.Bhoomaiah* v. *State of Andra Pradesh* (1976)1 SCC 157.

This circus of mercy will continue unabatedly until conventions are established or some guidelines are judicially pronounced. It is high time to put an end to repeated mercy petitions, by death row convicts to ensure finality to the case, on the rejection by the President or the Governor and dismissal of appeal by the Court. Any continuance of this practice would render the whole procedure a mockery and leads to abuse of the provisions. As it is evident very recently in Nirbhaya's case how power of pardoning is being abused.

Nature of the Power of pardon

Article 72 and 161 designedly and benignantly vest in the highest executive the humane and vast jurisdiction to remit, reprieve, respite, commute and pardon criminals on whom judicial sentences may have been imposed. However, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a Constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Article 72 and 161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. Supreme Court, in many instances, clarified that the executive is not sitting as a Court of appeal rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases, i.e., distinct, absolute and unfettered in its nature.

Justice Oliver Wendell Holmes in *Biddle* v. *Perovich* [35]said,

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of our constitutional scheme. When granted it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment fixed.[36]

[35] 274 U S. 480 (1927)

[36] *Ibid*. at 486.

In *Ex parte Garland*,[37] Justice Fields explaining the nature and effect of a pardon said:

> "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of law, the offender is as innocent as if he had never committed the offence."[38]

The classic exposition of the law relating to pardon is to be found in *Ex parte Philip Grossman*[39] where Chief Justice Taft stated:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."[40]

This is an important power which is based on a wide form of discretion. Discretion neither can nor should be eliminated in the course of exercising pardoning power. The essence of discretion is choice. An authority in which discretionary power is vested has range of option at his disposal and he exercises a measure of personal judgment in making the choice. Yet, discretion is not arbitrary judgment, but rather the ability to recognize correctly.[41]

Though a textual interpretation of the Constitution fails to convince that the framers of the Constitution intended for the advice of the Council of Ministers to be binding on the President and Governors while exercising their pardoning powers, the judicial interpretation of the Constitution suggests an entirely different proposition.

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[37] 71 U.S. (4 Wall.)333 (1867).

[38] *Ibid*. at 381.

[39] Written Submissions of Senior Counsel Soli Sorabjee in the Supreme Court of India as Amicus Curiae in *Epuru Sudhakar* v. *Government of Andhra Pradesh* (WP (Crl.) No. 284-285/2006). Written submissions of Mr. Soli Sorabjee in power to Pardon case.

[40] *Ibid*.

[41] P.J Dhan, " Justiciability of the President's Pardon Power", Vol.26 (3 & 4) *Indian Bar Review*,(1999) p.74.

The Supreme Court in *Samsher Singh* v. *State of Punjab*[42] a seven-judge bench stated that the satisfaction of the President or the Governor required by the Constitution is not their personal satisfaction, but the satisfaction of the Council of Ministers on whose aid and advice the President and the Governor exercise their powers and functions. The Supreme Court again in the case of *Maru Ram* ruled that the President and the Governors in discharging the functions under Article 72 and Article 161 respectively must act not on their own judgment but in accordance with the aid and advice of the ministers.

Further, a usual reading of these provisions shows that there is complete silence regarding the factors which must be taken into account by the President and the Governor while exercising the power to pardon. It is reasonable to assume that this silence was deliberate, since the power to pardon has historically been in the nature of a prerogative. The judiciary has been reluctant to impose guidelines on the executive for the exercise of pardoning power under Article 72 and Article 161. In *Kuljeet Singh* v. *Lt. Governor, Delhi and Anr.*[43] the Supreme Court expressed the view that the pardoning power of the President is a wholesome power that should be exercised 'as the justice of a case may require', and that it would be undesirable to limit it by way of judicially evolved constraints. In *Kehar Singh*[44], the Supreme Court stated that the power under Article 72 should be construed in the widest possible manner without the Court interfering to lay down guidelines of any sort. However, the Court went on to state that the power to pardon may be exercised to correct judicial errors, and for 'reasons of state'.

Judicial review on exercise of Power of Pardon

One of the earliest cases where a clemency petition was brought under judicial review was *G. Krishta Goud and J. Bhoomaiah* v. *State of Andhra Pradesh and Ors*[45], while rejecting the writ petition, the Court sounded a note of caution and stated that the Court would intervene where there was "absolute, arbitrary, law-unto-themselves malafide execution of public power". These parameters for

[42] (1974)2 SCC 831.

[43] (1982) 1 SCC 11.

[44] (1989 SCC (1) 204).

[45] (1976) 2 SCR 73.

judicial review were reiterated again in *Maru Ram* v. *Union of India and others*[46] where the Constitutional Bench further asserted that the Courts would intervene in cases where *political vendetta or party favouritism was evident or where capricious and irrelevant criteria like religion, caste and race* had affected the decision-making process. Such malafide and extraneous factors vitiate the exercise of pardon power and should be checked through judiciary.

Another, landmark case of *Kehar Singh*[47] in which the challenge was to the president's order declining clemency to one of the accused in the Indira Gandhi assassination case. The Court held that the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review. The Court can never question or ask for reasons why a mercy petition was rejected. However, if the reasons provided by the president in his order are held to be irrelevant, the court could interfere. In the case of *K.M. Nanavati* v. *State of Bombay*[48] a reprieve granted by the Governor under Article 161 was held constitutionally invalid since it conflicted with the rules made by the Supreme Court under Article 145.

In *Swarn Singh* v. *State of UP*,[49] the Governor of Uttar Pradesh remitted the whole of the life sentence of an MLA of the State Assembly who had been convicted of the offence of murder within a period of less than two years of his conviction. The Supreme Court found that Governor was not posted with material facts such as the involvement of the accused in 5 other criminal cases, his unsatisfactory conduct in prison and the Governor's previous rejection of his clemency petition in regard to the same case. Hence, the Supreme Court interdicted the order, acknowledging that though it had no power to touch the order passed by the Governor, if such power was applied arbitrarily, malafide and in absolute disregard of the finer cannons of constitutionalism, such an order cannot get the approval of law. Similarly, in the case of *Satpal* v. *State of Haryana*[50], it was held that the

[46] (1981) 1 SCC 107.

[47] C.J Pathak in *Kehar Singh* v. *Union of India* (1989 SCC (1) 204) remarked that the power of pardon rests on advice of the executive which is subject to provisions of article 74(1) of the Constitution.

[48] (1961) 1 SCR, p. 541.

[49] (1998) 4 SCC 75.

[50] 2000 (5) SCC 170.

constitutional power given to the Governor under article 161 if found to be exercised without advise by Government or if the jurisdiction is transgressed or if it is established that the order was passed without application of mind or if the order is malafide or has been passed on some extraneous considerations like political loyalty, religion, caste etc, then the court has full right to interfere.

The Supreme Court in the case of *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*[51] said that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. It clarified that the aim of such judicial review is not to substitute executive's discretion for the judge's discretion but to confine itself to questions of legality which mean in effect the following five basic questions:

1. Did the decision making authority exceed its powers?
2. Did the authority commit an error of law?
3. Did the authority commit a breach of the rules of natural justice?
4. Did the authority reach a decision that no reasonable tribunal would have reached?
5. Did the authority abuse its powers?[52]

The Supreme Court in *Government of A.P.* v. *M.T.* Khan[53] stated that if the government considers it expedient that the power of clemency be exercised in respect of a particular category of prisoners the government had full freedom to do so and also for excluding certain category of prisoners which it thought expedient to exclude. The Court further observed that "to extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved." In the case of *Epuru Sudhakar and Anr.* v. *Government of Andhra Pradesh*[54] the Court set aside a remission granted by the Governor of Andhra Pradesh on the

[51] 1997 (7) SCC 622.

[52] The Court quashed the order reasoning that the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner, hence the order fringed on arbitrariness.

[53] 2004 (1) SCC 616.

[54] AIR 2006 SC 3385.

ground that irrelevant and extraneous materials had entered into the decision making which highlighted the fact that the prisoner was a 'Good Congress Worker' and that he had been defeated due to political conspiracy.

The Supreme Court in *Narayan Dutt* v. *State* of Punjab[55] has held that the exercise of power is subject to challenge on the following grounds:

a) If the Governor had been found to have exercised the power himself without being advised by the government;

b) If the Governor transgressed his jurisdiction in exercising the said power;

c) If the Governor had passed the order without applying his mind;

d) The order of the Governor was malafide;

e) The order of the Governor was passed on some extraneous considerations.

Thus, in these judgments concerning the Governor's exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary.[56]

Judicial Review in other Countries:

*** *United Kingdom***

In UK judicial review the power of pardon is extremely restricted in scope. However the British constitutional structure recognizes the supremacy of parliament and provides an altogether narrower scope for judicial review than the Indian Constitution which tends towards separation of powers. Thus British precedent in this area has limited application to the India.

In England the monarch exercises the power on the advice of the departmental minister the Home Secretary. The Home Secretary's decision can in some situations be challenged by judicial review. In *R* v. *Secretary of State for the Home Department ex parte Bentley*[57] the Court held that the formulation of policy for the grant of a free pardon was not justiciable.

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[55] (2011) 4 SCC 353, para 24.

[56] The principles of judicial review on the pardon power have been restated in the case of *Bikas Chatterjee* v. *Union of India*, 2004 (7) SCC 634 at 637.

[57] 1993 (4) All ER 442.

*** *USA***

Article II of the US Constitution grants the President of the United States, the "Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The Court has been cautious in its interpretation of the pardoning power where conditions have been imposed in grant of pardons which conflicted with the constitutional rights of the persons who were pardoned. In *Hoffa* v. *Saxbe,*[58] a condition imposed on a pardon was challenged as unconstitutional. The District Court held that the "framework of the constitutional system" establishes limits beyond which the President may not go in imposing and subsequently enforcing conditions on pardons.

In Burdick v. *United* States[59], the Court upheld an offender's right to refuse a presidential pardon granted in order to compel him to testify in a case which conflicted with his right against self-incrimination. However apart from judicial scrutiny in this area the power of pardon has been allowed to be exercised freely. The lack of any standards or checks on the exercise of the clemency power has not stood the American system of justice in good stead. Commentators have noted that unbridled discretion in pardoning threatens to permit the President to shield himself and his subordinates from criminal prosecution and to undermine the essential functions of coordinate branches of government.

In US the President and Governors[60] have regularly exercised the clemency power in ways that are clearly at odds with society's interests, including granting or denying pardons to convicted murderers solely because of campaign promises made to supporters. One Governor was even impeached and removed for

[58] 378 F. Supp. 1221 (D.D.C. 1974).

[59] 236 U.S. 79 (1915).

[60] The decision of then President of U.S. Mr. Gerald Ford, to pardon the former President Richard Nixon from Watergate scandal on September 8, 1974. George H.W. Bush's pardons of 75 people, including six Reagan administration officials accused in connection with the Iran-contra affair. Mr. Bill Clinton, during his regime, has granted as many as 395 pardons amongst about 140 were issued on January 20, 2001, the day on which he has demitted his office, these decisions shrouded with a question– whether these decisions are free and fair? The way in which they hastened the process of pardon clearly indicated that the power in this behalf is exercised out of political expediency to appease the stakeholders.

particularly blatant abuses of the pardoning power. Apart from the evident abuse of the power of pardon, the inherent differences in the structure of the Government of the USA from that of India renders the adoption of the US system unsuitable. The USA follows a Presidential System of Government in which the executive is relatively insulated from the pressures of legislative party politics and more stable in nature than the Indian Parliamentary system. The system thus introduces a degree of responsibility in the use of the pardoning power which would not be possible in India.

* ***France, Germany and Russia***

In France pardon and act of clemency are granted by President of France who has the sole discretion and power is non questionable & absolute. A German President has pardoning power which he can transfer to someone else such as Chancellor or the Minister of Justice. An absolute power of pardon is given to the Russian President through the Article 84 of the constitution.

Issues and Challenges in the Excise of Power of Pardon in India:

- In a murder trial, it is a State which prosecutes against the accused on behalf of the society and at the same time it is the State which decides whether mercy petition address to the President should be allowed or not. It is just mockery of justice and hence submitted that there should be proper demarcation of the power of executive.
- Though the Apex Court held that death penalty is to be awarded in the rarest of rare cases only it is not further defined. In fact, the doctrine of rarest of rare case is superfluous as it is vague and incomplete. The judiciary has evolved its own jurisprudence in evaluating which cases are to be considered as "rare" and which are not on an inconvincible reasoning. A close analysis of various decisions in which capital punishment was upheld on the basis of above doctrine would reveal that no uniform guidelines exist for its application. Its application is largely dependent on the subjective satisfaction of an individual judge. The quantum of punishment varies according to the nature of a judge. In other words, subjective satisfaction of a Judge plays an active role in awarding "death" or "life". Moreover, in many cases, the court has applied this extreme punishment for punishing

political murders.[61] Conviction of an accused can be solely based on an uncorroborated testimony of an accomplice who himself is a participant in crime.[62]The court can award death sentence purely on circumstantial evidence[63] or even on pleading guilty of an accused.[64]

In India, special courts also award death penalty summarily. In such cases even the basic provisions of criminal law has been diluted, for example, presumption of innocence, confession, burden of proof etc.[65]

In fact, the Government of India is trying to widening its scope to less serious offences which does not even come within the frame work of rarest cases and is against international humanitarian law as well.[66] Further, in many Acts capital punishment is mandatory.[67] The mandatory nature of the capital punishment offence

[61] *Kehar Singh* v. *Delhi Administration*, AIR 1988 SC 1183, *State* v. *Nalini*, 1995 (5) SC 60; It is said that "Death penalty shall not to be applied for political offences or economic crimes". *See* Article 4(4) of American Convention on Human Rights; Article 11 of Arab charter on Human Rights, 1994; UN Special Rapporteur on extra judicial summary or arbitrary execution, UN document No.e/cn.4/ 1997/60,24 December 1996.

[62] Section 114 of *Indian Evidence Act, 1872*.

[63] *Dhananjay Chatterjee v. State of West Bengal* (1994) 2 SCC 220; *Kehar Singh* v. *Delhi Administration*, AIR 1988 SC 1183, *State* v. *Nalini*, 1995 (5) SC 60.

[64] *See* section 229, 241 and 252 of the Code of Criminal Procedure, 1973.

[65] International community on various occasions urged to follow strictly "procedural safeguards" for those serving death sentences. *See* Article 8 of the American Convention of Human Rights; Article 7 of African Charter on Human and People's Rights; Article 14 of I.C.C.P.R. 1979; The United Nation Economic and Social Council (ECOSOC) adopted safeguards guarantying protection of the rights of those facing the death penalty, 1984; General Assembly Resolution 2393 (XXII) of 26 Nov. 1968; Resolution 1989/64, adopted on 24th May 1989 and Resolution 1996/ 15 adopted on 23 July, 1996 by the UNECOSOC.

[66] Various international and regional instruments say that "Death sentence shall be applied only for more serious crime and it shall not be extended to those crimes to which it does not presently apply." *See* Article 4(2) of American convention on Human Rights; Article 2 of Second Optional Protocol to the ICCPR, 1989; Article 2 of protocol to the American Convention on Human Rights; Article 2 of protocol to the convention of the protection of human rights and fundamental freedom; under Article 10 of Arab Charter on Human rights, 1994.

[67] *Under the Arms Act 1959,* who ever uses any prohibited arms which resulted in death of any person; Under the *Schedule Casts and Schedule Tribes (Prevention of Atrocities Act) 1989*,whoever fabricates false evidence which resulted in conviction of an innocent member of a schedule caste etc.; Section 31A of the *Narcotic Drugs and Psychotropic Substance Act 1985* (now abolished), If a person who has been convicted in an offence relating to narcotic drugs and he subsequently do or attempt to the offence again. *Under the commission of Sati (prevention) Act, 1987*, if any person either directly or indirectly abets the commission of sati shall be punished with death. Similarly death sentence is also mandatory in the *Prevention of Terrorism Act (2002)*(now abolished) for causing death by using bombs etc.,

is the cannon of criminal jurisprudence as well as the principle of natural justice, *Audi Alteram Partem*. It totally excludes judicial discretion, as the court has no other option to impose any other sentence. Once it is proved that the accused has committed the crime, the court is bound to award death sentence only and nothing more or nothing less than that.

- Further, there is no uniformity in the decisions of Supreme Court.[68] In some cases even the delay of more than two years in the execution of death sentence was considered so grave that it resulted in commutation of death sentence into life imprisonment. But in many other cases the apex court was not obliged to commute death sentence into life even though there was delay of more than fourteen years in execution of death sentence.[69]
- The power conferred on the President is very narrow in scope he has either to consider the recommendation or reject the same. In the event the Home Ministry again places the recommendation for on the file, he has no other go but to accord his assent. The dichotomy envisages that the discretion to exercise the power to pardon although supreme power, tacitly, lies with the Council of Ministers but not with the President. Thus, power of pardon contemplated in the Constitution is not absolute power but clipped with limitation. The scheme visualized herein is of reverse socio-legal engineering by making the President to act on the advice of the executive. Thus, the aggrieved can avail remedial justice at the behest of the executive by just getting a formal approval of the President.
- ·The President and Governors are bound to act as per the advice of the Council of Ministers while exercising their pardoning powers may lead to situations of absurdity. For example, in the case of *Kehar Singh* the accused in relation to whom pardon was sought was the assassin of Ms. Indira

[68] *S. Triveniben* v. *State of Gujrat*, 1989 Cr.L.J 870; *Javed Ahmed* v. *State*, 1984 Cr.L.J 1909 (SC); *Madhu Mehta* v. *Union of India*, AIR 1989 SC 2299; *Khemchand* v. *State*, 1990 SCALE 1; *State of U.P.* v. *Samman Das*, 1972 Cr.L.J 487, *State of Maharashtra v. Mangalya*, 1972 Cr.L.J 570 SC. *Vatheeswaran* v. *State*, 1983 Cr.L.J 481 (SC) *Pratt v. Morgen* v. *Attorney General of Jamacia* (1993) 4 ALL E.R. 769.

[69] *Dhananjay Chatterjee* v. *State of West Bengal* (1994) 2 SCC 220 at 239 (even delay of fourteen years in execution of death sentence was not condoned); See, *Manohar herum Shah* v. *State*, 1973 CL 971 SC; *Sher Singh* v. *State*, 1973, Cr.L.J 803 SC

Gandhi, a former Prime Minister of India. In such a situation, the possibility of the advice of the Council of Ministers, which comprised Ministers from the same political party as the former Prime Minister, suffering from bias or a lack of objectivity cannot be precluded.

- Further, in the era of coalition governments, there is a chance that the advice given to the Council of Ministers would not reflect a "true, just, reasonable and impartial opinion", and would instead be based wholly on political motivations.[70] In India, it may be noted that the vesting of this power in the President and Governors, as opposed to the Prime Minister or Legislatures, may have been deliberate, so as to prevent the grant of pardon being made open to any sort of legislative debate. In light of such possibilities, it is submitted that some leeway for the President to exercise the power to pardon without being bound by the advice of the Council of Ministers, and without bowing to political pressures, is necessary.
- The possibilities of abuse of power are inherent in the pardon power. The records,[71] in this regard, evidences that the Presidents of India, in the past, has bailed out many culprits from the death sentences. Do they have acted in due deference to the principles of natural justice and rule of law? On many occasions the Executive head has exercised the power of pardon wielding political vendetta or party favouritism that may make the actual exercise of the power to pardon vulnerable.[72] A worrying trend is the growing

[70] N.Thakur, President's 'Power to Grant Pardon in Case of a Death Sentence', 105 *Cri.L.J* 101 (1999), 104.

[71] No President in India's history has used the power to pardon death-row inmates as extensively as President Patil. She has granted a record of 30 pardons in 28 months, over 90 per cent of India's total death sentences pardoned ever. But 22 of those relate to brutal multiple murders and gruesome crimes on children, the worst of what human beings can do to one another. Some are rogues who lived on the edge of law and bounced in and out of the penal system for most of their adult lives. President Patil's acts have put mercy on trial in these unmerciful times.

[72] In Andhra Pradesh, the then Governor Sri. Sushil Kumar Shinde has reduced the sentence of a congressman from 10 years to 5 year.

tendency of successive Presidents to disregard the advice of the Council of Ministers in the exercise of this power.[73]

- If the President disregards the recommendation of the ministerial advice to reject a mercy petition of a convict, always has the option to sit over it and delay taking a decision until his or her retirement. This is called "Pocket veto" as the Constitution does not expressly mention it. But, the use of this option has sometimes landed the President in legal tangle, with the death row convicts choosing to challenge the rejection of their mercy petitions, or their non-disposal after an undue delay, as having imposed cruel and undue punishment and seek commutation of their death sentences on various grounds.

Conclusion

Every civilized country recognizes and has, therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency to be exercised by some department or functionary of government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgment are always tempered with mercy. It is necessary to keep in mind the salutary principle that[74] "To shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community."

It is imperative that a person be deprived of his life and liberty by due process of law or by laws which are just, fair and reasonable. Consequently, the presidential power should also be used in accordance with the due process of law. The provision should be exercised with equanimity towards one and all without distinctions on the basis of gender, age, caste, community, language or geography. Today's changing political climate underscores the need for principled exercise of the pardon power.

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[73] Former President A.P.J. Abdul Kalam inherited 12 pending mercy petitions from his predecessor which grew to 20 in his tenure. Despite recommendations for rejection of the same by the Home Ministry, he rejected only 1 petition in his 5 year tenure – that of *Dhanonjoy Chatterjee's* case whose mercy petition had already been rejected by two former Presidents, Shankar Dayal Sharma and K.R. Narayan.

[74] As quoted in Burghess, J.C. in (1897), U.B.R. 330 (334).

Harsher sentencing standards and growing public sentiment in favour of capital punishment have resulted in an increasing number of death penalty cases finding their way into the pardon process. The power to grant pardon, as envisaged in Articles 72 and 161 of Indian Constitution can achieve its aim and object only when they are exercised with a sense of responsibility. The power of judicial review provides a kind of check over misuse of this extraordinary power in the hands of executive organ of the state. The purpose of Articles 72 and 161 is to provide a human touch to the judicial process. If this human touch is not exercised properly, the very purpose of mercy provisions is defeated.

But today Executive clemency is like the unbridled wind which blows unhindered with least interference of the judiciary. Unfortunately, the granting of pardons, reprieves, and manifestations of the executive clemency power have been described as unilateral, notoriously non-reciprocal, virtually unassailable, absolute and perhaps the most imperial of presidential powers. From the time of inclusion of executive clemency in the constitution it has been subjected to various controversies mainly due to the vague language of articles 72 and 161 as well as its archaic origin. The question of extent of power of pardon of punishment, the question of who should be granted pardon and what procedure to be followed in granting pardon by the executive have been a matter of debate for decades. The executive which is mired with its political bias has been granted to make decisions over-riding the decisions of the apex-courts of the country.

In India, it may be noted that the vesting of this power in the President and Governors, as opposed to the Prime Minister or Legislatures, may have been deliberate, so as to prevent the grant of pardon being made open to any sort of legislative debate.

UNWRITTEN CONSTITUTIONAL CONVENTIONS AND ENTRENCHED CONSTITUTIONAL TEXT: A STUDY ON THEIR INTERPLAY IN A COMPARATIVE PERSPECTIVE

Ms. Sayantani Bagchi*

I. Introduction

A Constitution grows amidst momentous changes during the years of its existence. It is either formally amended or undergoes an informal transformation with changing times and needs. To bring about a formal change, written Constitutions themselves provide for methods of an amendment that ensure that the Constitution addresses and accommodates the shifting dynamics of the society. The process of formal amendment entails several aspects. An amendment is brought about in the exercise of constituent power vested in either an independent body or representative institutions. While some Constitutions are rigid some are flexible and the others are a blend of both. Again, while some Constitutions expressly outline what cannot be amended while some do not. The techniques of amendment vary greatly across jurisdictions and are a popular concern in the constitutional discourse. Constitutions also change through informal means like judicial interpretation and unwritten constitutional conventions. Judicial interpretation serves as a means to transform the meaning ascribed to an entrenched constitutional provision without altering its letter. Constitutional conventions, among other ways, constitute a crucial informal mechanism of constitutional change. Besides eliciting

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constitutional change, conventions also substitute constitutional silences and fundamentally inform the working of a responsible government.

This paper shall at the very outset address the most significant questions associated with the working of constitutional conventions. Such a discussion would entail their meaning, the purposes they serve, the scope of operation, the myriad of factors that contribute towards crystallising a practice into a convention, and the factors that ensure obedience. The discussion shall lead us to another significant and core area of this paper i.e. the interaction of conventions with entrenched constitutional provisions in upholding established principles of constitutionalism. As a follow-up task it would be pertinent to understand if conventions are capable of unsettling established principles of constitutionalism. Instances from India, Canada and Australia would help us understand such experiences with enhanced clarity. Constitutionalism, put simply, acts as a check on the arbitrary exercise of governmental power. It is achievable not only through a constitutionally laid apparatus but through also extra-constitutional means that supplement it, prominent among them being political rules/conventions which are based on the presumption of the unpredictability of the written text. The wide range of human behaviour cannot efficiently be captured in one single Constitution and hence arises the inevitability of constitutional conventions. The scope of this paper is limited to jurisdictions with codified Constitutions which are modelled around the Westminster model.

Before we delve into a discussion on constitutional conventions and their interplay with the entrenched provisions of the Constitution, we must understand the essential qualities that confer constitutional status to a convention. To start with, let us consider a few definitions. A working definition proposed by O. Hood Phillips reads, "Rules of political practice which are regarded as binding by those whom they apply, but which are not laws as they are not enforced by the Courts or by the Houses of Parliament." This definition helps create a distinction between constitutional conventions and mere practices not regarded as obligatory or practices that are inconclusively considered binding, non-political rules devoid of constitutional significance, judicial rules of practice as the rules of precedent, laws enforced by Courts, and rules enforced by the Houses of Parliament through their officers.[1]

[1] O. Hood Phillips', *Constitutional and Administrative Law* (Sweet & Maxwell Ltd., London, 7th edn., 1987) pp. 113-116.

Galligan and Brenton define conventions as "basic political rules affecting the structure and powers of government that are not enforceable in courts of law, so not amenable to jurisprudential treatment that purports to view them as quasi-laws."[2] John Elster defines Constitutional norms as "sanction-based practices that regulate the relation between the main branches of government, their prerogatives, and limitations on their powers."[3] Authors like A.V. Dicey, whose writings command tremendous authority, focus on understanding conventions from a legal perspective by distinguishing 'law of the Constitution' and 'convention of the Constitution' and asserting the non-legal and unenforceable aspect of conventions. While the former constitutes law in the strict sense, the latter do not as they are not enforceable.[4] Dicey's words what constraints "the boldest political adventurer to obey the fundamental principles of the Constitution and the conventions of those principles are expressed is in fact that the breach of those principles will almost immediately bring the offender into conflict with the Courts and the law of the land" depict that the only sanction behind Conventions is legal and not political.[5] However, scholars in recent years refused to accede to such an approach[6] towards the understanding of conventions which according to them relegates a convention to a status inferior to that of law and judicial decisions, and rather than viewing conventions as 'not law', they view constitutional conventions "as integral parts of the constitutional system that has broad political and social, rather than legal foundations."[7]

II. The 'Constitutional' Element in Conventions

The presence of the element of 'Constitution' in a constitutional convention is undeniable as they both form part of the same constitutional order. Since Conventions

[2] Brian Galligan and Scott Brenton, *Constitutional Conventions in Westminster Systems* (Cambridge University Press, 2015)p. 8.

[3] Jon Elster, Unwritten Constitutional Norms 21 (undated) (unpublished manuscript) p. 43.

[4] A.V Dicey, *An Introduction to the Study of the Law of the Constitution* (The Macmillan Press Ltd., London, 10th edn., 1959)pp. 417 – 438.

[5] *Ibid*.

[6] Ashraf Ahmed, "A Theory of Constitutional Norms" 12 *Mich.L.Rev* (In Press 2022)p. 11.

[7] Galligan, Denis and Versteeg, Mila (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013); Professor Diceys statement that the convention is not a binding rule was departed with by Sir Kenneth Wheare in Modern Constitutions, who wrote - By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution. *K. Lakshminarayanan* v. *Union of India And Another* Lnind 2018 SC 635.

echo constitutional values, their breach is equally unconstitutional.[8] But what distinguishes a Constitution from a convention is the formal expression and legal sanction of the latter. While judges are the interpreters and enforcers of the latter, political branches of the Government are the interpreters of the former. Such contingencies and unpredictability of conventions invariably set off any discussion on Constitutional conventions with a few mandatory questions - Why do conventions arise or what purpose do they serve? How do they arise and what is their scope? Do they essentially require an arrangement created by a codified Constitution to arise and evolve? How do practices crystalize into well-established conventions despite lack of legal sanction?

Conventions arise either out of the need to supplant an entrenched constitutional provision or of a distinct legal or political context and not from a void. They often arise in response to constitutional crises; political crises, reform; changing societal norms; and emergencies.[9] Sir Ivor Jennings states that, "The shortest explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law: they make the legal Constitution work; they keep it in touch with the growth of ideas. A Constitution does not work by itself; it has to be worked by men."[10] The passage establishes a proportional relationship between a Constitution and its conventions which suggests that conventions grow and respond to the changing meanings that a Constitution acquires during its existential years. The Supreme Court of India observed that "The object of constitutional convention is to ensure is that the legal framework of the Constitution is operated in accordance with constitutional values and constitutional morality…The conventions are not static but can change with the change in constitutional values and constitutional interpretations. No constitutional conventions can be recognised or implemented which runs contrary to the expressed constitutional provisions or contrary to the underlined constitutional objectives and aims which Constitution sought to achieve."[11]

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[8] Max Vetzo, "The Legal Relevance of Constitutional conventions in the United Kingdom and the Netherlands" 14 *Utrecht Law Review* (2008)p. 146.

[9] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, "The Dynamics of Constitutional Conventions in Westminster Democracies" 72 *Parliamentary Affairs* (2019)pp. 664 – 683, *available at* https://doi.org/10.1093/pa/gsy027 (last visited on July 25, 2021).

[10] Sir Ivor Jennings, *Law and the Constitution* (Hodder & Stoughton Ltd., 5th edn., 1959)pp. 81-82.

[11] *K.Laksminarayan* v. *Union of India* 2019 (4) SC J 30.

These observations reflect that conventions can be allowed to germinate only in those places where there is a vacuum and not where the ambit is set out by the entrenched constitutional provision so that continuity and consistency are maintained when the constitutional ideals are put into action. In the event of a conflict, unquestionably the entrenched provision leads the way. In *UNR Rao* v. *Smt. Indira Gandhi*, the Supreme Court laid down that, "If the words of an Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a parliamentary system of Government with a Cabinet. In trying to understand one may keep in mind the conventions prevalent at the time the Constitution was framed."[12] Since conventions alter or refine the constitutional meaning without a formal change in the letter of the Constitution, they at times regulate the discretionary powers vested on an authority. O Hood Philips' opines that "the ultimate object of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors."[13] Conventions regulate the exercise of discretionary powers conferred on a constitutional functionary and provide a means for cooperation among various departments of the Government.[14] Such explication helps us infer that conventions play a stupendous role in shaping the growth of constitutionalism. The above discussions throw light upon the outcomes that conventions help in achieving. In association with written constitutional texts or even without them, they help in shaping the idea of constitutionalism. Conventions, in other words, help constitutionalism thrive in ever-changing dynamics.

III. The Scope of Conventions

The immediate question that follows pertains to the scope of conventions. It is to be remembered that a constitutional arrangement sustains several relations which may be regulated by both law and conventions. In the context of the Westminster model, Dicey's observation that constitutional conventions primarily relate to the Crown's prerogative powers and enable the Ministers of the Crown to exercise these formal powers in furtherance of the principles of responsible government.

[12] AIR 1971 SC 1002.

[13] *Supra* note 1 at p.119.

[14] *Ibid*.

Marshall goes beyond the confines of Dicey's observation and holds that several other relations are governed by conventions namely "relations between Cabinet and Prime Minister, relations between the Government as a whole and the Parliament, relations between the two Houses, relations between Ministers and the Civil Service, relations between Ministers and the Machinery of justice" etc.[15] In general, in systems which are modelled around the British legal system, most concerns of a responsible government relating to appointment and removal of Ministers, the relation between the head of the States and their cabinet, ministerial responsibilities, the relationship between the executive and the legislature, independence of the judiciary to name a few are regulated by conventions.[16] In countries like the United Kingdom and New Zealand which do not have a single codified Constitution, dependence upon conventions is more than countries with written Constitutions like Canada, Australia, and India.

The weight attached to these unwritten constitutional norms in different countries varies extensively depending upon their political arrangements and constitutional dynamics. Conventions may be a part of systems with both written and unwritten (uncodified) Constitutions. A written Constitution however considerably contains the growth of conventions. Even the most far-sighted and well-researched Constitution can't escape the clutches of human fallibility. Looking beyond the constitutional text is inevitable. But the interest of constitutionalism demands that conventions are the closest to rule of law as we understand it in various jurisdictions.[17]

IV. The Binding Factor(s)

The most challenging task is to ascertain the factors that contribute towards crystalizing practices into well-established conventions despite the absence of legal sanction.[18] It is important to note that not every practice fructifies into an established convention. Lack of judicial enforcement considerably dwindles their authority and

[15] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, 2001) p. 4.

[16] *Supra* note 2 at p.9.

[17] Richard Albert, "How unwritten constitutional norms --change written constitutions" 38 *Dublin University Law Journal* (2015) p. 411.

[18] Joseph jaconelli, "Do Constitutions Bind?" 64 *The Cambridge Law Journal* (2005) pp.149-176.

subjects them to frequent abdication. What then are the factors that fortify a rule crystallizing it into a constitutional convention? Dr. Jennings's momentous works Law and the Constitution and Cabinet Government provide early insights into this connection. He says, "Conventions grow out of practice, and their existence is determined by precedents."[19] Ivor Jennings says, "We have to ask ourselves three questions: First, what are the precedents? Secondly, did the actors in the precedents believe that they were bound by a rule, and thirdly, is there a reason for the rule?[20] A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail unless it is perfectly certain that the persons concerned regarded them as bound by it."[21]

This view has been categorically adopted and applied by Courts to test whether a rule qualifies as a convention.[22] Finding accurate answers to the questions posed by Jennings is challenging due to the complex character of conventions. The presence of all the dynamics might be unachievable in certain cases. The definitions advanced by Sir K.C Wheare and Professor Philips emphasize convention as rules that are accepted as obligatory and which are regarded as binding' respectively. This suggests that the propelling force lies in the beliefs of those to whom they apply. Leaning towards 'reason' as a major factor, it is also questioned if "interests of transparency, credibility and legitimacy" are convincing enough to establish a constitutional convention.[23] However the other questions seeking the presence of precedents and reason indicate that mere endorsement by the believers does not result in the establishment of a convention.[24] Geofrey Marshall writes that "we pick out and identify as conventions precisely those rules that are generally obeyed and generally thought to be obligatory."[25]

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[19] *Supra* note 10.

[20] *Ibid*.

[21] Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th edn., 1959) p.136.

[22] Adrew Heard, "Constitutional Conventions: the Heart of the Living Constitution" 6 *Journal of Parliamentary and Political Law* (2012) p. 319.

[23] M Jashim Ali Chowdhury, "Towards a "consensual constitutional convention? *The Daily Star* (Feb 7, 2017) *available at* https://www.thedailystar.net/law-our-rights/towards-consensual-constitutional-convention-1356955 (last visited on May 5, 2021).

[24] *Supra* note 15.

[25] *Ibid*.

Sir Ivor Jennings argued, for example, that conventions are obeyed "because of the political difficulties which follow if they are not". Others have suggested that they are obeyed not because of the probability of a consequential breach of law, but because disregard of the convention is likely to induce a change in the law or the constitutional structure. It is also argued in the context of the British legal system that constitutional deadlocks that were either created deliberately by leaders of the majority party to limit the monarchical exercise of arbitrary power or even accidentally in response to a situation are observed because of fear of constitutional deadlock. He argues that constitutional deadlocks which are triggered by the refusal of the majority party to cooperate with the ruler if he fails to observe them constitute real sanctions behind observance of conventions.[26] Therefore, actors who are regulated by conventions support their actions in constitutional terms as constitutional conventions are nothing but constitutional principles put into practice. These conventions supplement the Constitution in regulating the day-to-day functioning of 'legal or quasi-legal institutions'[27] created by a Constitution (both Codified and uncodified).

Over and above the kind of sanctions we have looked at, certain philosophical considerations also contribute towards the establishment of a convention. It may be said that conventions help in coordinating the behaviour of actors who share a common interest.[28] It arises from a regular practice that gets deep-seated in a particular transaction between people and they expect one another to follow it. Ashraf identifies four conditions that are indispensable for a convention to exist namely, 'preferences and mutual expectations' which signify that actors consider some outcomes to be better than the other and is confident that the other actor shall act in a particular way which shall, in turn, maintain certainty in their dealings with each other. Third and fourth, 'regularity of behaviour and common knowledge' contributes in setting a precedent. When a convention is crystallised by way of continued practice and attains the status of a precedent, actors repose faith in the expected outcome of such conventions.[29]

[26] Mukut Behari Lal, "Constitutional Deadlocks and Conventions" 1 *The Indian Journal of Political Science* (1939) pp. 42-46.

[27] *Supra* note 6 at p. 23.

[28] *Supra* note 6 at p.18.

[29] *Supra* note 6 at p.21.

V. Interaction with Entrenched Constitutional Provisions

Conventions operate differently in different constitutional systems.[30] In jurisdictions without a supreme codified Constitution or a master-text, conventions authoritatively regulate the constitutional dynamics when compared to jurisdictions with written Constitutions.[31] Akhil Reed Amar in his book *America's Unwritten Constitution* observes that a written Constitution "operates at a higher legal plane" than everyday political rules.[32] The unwritten political rules (or even unenumerated rights, unwritten customs, judicial precedents) must demonstrate a certain fidelity to the written Constitution. Such a mandate is intensified when the words of the Constitution convey a "clear…command".[33] The Indian Supreme Court refused to recognize that an established constitutional convention is any different from constitutional law. It observed that "Once it is established to the satisfaction of the Court that a particular convention exists and is operating, then the convention becomes a part of the Constitutional Law of the land and can be enforced in the like manner."[34]

Though conventions do thrive in systems with codified Constitutions, the presence of a codified Constitution considerably restricts their operations. However they evolve and regulate the exercise of discretion and sufficiently shape the

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[30] Countries like UK and Netherlands place absolute reliance on conventions in the absence of a supreme legal document. Most of the significant features of UK's and New Zealand's conventions and norms can be found written in various places. Sir. Geoffrey Palmer sums up New Zealand's Constitution as "a political constitution in the sense that political developments shape it and change it on a continuing basis and there are few fixed principles. Dicey took a comparative approach to the study of the British constitution. Like many Americans in the nineteenth century, Dicey highlighted the apparent contrast between the written constitutions of the American tradition and the unwritten constitution of the English tradition. The lack of a written constitution, he observed, complicated the subject of his study. American commentators had the advantage of "a definite legal document," which could be interpreted in light of standard legal canons for understanding any legislative enactment. The U.S. Constitution, he believed, could be expounded with "ordinary legal methods" in a manner

[31] Australia, Canada and the United States of America.

[32] Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* xi (Basic Books, USA, 2012).

[33] *Ibid*.

[34] *Supreme Court Advocate on Record Association* v. *Union of India* AIR 1994 SC 268.

functioning of a responsible government by filling up 'significant gaps'[35], the ultimate objective being the exercise of political power in the most democratically suited manner. In the words of K.C. Wheare, the purpose of conventions "is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating how legal rules shall be applied."[36] For instance, India, despite its thorough constitutional text relies heavily on constitutional conventions practiced in the UK. A study of the Constituent Assembly Debates reflects that attempts to codify certain concerns e.g. the relationship between President/Governor with their respective Councils though raised were later dropped when it came to their incorporation in the final Constitution.[37] A similar situation may be witnessed in Canada and Australia. An interesting distinction that the UK shares with other Westminster derived polities like Canada, and Australia is that in the United Kingdom, the chief concern is "the direct, unmediated legal powers of a hereditary monarch and a sovereign parliament" while in the above countries, the executive and legislative powers are dispersed legally in functionaries like Presidents, Governor and Parliaments and such dispersion coupled with "a written Constitution and constitutional judicial review."[38] Such factors have considerably diminished the reliance placed on British conventions. Nevertheless, there always remains scope for evolving new conventions growing out of the matrix created by a written Constitution.

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[35] Keith E. Whittington, "The Status of Unwritten Constitutional Conventions in the United States Forthcoming" *University of Illinois Law Review* January 1 (In Press, 2013) *available at:* https://ssrn.com/abstract=2244944 (last visited on July 15, 2021).

[36] KC Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, 1938).

[37] Prof. KT Shah made a relevant observation in the Constituent Assembly - " Here, however, we are making a new Constitution, and we are starting upon a new democratic career on a very large national scale. After all, you must remember that the United Kingdom compared to India is perhaps not one-tenth or one-twelfth in size; and, in point of the population, it is perhaps one-sixth or one-fifth in strength of numbers. Therefore, what may have suited that country and its ways may not suit us. At any rate, they have a long history of precedents and conventions behind them. We have to make those precedents and conventions. I therefore submit it would be as well for us not to leave any room for doubt, and make precise and explicit the powers that we are vesting in the President. Constituent Assembly Of India Debates on December 10, 1948 *available at* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C10121948.pdf (last visited on July 15, 2021)

[38] *Supra* note 2 at p.30.

However, while some believe that conventions make the constitutional structure workable by adding flesh to its structure, some claim that conventions in addition to incorporating something new within the defined precincts of the Constitution may drastically replace/ repudiate the meaning ascribed to an entrenched constitutional provision. Richard Albert argues that "constitutional conventions may also change written Constitutions though only informally by creating, retarding or accelerating constitutional change, all without altering the text." He argues that in one way, conventions can fill a void by introducing new elements into the Constitution (i.e. adding something that was not already there in the Constitution) or by refinement i.e. by supplementing or adding to the meaning of the already existing words of the Constitution. On the other hand, conventions may bring about changes by repudiation. This can happen in two ways. On one hand, constitutionally entrenched provisions may lose their relevance or binding force because of non-use and abandonment thereby creating a void or tacit deletion from the constitutional text. On the other hand, informal change by repudiation could also be brought about by substitution i.e. "where a convention emerges as a result of political practice that conflicts with a rule entrenched in the constitutional text….this constitutional change effectively substitutes a written constitutional provision with an unwritten political practice that defies the plain meaning of the constitutional text."[39]

Learned author D.D. Basu argues that conventions interact with entrenched constitutional provisions in various ways. They may nullify a provision without formally obliterating the same or may transfer power from one constitutional authority to another or may supplement an entrenched provision.[40] The working of a few conventions selected from the three countries, namely India, Canada, Australia, and India will help us understand how conventions have a bearing on entrenched constitutional provisions. The constitutional positions of these countries share predominantly two similarities namely their colonial past and the fact that their Constitutions talks very little about the actual functioning of the Cabinet and Ministry thereby leaving immense scope for British constitutional conventions to govern the Executive domain.[41]

[39] *Supra* note 17.

[40] DD Basu, *Commentary on the Constitution of India* (Lexis Nexis, 8th edn., 2008) p. 4499.

[41] Areas regulating appointment, dismissal and overall functioning of the Executive, principles of responsible government, collective and individual responsibility.

Though the suitability of the Westminster style of governance has been questioned in India ever since the days of commencement of the Constitution, the functioning of the Parliamentary form of government is akin to the Westminster style. The words of Dr. Rajendra Prasad uttered when the final adoption of the Constitution was put to the vote of the Chamber bring out the essence of British Parliamentary governance and its applicability in India:

"We have had to reconcile the position of an elected President with an elected Legislature, and in doing so, we have adopted more or less, the position of the British monarch for the President..... His position is that of a constitutional President. Then we come to the ministers. They are, of course, responsible to the Legislature and render advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself, making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King acts always on the advice of his ministers will be established in this country also and the President, not so much on account of the written word in the Constitution but as a result of this very healthy convention, will become a constitutional President in all matters."[42] In the estimation of Dr. Ambedkar, the British model seemed more accountable to the people when compared to the American and Swiss Models which provide more stability.[43] In the most vibrant words of Justice Krishna Iyer, "Not the Potomac, but the Thames, fertilizes the flow of the Yamuna, if we may adopt a riverine imagery."[44] The Indian Constitution does not leave it upon conventions to govern the entire domain of parliamentary governance and instead codifies several of them. An illustration could be the explicit adoption of the British convention on 'Collective Responsibility' which is a cornerstone of the Westminster model in Article 75(3) of the Indian Constitution.[45] Again, the otherwise settled convention[46] on the bindingness

[42] Constituent Assembly Debates on November 26, 1949 *available at* https://indiankanoon.org/doc/600458/ (last visited on July1, 2021).

[43] Vikram Raghavan, "All the President's Mien" *The Hindu* (May 26, 2021), *available at* https://www.thehindu.com/features/metroplus/society/all-the-presidents-mien/article3451358.ece (last visited on July 10, 2021).

[44] *Shamsher Singh* v. *State of Punjab* 1974 AIR 2192.

[45] The Constitution of India, Art. 75.

[46] *Supra* note 44.

of the ministerial advise on the President received explicit constitutional recognition vide the 42nd Constitutional Amendment Act, 1976.[47] The Convention followed in India that Courts cannot question the exercise of political power in a court of law was an expressly recognized in the Constitution.[48] On the other hand, several other areas were left open to be governed by conventions namely, manner of appointing Prime Ministers, principles of proving collective responsibility, discretionary powers of State Governors to name a few.

Despite the strong reliance placed on British Conventions, India is often known to witness the birth of several other conventions like the ones discussed hereinafter. One of the oft-cited examples of constitutional convention in India is the seniority convention adopted in India as the Constitution is silent on the criteria for appointing Chief Justices to the Supreme Court of India. However, if we were to trace the origin of the seniority convention in establishing a consistent trajectory would be difficult. Relying on the works of notable scholar Abhinav Chandrachud[49], there was no coherent application of the seniority convention in India before the Constitution was enacted except in certain isolated instances in a few High Courts. The seniority convention in the High Courts was an exception and not a rule. The nine-judge bench of the Supreme Court of India sanctioned the seniority convention in the *Second Judges c*ase[50]. Also in the historic *National Judicial Appointment Commission (NJAC) Case*[51], the Apex Court reiterated the importance of the seniority convention in appointing the Chief Justice. Another noteworthy convention that was born in India is concerned with the appointment of Judges to the higher judiciary. Through a series of cases, the Indian Supreme Court established a convention that a Collegium of judges comprising the Chief Justice and four senior most judges shall be responsible for appointing judges in

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[47] Article 74(1) reads as "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

[48] Constitution of India, Art. 74 (2).

[49] Abhinav Chandrachud, "Supreme Court's Seniority Norm: Historical Origins" XLVII *Economic and Political Weekly* (2012) *Available at* https://ssrn.com/abstract=2077494 (Last visited on July 5, 2021).

[50] *Supreme Court Advocates on Record Association* v. *Union of India* AIR 1994 SC 868.

[51] *Supreme Court Advocates on Record Association* v. *Union of India* (2016) 5 SCC 1.

India. In India, the collegium system arose out of judicial decisions that interpreted 'consultation' as 'concurrence' under Article 124 of the Constitution though literally both do not have the same connotation.[52] Such interpretation led to the formation of a collegium of judges circumventing the Constitutional requirement of executive appointment. Later in the NJAC case, the proposal to replace this convention with a National Judicial Appointment Commission was quashed by the Indian Judiciary by asserting that the convention upheld the independence of the judiciary which is a part of the 'basic structure' of the Constitution and should be retained. Interestingly, the 99th Constitutional Amendment Act, 2014 was struck down as unconstitutional and the validity of the previous convention was upheld.

A few illustrations from Canada will help us understand how conventions interact with entrenched constitutional provisions. In general, several British conventions ranging from government formation, overall functioning of the Cabinet and its responsibility, events in the aftermath of elections which include defining working of the minority government or how a caretaker government shall function were formally transplanted into the Canadian Constitution.[53] *The Constitution Act, 1867* which constitutes a significant part of the Constitution of Canada provides a mechanism[54] whereby the imperial government exercises significant control over Acts of Parliament and provincial legislatures. The mechanisms are called '*reservation'* and '*disallowance'* respectively. In the former case, the Governor-General[55] or Lieutenant General[56] (as the case may be) rather than refusing to give assent to the Bills, can reserve a Bill and refer the matter to the imperial government for its final decisions whereas in the latter case, the power to nullify or absolutely repeal a Bill expressly assented to by the Governor-General or Lieutenant General was conferred on the Queen-in-Council (in case of a federal Bill) or Governor-General (in case of a provincial Bill). Such an arrangement, though against the federal scheme was an obvious extension of the structure of Canada agreed to at the time of confederation. However, over a period the mechanism fell into the hands of a convention of disuse but it remains in the Constitution Act to date.[57]

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[52] *Supra* note 50.
[53] *Supra* note 2 at 193.
[54] *Constitution Act, 1867*, Sections 55, 56, 57, 90.
[55] *Ibid.*, Sections 55, 56 and 57.
[56] *Ibid.*, Section 90 (In case of provincial Bills).
[57] Robert C.Vipond, "Alternative Pasts: Legal Liberalism and the Demise of Disallowance Power" 39 *University of New Brunswick Law Journal,* pp. 126-157.

No discussion on conventions is ever complete without a reference being made to the *Patriation Reference Case*[58]. The formal power to amend Federal-Provincial matters in the Constitution vested exclusively in the UK. Nevertheless, a convention evolved whereby whenever the Parliament of UK exercised its formal power to amend the Canadian Constitution at the request of the Canadian Government, the government had consulted and obtained the consent of the affected provinces. Such a convention supplemented the formal constitutional rule that conferred the sole authority to amend the Canadian Constitution on the UK Parliament. Such a convention was also given express recognition by the Canadian Supreme Court in the exercise of its advisory jurisdiction[59]. Hence, it may be said that the convention became an established political practice even without being entrenched formally into the Constitution.

Like Canada, the Australian constitutional system essentially relies on conventions transplanted from Britain.[60] The founders of the commonwealth Constitution almost incontestably agreed on the adoption of the Westminster way of parliamentary governance. None of the conventions ranging from maintaining the majority in the House of Representatives, appointing the leader of the majority to form a government, binding nature of the ministerial advise on the Governor-General were explicitly incorporated into the 1901 Constitution.[61]

A closer look at the above conventions helps us identify different patterns in which constitutional conventions interact with entrenched constitutional provisions. The prevalence of un-enumerated constitutional principles in the domain governing the working of the executive as visible in all the three countries establishes a pattern of interaction whereby the conventions supplement the entrenched provision. They

[58] *Re: Resolution to amend the Constitution* [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753, at 876-77 (S.C.C.).

[59] *Ibid*.

[60] Alan J Ward, "Exporting the British Constitution: Responsible government in New Zealand, Canada, Australia and Ireland" 25 *The Journal of Commonwealth & Comparative Politics* (1987) pp. 3 -25, *available at* https://doi.org/10.1080/14662048708447505 (last visited on July 14, 2021).

[61] Jeremy Moon and Campbell Sharman (eds.), *Australian Politics and Government: The Commonwealth, The States and the Territories* (Cambridge University Press, 2003), CJG Sampford, "Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions" 7 *Oxford Journal of Legal Studies* (1987) pp.369 – 417.

add to the existing structures provided by the written Constitutions. The second instance of the same from Canada as highlighted in the *Patriation reference case* highlights how a convention supplements the legal text of the Constitution by making consultation with the provinces mandatory despite the absence of such a mandate in the entrenched part. The seniority convention from India provides an instance of 'void filling' as enunciated by Richard Albert whereby the convention addresses the gap created due to a lack of clarity as to the manner of appointing the Chief Justice of India.[62] If we talk about the second instance from India, i.e. the system of Collegium wherein Judges appoint judges, whether such a convention brings about constitutional change by substitution 'where a convention emerges as a result of political practice that conflicts with a rule entrenched in the constitutional text' is still strongly debated. It may thus serve as an illustration for a convention nullifying a provision without formally obliterating the same. The Canadian instance of reservation and disallowance may be described as an instance of convention arising from disuse wherein an entrenched provision undergoes a tacit omission without an express deletion from the Constitution.

VI. Conventions, Constitutionalism and Constitutional Change

Unwritten rules of politics in a given system evolve from years of conflicts and settlements, dominance and subjugation, experiences and experiments. A Constitution identifies and accords legal sanctions only to those political rules which constitute the core of good governance and an indicator of the country's core and leading political beliefs. Such a charter sketches how competing groups can engage in a power struggle in a methodical manner. If a rule finds place in the Constitution, the political sanction behind it transforms to a legal sanction. If not, political rules may also take the shape of a convention if they are regularly pursued by political stakeholders. The notable part about constitutional conventions is that they grow in a constitutionally supported set-up. The presence of a written Constitution considerably restricts the concentration of powers in one organ of the government. Thus it may be said that both Constitutions and constitutional conventions work in collaboration with one another in shaping the idea of constitutionalism. Constitutionalism creates both legal limits to arbitrary exercise of power as well as safeguards the political responsibility of the Government to the governed.[63]

[62] Constitution of India, Art. 124.

[63] DD Basu, *Commentary on the Constitution of India* (Lexis Nexis, 9th edn., vol 8, 2008).

Conventions are the expressions of the public faith in rule of law, an essential component of Constitutionalism. Over time, these rules, practices (besides entrenched/codified Constitutional provisions) evolve as substantial restraints on the arbitrary exercise of State power. Constitutionalism aims at striking a coherent balance between the legitimate exercises of constitutionally conferred power by the Government and restricting the exercise of such power in a manner conducive to the rule of law. It must however be remembered that conventions by their very nature are contingent and their continuance depends upon a myriad of factors, the most significant among them being the changing political dynamics in which they operate. Actors may replace one convention with the other depending upon political necessity. Such a change is normal in a dynamic constitutional apparatus.[64] But what is to be remembered is that changing a convention because of political necessity is different from violating a well-established conventional rule because the former is conducive to the growth of constitutionalism while the latter is detrimental thereto.

The problem arises when well-established Conventions, which have essentially satisfied the preconditions of stability, precedence, and reason over the years and have shaped the understanding of constitutionalism are flouted and disregarded. Jurisdictions that have inherited the British Parliamentary legacy owing to their colonial past, have witnessed several threats to deep-rooted conventions which were adopted to support the working of the constitution. Largely being unwritten and unenforceable, these conventions are susceptible to breach by political actors. Such actions have widespread ramifications and substantially disturb the constitutional *status quo*.

Instances from India substantiate the afore-stated assertion and help us understand how well-established conventions that have enjoyed years of political and judicial endorsement have been routinely flouted and reduced to a mockery.

Two other countries that share a colonial past as that of India are Canada and Australia. These legal systems have the utmost regard for constitutional conventions primarily because they have been modelled (largely) around the British Constitution.[65] Although the viability of following British footsteps in terms of adopting

[64] *Supra* note 6 at p.28.

[65] Jonathan Stephens, "Rule of Beliefs: Constitutional Conventions and the Rule of Law" 2 *UNSWLawJLStsS* (2013) p.2..

parliamentary institutions was on the higher side, bitter colonial experiences and inherent distrust of authority acted as a check.[66] Thus in both these countries, conventions play an influential role in shaping the implementation of the written constitutional provisions which lay down the operational structure. However, experiences from the two countries would help us understand how disregard for conventions has consequences not only political but also legal.

The Canadian constitutional crisis of 2008 serves as a classic example in this connection. The accountability of the Government to the House of Commons constitutes a significant convention ever since its inception. This signifies that the Ministers who enjoy the confidence of the House shall continue to advise the Queen and the Governor-General despite the vast range of powers they enjoy. However, in certain extraordinary situations, the Governor-General retains powers wherein he may exercise the power based on his own discretion even by disregarding the Ministerial advise. An interesting situation arose in Canada where the limited role of the Governor-General was under the scanner. The conservative government of Canada led by Prime Minister Stephen Harper after the 2008 elections, decided to roll out a fiscal update eliminating public subsidies to political parties. Having gone against the interests of the opposition parties, they decided to denounce such a move and called for a vote of no confidence at the earliest opportunity. The government realised quite clearly that it would be defeated and hence without further delay called upon the Governor-General to prorogue the Parliament which she acceded. The vote was thus delayed. The House of Commons met after several months and swiftly escaped dismissal. Such a decision by the Governor-General permitting a delay in the vote of no confidence with the complete knowledge that the same would set a dangerous precedent paving way for future Prime ministers to abuse their power and challenged the ability of the electorate to freely determine the fittest persons to continue following an election.[67] Despite several arguments that might back the Governor General's decision, his decision is unquestionably a subversion of the political process as far as it denies the elected members to take

[66] *Supra* note 40.

[67] Lorne Sossin and Adam M. Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General" in Peter H. Russell and Lorne Sossin (eds.), *Parliamentary Democracy In Crisis* (University of Toronto Press, 2009) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394530 (last visited on July 6, 2021).

a due course and decide the matter democratically. Also, the action of the Governor-General has approved something whose constitutional validity is highly questionable, delay in conducting a vote of no confidence that too through a process of prorogation. Such tactics are a major threat to stable political systems.

The 1975 constitutional crisis in Australia exemplifies the obscurities and complications that can arise in a system that places reliance on constitutional conventions. The balance of power in the Senate underwent a substantial change due to the filling of two casual vacancies created by two Labour Party Senators but a non-labour party member and another Labour party Member who was hostile to the Government by Gough Whitlam. In 1947, in light of the mounting financial controversies of the Whitlam Government, the Senate which was largely in the control of the opposition blocked supply Bills[68] from the lower House and forced for a premature election. Though Money Bills cannot originate in the Senate, they can place substantial limitations on it. It was alleged that the Senate's action went against the settled convention that Senate does not block supply. Despite the opposition's claim asking the Whitlam Government to submit itself to the popular judgment, the Prime Minister refused to resign. In an alleged breach of convention, the Governor-General immediately dismissed the Whitlam Ministry and appointed the leader of the opposition, Malcolm Fraser as the caretaker Prime Minister. With the Prime Minister's support, the supply Bill was passed. The Prime Minister thereafter advised the Governor-General to dissolve both the Houses and subsequently the Houses are dissolved. The consequences of the actions of both the Senate and the Governor-General were dire. Firstly, the appointment of members in the Senate not affiliated to the same party as that of the outgoing Senator is a breach of convention.[69] Secondly, the course is taken by the Senate to demand re-election by blocking supply bills breaking a convention that the Senate never blocks a supply Bill was also subject to criticism more so because none of the Bills were

[68] 'Supply' is a term sometimes used to refer to all spending bills. At the time of these events, 'supply' also was defined more narrowly to refer specifically to bills that were enacted to authorize spending during the early months of a fiscal year, before the annual budget for that fiscal year was approved. In the 1970s, such supply bills were a necessary and predictable part of Parliament's annual agenda. Today, such bills rarely are needed because Australia changed its annual budget timetable available *at* https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/platparl/c04 (last visited on July 20, 2021).

[69] The Constitution was later amended to match the convention.

previously rejected by the Senate. Thirdly, And if the Prime Minister turns a deaf ear to the Governor General's plea to resolve the conflict by dissolving the House, it would be a breach to pass supply bills by a caretaker government before re-election takes place. The most significant breach of the convention took place when the Governor-General abruptly dismissed the Whitlam Government which retained the majority support. The conventions that were primarily at stake have been briefly enumerated by David Solomon,

"The convention that the Governor-General acts only on the advice of his ministers, the convention that those ministers must control a majority in the House of Representatives, the convention that the Senate does not reject money bills, the convention that states should replace dead or retired Senators with men selected from the same party as the departed Senator, the convention that the Commonwealth selects the day on which Senate elections are held, the convention that a government which does not have assured supply will resign, the convention that a Prime Minister defeated on the floor of the House will resign—and so on."[70]

Any reasonable person would logically conclude that the parties were driven not by the contents of a Bill but were rather by their assessments as to who is likely to benefit from the elections from both the Houses. This constitutional deadlock was a major threat to the integrity of several constitutional conventions that lie at the heart of Australia's democratic governance.

Violation of well-established conventions is not unknown even in Indian. Partisan motives are often attributed to the exercise of powers by functionaries such as Speakers (while accepting resignations) and Governors (while forming governments). Outright violations of conventional practices are often brought under the scanner. For instance, several MLAs in Karnataka belonging to the ruling Congress-JDS parties offered their resignation to the speaker to offer an opportunity to the BJP (Bharatiya Janata Party) to stake a claim to form a government in Karnataka. While the MLAs argued that their resignation was offered freely, the reeling combine held that the consent was obtained through bribes. In this context, the Speaker's role becomes pertinent. Article 190 requires the MLAs to tender their resignations to the speaker who enjoys the power to either accept them or

[70] David Solomon, *Australia's Government and Parliament* (Thomas Nelson,1978) p.186.

reject them if such resignations are not genuine or voluntary. However what Article 190 cannot assure us that the speaker shall act in good faith. But the presumption that he will has become a convention. The British conventional practice requires the Speaker to be neutral given the pivotal role played by him. It is often said that he must rise "above party loyalties as the Constitution as a guiding light".[71] It has been brought to the notice of the Honourable Supreme Court that the speaker has intentionally delayed in deciding the fate of the resignations and acted in a partisan manner. In this case, strong allegations were hurled against the Speaker and it was alleged that the speaker was delaying the acceptance of resignations so that the MLAs follow the party whip in fear of disqualification and vote for the party in the upcoming trust vote. In such complex situations, the actual problem is faced by the Judiciary which on one hand is bound to remain detached from questioning political decisions[72] and on the other hand is obliged to uphold constitutional propriety.[73]

In yet another case in Karnataka, the claims of congress-JDS to form government in Karnataka were rejected by the governor who allowed the BJP to form the government. Interestingly the chief minister was given 14 days to prove the majority on the floor of the House. Allegedly this move was targeted at allowing the BJP to manipulate the MLAs to switch sides. Inevitably, the Supreme Court intervened and reduced the period from 14 days to 48 hours. As a result of such intervention, the BJP failed to prove its majority on the floor of the House paving way for the Congress - JDS to form the government. Though the Supreme Court was unable to rule upon the validity of the conventional process, it is argued that reducing the time gap, has reduced the likelihood of bad faith to creep into the process.[74]

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[71] Chaksu Roy, "Speakers must rise above party loyalties, with Constitution as their guiding light" *The Indian Express* (June 19, 2019), *available at* https://indianexpress.com/article/opinion/columns/parliament-speaker-lok-sabha-rajya-sabha-5787242/ (last visited on June 25, 2021).

[72] Though it is understood that the *S.R Bommai* v. *Union of India* AIR 1994 SC 1918 Standards are applicable in such cases as well.

[73] Krishnadas Rajagopal, "Supreme Court uphold Speaker's disqualification of 17 Karnataka MLAs" *The Hindu* (Nov. 13, 2019) *available at* https://www.thehindu.com/news/national/supreme-court-upholds-speakers-disqualification-of-17-karnataka-mlas/article29960032.ece (last visited on June 25, 2021).

[74] Gautam Bhatia, "Judicial Supremacy Amid The Breakdown of Constitutional Conventions: What the Karntaka Controversy Tells Us about Our Parliamentary Democracy" *Livelaw* (July 16, 2019), *available at* https://www.livelaw.in/columns/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy-146440 (last visited on June 25, 2021).

In Maharastra, the pre-poll alliance between BJP – Shiv Sena swiftly won the 14th Assembly elections in Maharastra with 160 votes (while they needed 145 votes) against Congress-Nationalist Congress Party. Immediately thereafter, the game began to change. Shiv Sena expressed its disagreement over 50:50 power-sharing (primarily rotating the Chief Ministers' post between two parties within the 5 years' time-period). The alliance was called off. Technically none were in a position to form the government. Thereafter, the Governor of Maharashtra called the BJP to know if they wanted to stake a claim in forming the Government. On BJP's refusal, he turned to the Shiv Sena. Shiv Sena expressed its desire to form the Government but wanted more time so that it could gather support from other parties. The Governor refused. Lastly, he invited the NCP to stake a claim in government formation who also wanted more time. The Governor who was then satisfied that it was a fit case for imposition of President's rule wrote to the Centre and the latter was convinced and a proclamation was issued.[75] In a serious breach of constitutional conventions, despite an agreement reached by the BJP-NCP and the Shiv Sena, a BJP-NCP government was sworn in by revoking President's rule. It is often argued that the Prime Minister had bypassed regular procedures including consultation with the Cabinet to reach this conclusion to revoke President's rule. In support of the NCP's claim to have the necessary strength, a letter was produced by Ajit Pawar who authenticity was questioned before the Supreme Court. This instance had several repercussions arising out of the Supreme Court's intervention which will be taken up in future discussions. But for our purposes, it is significant to understand how political stakeholders don't hesitate to disturb settled conventional principles when their interests are at stake. Gautam Bhatia argues, "It is, therefore, clear that whoever finally "wins" the political game, constitutional conventions have lost. They lost when electoral enemies switched sides, betraying the voters; they lost when the governor acted arbitrarily in allocating time to the claimants to prove their majority; they lost when the PMO bypassed due process to have President's rule revoked in the early hours of the morning, which the President

[75] Dev Goswami, "How BJP Shiv-Shena win to President's Rule" How Maharashtra politics descended into chaos" *India Today* (Nov. 13, 2019), *available at* https://www.indiatoday.in/india/story/from-bjp-shiv-sena-win-to-president-s-rule-how-maharashtra-politics-descended-into-chaos-1618328-2019-11-13 (last visited on June, 2021).

approved; and they lost when the governor equally hurriedly swore in the new government without objectively convincing himself of the numbers."[76]

All the instances discussed above have serious corollaries on the functioning of a parliamentary system, a model that we claim to adhere to. There is no bigger shame to constitutionalism than having a set of political stakeholders guided by their interests who are ready to give up their virtues and subvert the constitutional process. The instances discussed above highlight the vulnerability of conventions in the hands of political stakeholders.

VII. Conclusion

Constitutional conventions cater not only to continued demands for change in the political framework but also fill constitutional silences and hence their appeal in the estimation of the constitutional stakeholders is enormous. Their flexibility paves way for their indispensability in a constitutional set-up. However, conventions lack a strong support system and are often set at naught by those who don't feel sufficiently incentivised by the supremacy. The incidents enumerated above depict the contemplation among political stakeholders that conventions owe their allegiance towards them and not towards constitutional values. The most obvious solution for such a concern could be cultivating a culture of reverence towards the unwritten constitutional norms. But the complexities of the incidents discussed, demonstrate the inadequacy of such a submission. Lack of enforceability certainly constitutes a major obstruction in connecting conventions to constitutional values. Nevertheless, the role of the Courts can substantially bridge this gap by recognizing and employing[77] conventions if not by enforcing them. Overt enforcement of conventions would entail several repercussions for the structural balance among the functional organs of the government and is far from feasible. Yet, judicial participation in strengthening the culture of conventions can go a long way in establishing their sanctity in the constitutional edifice.

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[76] Gautam Bhatia, "How the Constitution was betrayed" *Hindustan Times* (Nov. 26, 2019), *available at* https://www.hindustantimes.com/columns/how-the-constitution-was-betrayed/story-MCweF1LKbQZGuQwQ5rQK7N.html (last visited on June 25, 2019).

[77] For a discussion on enforceability of Constitutional conventions, refer to Farrah Ahmad, Richard Albert and Adam Perry, "Enforcing Constitutional Conventions" 17 *ICON* (2019) pp.1146 – 1165, *available at* https://academic.oup.com/icon/article-abstract/17/4/1146/5710821 (last visited on July 15, 2021).

DECONSTRUCTION OF DICHOTOMY BETWEEN 'ORDER' AND 'AWARD' IN JURISDICTIONAL ISSUES

-Ms. Sharada Shindhe*

Abstract

Based on the principle of Kompetenz Kompetenz, Arbitration law, confers power over arbitral tribunal to decide on its jurisdiction. Arbitral tribunal is empowered to pass various orders and award during and at the end of arbitral proceedings. When arbitral tribunal decides on a jurisdictional issue, Arbitration and Conciliation Act, 1996 treats it as an 'order'. If the tribunal holds that it does not have jurisdiction, such order is subject to appeal. However, if tribunal holds that it has jurisdiction, such order is not subject to immediate challenge, instead party will have to wait till final award is passed. If arbitral tribunal does not treat it as part of jurisdictional issue and terms this decision as an award (or interim award), then it can be subject to review by courts. This article tries to find out the contours of arbitral jurisdiction, factors that go to determine jurisdiction of arbitral tribunal, supervisory jurisdiction of courts over decisions of arbitral tribunal and approach of Courts when rulings of arbitral tribunal on jurisdictional issues are challenged. Author concludes with a suggestion that immediate judicial review of rulings of arbitral tribunal on jurisdictional issues will provide finality to these issues and further the process of arbitration.

Key words: Jurisdiction of arbitral tribunal, Principle of *Kompetenz Kompetenz,* Powers of arbitral tribunal, Order, Award

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I. Introduction

Jurisdiction is the power and authority of arbitral tribunal to hear and decide the subject matter of a dispute. Arbitral tribunal is a private forum appointed by the parties to decide dispute between them. In arbitration, the authority to adjudicate on issues between parties is derived from arbitration agreement and it becomes basis for exercise of jurisdiction of arbitral tribunal[1] It is this agreement that decides the scope of reference as well as the procedures that tribunal needs to follow. Though arbitration agreement is basis for reference to arbitration, it cannot be said that jurisdiction of civil court is barred and amounts to total ouster. It is only when party files an application before court for reference to arbitration that the jurisdiction of civil court is excluded[2].

For quick resolution of disputes as intended by parties, enhanced role of arbitral tribunals is must. Conferring more powers to Arbitral Tribunal strengthens the process of arbitration. In this direction, based on UNCITRAL Model Law[3] *Arbitration and Conciliation Act, 1996* (hereinafter referred as *the Act of 1996*)

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[1] *Waverly Jute Mills Co. Ltd* v. *Raymon & Company (India) Pvt. Ltd*., AIR 1963 SC 90.

"An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."

In *Union of India* v. *A. L. Rallia Ram*, (1964) 3 SCR 164, a Three-Judges Bench held that arbitrator derives his authority to arbitrate from the arbitration agreement and in its absence, the proceedings of the arbitrator would be unauthorized.

Constitution Bench of Supreme Court in *Khardah Company Ltd*. v. *Raymond & Co. (India) Pvt. Ltd*., AIR 1962 SC 1810 held that it is the arbitration agreement that confers jurisdiction on the arbitrators to hear and decide a dispute and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured even by acquiescence. Thus arbitrators derive their jurisdiction from arbitration agreement.

[2] *Hindustan Petroleum Corporation Ltd*. v. *Pinkcity Midway Petroleum*, AIR 2003 SC 2881.

[3] Article 16 of UNCITRAL Model Law deals with competence of arbitral tribunal to rule on its jurisdiction

has incorporated provisions conferring powers on tribunal[4] to determine the aspects of jurisdiction.

Section 16 is an important provision under *the Act of 1996*. It empowers the tribunal to decide on the question of its own jurisdiction. Party to arbitration agreement gets an avenue to question jurisdiction of arbitral tribunal. Any decision given by the tribunal is subject to judicial control either immediately or after passing final award. When an objection on jurisdiction is raised by party before tribunal, it is an obligation on part of arbitral tribunal to decide the same[5].

Part II of this article makes a comparison between Model Law and Indian Law on this issue. Part III deals with different aspects of jurisdiction and Part IV deals with the role of Courts *vis-a-vis* arbitral tribunal in arbitral process. Part V deals with the approach of the Supreme Court and Part VI with contours of order and interim award. Part VII deals with conclusion suggesting possible approach that could be taken to resolve this riddle.

II. Divergence between Model Law and Indian Law

Disputes with respect to jurisdiction of arbitral tribunal may arise at any stage and party objecting to jurisdiction, can raise a plea regarding the same before

[4] Sec. 16. Competence of arbitral tribunal to rule on its jurisdiction –

(1) The arbitral tribunal may rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) of sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal makes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

[5] *Lalit Kala Academy* v. *Svapan Const.* (2005) 2 Arb LR 447.

arbitral tribunal[6]. The authority of arbitral tribunal to decide on objections with respect to its own jurisdiction is now well recognized internationally as well as under Indian legislation[7]. When jurisdictional objections are raised, arbitral tribunal can take up this issue as a preliminary issue, and decide on it or it can decide this issue along with other issues at the time of passing final award. It is the discretion of the arbitral tribunal to choose any one of these options as per *UNCITRAL Model Law* and *UNCITRAL Arbitration Rules*[8]. However, under *the Act of 1996*, it is mandatory for tribunal to decide on jurisdictional issue before deciding any other issue. Once jurisdictional objection is raised, arbitral tribunal cannot defer it until it passes final award.

When arbitral tribunal takes up jurisdictional issue as preliminary issue and gives a ruling, the subsequent course of action that follows depends on the governing legislation. Some jurisdictions provide for immediate judicial review whereas some other does not[9]. *UNCITRAL Model law*[10] provides that if arbitral tribunal holds that it has jurisdiction, such ruling is subjected to immediate judicial review. Immediate judicial review of the jurisdictional award is a process aimed at allowing speedy and decisive resolution of jurisdictional disputes[11]. Much time and energy would be

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[6] *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*, AIR 2002 SC 1139; *Rungta Projects Ltd*. v. *Tenughat Vidyut Nigam Ltd*., 2005 (3) Arb LR 182.

[7] Sec. 16. *See* also *Konkan Railway Corporation Ltd*. v. *Rani Construction Pvt. Ltd*., AIR 2002 SC 778; *Shree Subhalaxmi Fabrics Pvt. Ltd*. v. *Chand Mal Baradia*, AIR 2005 SC 2161.

[8] Art. 16 (3) of *UNCITRAL Model Law* provides that arbitral tribunal may rule on objections to its jurisdiction as a preliminary issue or in a award. *UNCITRAL Arbitration Rules* under Article 23 provides for power of arbitral tribunal to rule on jurisdiction. These rules give discretion to arbitral tribunal to rule on such issue either as preliminary question or as an award.

[9] Art. 1052 of *Netherlands Code of Civil Procedure* does not provide for interlocutory judicial review of a positive jurisdictional award.

[10] Art. 16 (3) provides that if the arbitral tribunal rules that it has jurisdiction, and a party wants to challenge, he can challenge it within 30 days from the date of receiving notice of such ruling.

[11] Gary B Born, *International Commercial Arbitration*, Vol. I, (Netherlands, Kluwer Law International, 2009), p. 879.
Gary B Born, in his book provides clear idea on the approach adopted under Model Law on jurisdictional issues as under;
"Basic structure of the Model Law is a) to permit arbitral tribunals to consider and decide jurisdictional issues in an award (Sec.16) which are b) subject to very prompt subsequent judicial review (Sec. 34), but also c) to permit interlocutory judicial consideration of jurisdictional issues to occur prior to, or in parallel with, any arbitral decision (Art. 8 (1)) while d) the arbitral proceedings continue notwithstanding the jurisdictional challenge (Art. 8 (2). This approach makes it entirely possible that a national court may decide jurisdictional issues before the arbitral tribunal itself does so, and that such judicial decisions may pre-empt the tribunal's jurisdictional decision".

lost if it is found subsequently that the tribunal never had jurisdiction. This defeats the objective of expeditious disposal of the Act.

The Indian approach differs from *UNCITRAL Model law* in this regard. Under *the Act of 1996*, a ruling on jurisdictional issues is termed as order and makes provision for immediate appeal on negative jurisdictional orders[12] only. If a party wants to challenge positive jurisdictional order,[13] he will have to wait until the final award is passed[14]. This approach has given rise to various judicial interpretations on this issue and has led to confusions.

In this context, it is proposed that immediate judicial review of jurisdictional issues – be it positive or negative - should be provided to render finality to issues on jurisdiction once for all. This approach is followed in many jurisdictions and is in consonance with the jurisprudence developed internationally on this aspect. This will pave way for arbitral tribunal to freely decide on all other matters.

III. Issue of Jurisdiction

Stroud's Judicial Dictionary of Words and Phrases defines "'Jurisdiction' [as] a dignity which a man hath by a power to do justice in causes of complaint made before him. In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference i) to the subject matter of the issue or ii) to the persons between whom the issue is joined or iii) to the kind of relief sought, or to any combination of these factors. In its wider sense, it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' or as to the circumstances in which it will grant a particular kind of

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[12] Orders rejecting objections raised by arbitral tribunal are referred as positive jurisdictional orders because tribunal upholds its jurisdiction. Whereas orders accepting objections raised by arbitral tribunal are termed as negative jurisdictional orders because arbitral tribunal is holding that it has no jurisdiction.

[13] When party raises objection to jurisdiction before arbitral tribunal, if tribunal upholds its jurisdiction by rejecting objections raised, such orders are referred as positive jurisdictional orders.

[14] *Pandey & Co., Builders Pvt. Ltd.* v. *State of Bihar,* AIR 2007 SC 465; *Triad India* v. *Tribal Co-operative Marketing and Development Federation of India Ltd*., 2007 (1) Arb LR 327 (Del); *Jain Studio Ltd*. v. *Maitry Exports Pvt. Ltd.,* 2008 (1) RAJ 698.

relief which it has 'jurisdiction' to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances[15].

a. When such issue arises?

Jurisdiction of arbitral tribunal can be questioned at several stages. It can be questioned immediately after the reference is made to arbitration based on terms of agreement. Party can question jurisdiction of tribunal during arbitration proceedings are going on. It may be with respect to the scope of reference. Lastly, during enforcement stage party can object for enforcement on the ground that the scope of award is much wider than permitted by arbitration agreement[16]. At the outset of the reference, the question arises whether a particular issue is or is not one that should be referred to arbitration under the terms of the agreement.

Any decision on jurisdictional issue goes to the root of the matter[17] and therefore it has to be decided on priority at preliminary stage itself. Arbitral tribunal exercises its jurisdiction on satisfying that there exists dispute between parties and the dispute falls within its jurisdiction as per the terms of the agreement.

b. Principle of *Kompetenz Kompetenz*

Principle of *Kompetenz Kompetenz* requires that arbitral tribunal be empowered to decide on all issues relating to jurisdiction[18]. This principle has been applied in all major rules on international commercial arbitration as well as under national legislations. Application of this principle however changes as per the national and institutional background.[19] Arbitral tribunal can decide all issues pertaining to jurisdiction[20] as well as any objections with respect to existence or validity of arbitration agreement.

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[15] Stroud's Judicial Dictionary of Words and Phrases, 7th edn., vol. 2 (Delhi, Sweet and Maxwell, 2008), 1431.

[16] David St John Sutton, Judith Gill and Matthew Gearing, *Russel on Arbitration*, 23rd edn., (London, Sweet & Maxwell, 2007), p. 71.

[17] *Konkan Railway Corp. Ltd.* v. *Rani Construction Pvt. Ltd.*, AIR 2002 SC 778.

[18] *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 S.C.C. 641.

[19] William Park, "Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law", 8 *Nev.L.J.* 135, 136 (2007).

[20] *Madhucon Projects Ltd.* v. *Indian Oil Corporation Ltd.*, AIR 2007 (NOC) 1949 (Del); *Indian Cements Capital and Finance Ltd.* v. *Sasikumar*, 2015 (5) KHC 909.

Supreme Court in *SBP and Co*. v. *Patel Engineering Ltd*[21], explaining the scope of power of tribunal held,

"Section 16 is said to be the recognition of the principle of *kompetenz-kompetenz*. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to determine the contours of its jurisdiction, only means that when such issue arise before it, the tribunal can and possibly ought to decide them".

This does not mean that courts cannot review on the decision of arbitrator on the issue of jurisdiction. If court's review of decision regarding jurisdiction is not allowed, it would amount to a classic case of pulling oneself up by one's own bootstraps[22].

IV. Harnessing the Power of Arbitral Tribunals and Courts

Empowering Arbitral Tribunal to decide on all aspects of arbitration and minimizing supervisory role of courts has been the settled position in recent times. It is no way means to keep judiciary out of arbitral process in entirety. Arbitration cannot be contemplated without support from judicial system. Judicial review provides necessary procedural safeguards and reduces errors of law[23]. Sec. 5 states that unless the Act specifically provides for intervention, no judicial authority shall intervene[24]. This is to reduce the role of courts in arbitral process as court's excessive intervention causes delay in disposal of arbitral proceedings. Enhancing the powers of arbitral tribunal is in tune with this approach. Thus there has to be a delicate balance between extent of judicial intervention on the one hand and autonomy of arbitral tribunal to take decisions on the other.

a. Scheme of Sec. 16 *vis-à-vis* Sec. 37

Sec. 16 provides power to arbitral tribunal to rule on its own jurisdiction including objections with regard to existence or validity of arbitration agreement. Sub-sec. 2 provides that any objections to the jurisdiction can be raised before arbitral tribunal

[21] (2005) 3 Arb.L.R. 285.

[22] Saville LJ from a speech at Middle Temple Hall on 8 July 1996 quoted in Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes*, (Oxford, Oxford University Press, 2005), p.171.

[23] Paul F. Kirgis, "Judicial Review and the limits of Arbitral Authority", *81 St. John's L. Rev. 99* (2007), p. 106.

[24] *See* also *S.S.Fastners* v. *Satya Paul Verma*, 2001 (1) Arb L R 399; *Assam Urban Water Supply & Sewerage Board* v. *Subhash Project & Marketing Ltd*., 2003 (2) Arb L R 301.

before submission of the statement of defence. Sub-sec (3) provides that if tribunal is exceeding the scope of its authority, then such issues must be raised immediately. When an objection to jurisdiction is raised, sub-sec. 5 states that the arbitral tribunal shall decide on such plea and if it takes a decision to reject the plea raised in sub-section 2 or sub-section 3, then it will continue with the arbitral proceedings and make an arbitral award. This order of rejection can be challenged once tribunal passes award under Sec. 34 of the Act. Thus sub-section 5 of Sec. 16 provides immediate judicial review of negative jurisdictional orders only. Constitutional validity of Sec. 16 (5) was challenged in *Babar Ali* v. *Union of India*[25] on the ground that it does not provide for immediate judicial review of positive jurisdictional orders and therefore unconstitutional. Supreme Court upheld constitutional validity of Sec. 16 (5) stating that judicial scrutiny of the order is not completely prohibited by this provision. Such orders can still be questioned after award is passed. The time and manner of judicial scrutiny can legitimately be laid down by the Act.

Sec. 37 provides for appeal over certain orders passed by court and tribunal. Sub-section 1 of Sec. 37 specifically says that appeal shall lie from the orders mentioned in the provision (and from no others). In other words it means only those orders specifically mentioned under Sec.37 are appealable. Sec. 37 (2) and Sec. 37 (3) provide for accepting the plea referred in sub-section (2) and sub-section (3) of Section 16. Accepting the plea under Sec. 16 (2) means that arbitral tribunal accepts that it lacks jurisdiction or as per Sec. 16 (3), it accepts that it has exceeded scope of its authority. Both these rulings are appealable. On the other hand if arbitral tribunal holds that it has jurisdiction, or the matter is within the scope of its authority, such rulings are not made appealable. Thus, Sec. 37 provides for appeal over negative jurisdictional decisions only and all positive jurisdictional decisions can be challenged only after final award is passed. Legislative object is that the negative jurisdictional orders causes impediment in expeditious disposal and therefore they are made appealable. While the positive jurisdictional orders are in the interest of arbitration, and for that reason they are made non appealable. But how reasonable it will be to expect a party subject to positive jurisdictional decisions to wait till the end of arbitral proceedings and then challenge?

[25] (2000) 2 SCC 178.

The scheme of sec. 16 vis-à-vis sec. 37 is aptly described by Supreme Court in *M/s. Deep Industries Ltd.* v. *Oil and Natural Gas Corporation Ltd. and Anr*.[26] In this case, M/s Deep Industries (appellants) entered into a contract with ONGC (respondents) for supply of Mobile Air Compressor for a period of five years. This contract had arbitration clause. Soon after entering into contract, respondents terminated the contract on the ground that some part of the equipment used was second hand. Respondents blacklisted appellants for a period of 2 years. Appellants invoked arbitration clause via notice and sole arbitrator was appointed. In its claim petition, appellants questioned the termination of contract and the order of respondents blacklisting appellants for a period of two years.

An application under section 16 was filed questioning the jurisdiction of tribunal on the ground that arbitration notice was confined only to termination of agreement and did not deal with the issue of blacklisting order of respondents. Arbitrator dismissed Sec. 16 application and held that the matter is within the scope of his jurisdiction.

Against this order of arbitrator, an appeal was sought before City Civil Court, Ahmedabad. Court upheld the order of arbitrator. Respondents then sought first appeal under Sec. 37 of *the Act of 1996*. It was dismissed. Respondents then approached Gujrat High Court under Article 227 by filing a Special Civil Application. High Court allowed the Writ Petition and order of City Civil Court, Ahmedabad was set aside.

Decision of High Court was challenged before Supreme Court by way of Special Leave Petition. Supreme Court held that High Court of Gujarat wrongly exercised supervisory jurisdiction under Art. 227 of the Constitution. Supreme Court made an observation that order passed on application under section 16 is not appealable and High Court could not have set aside the order of Civil Court upholding jurisdiction of arbitral tribunal. If party intended to challenge that order, they should wait until final award is passed and then move an application for setting aside the award under section 34.

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[26] Civil Appeal No. 9106 of 2019.

b. Nature of ruling on jurisdiction

The Act under Sec. 16 terms decision on jurisdiction as 'order'. Order upholding arbitral tribunal's jurisdiction – positive jurisdictional decision – cannot be challenged under appeal. However, final award can be challenged under sec. 34. Some of the jurisdictions term decision on jurisdictional issues as an award or interim award. But the approach of Indian legislation is to treat such decisions as order. The recourse available to party to challenge such order is provided in express terms under the legislation itself.

Though the nature of ruling on jurisdictional issue is termed as order under Sec. 16, what would be the consequences if arbitral tribunal terms such ruling as interim award? Can it then be challenged as award? Such issues have cropped up in number of cases before courts. This has lead to a situation wherein an order, which could not be challenged otherwise, can now be subjected to challenge only because it is termed differently by the arbitral tribunal. This has created confusions with respect to interpretation of these sections.

On this issue different courts have held that decision on jurisdiction cannot be termed as interim award and is not subject to challenge under Sec. 34[27].

In *Union of India* v. *East Coast Builders and Engineers Ltd.*[28] the question before Delhi High Court was whether an order passed by arbitral tribunal regarding arbitrability of a dispute under Sec. 16 can be challenged as interim award under Sec. 34. Rejecting this contention A.K.Srivastava J. wrote;

> "If an order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Sec. 37 of the Act would not have provided for appeal against an order whereby the arbitral tribunal holds that it has no jurisdiction. While enacting Sec. 16 of the Act, the legislature was conscious that the arbitral tribunal could hold in its favour or against

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[27] *Union of India* v. *East Coast Boat Builders and Engineers Ltd*., (1999) 4 RAJ 365; *Triad India* v. *Tribal Cooperative Marketing and Development Federation of India Ltd*., (2007) 1 Arb. L R 327; *Uttam Singh Dugal and Co. Pvt. Ltd*. v. *Hindusthan Steel Ltd.*, AIR 1982 MP 206; *ITI Ltd*. v. *Himachal Futuristic Communications Ltd.,* (2008) 2 Arb.LR 100; *Jain Studio Ltd*. v *Maitry Exports Pvt. Ltd*., (2008) 1 RAJ 698, (2007) 145 DLT 490 (Del).

[28] AIR 1999 Del. 44 following decisions of *Uttam Singh Duggal* v. *Hindustan Steel Ltd*., AIR 1982 MP 206; *Anand Prakash* v. *Asst. Registrar Co-operative Societies,* AIR 1968 All 22

itself on the point of jurisdiction. If the legislature had to treat an order under Sec. 16 to be an interim award, it would not have provided for an appeal under Sec. 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and legislature would have left challenge to such order as well as under Sec. 34 of the Act. It cannot be accepted that the order under Sec. 16 would change its nature upon two different contingencies, i.e., to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. Therefore it can easily be interpreted that in either case it is only an interim order and not an interim award".

Legislative intention behind terming decision on jurisdictional issue as order and not award is further explained by court in *Nirma Ltd.* v. *Lurgi Energic and Entsorgung Germany and Ors*[29], as under;

"The scheme of Sec. 16 and 37 is such that the Arbitral Tribunal is empowered to rule on its own jurisdiction. A plea that the Arbitral Tribunal does not have jurisdiction or a plea that the Arbitral Tribunal is exceeding the scope of its authority, has to be decided by the Arbitral Tribunal and, if it takes a decision rejecting that plea, it is duty-bound to continue with the arbitral proceedings and make an arbitral award. And, the party aggrieved by such an arbitral award is permitted to make an application for setting aside the arbitral award in accordance with Sec. 34. Therefore, obviously, recourse is provided for challenging 'such an award' which is made after the decision rejecting the plea regarding lack of jurisdiction or about arbitrators exceeding the scope of authority. The decision rejecting any of those pleas and the award made thereafter are clearly distinguishable and by no stretch can be considered to be synonymous for the purpose of Sec. 16. If the plea regarding jurisdiction or exceeding the scope of authority were accepted, an appeal from such a decision is expressly provided in Sec. 37 (2) where it is called 'an order of the arbitral tribunal'. Thus, the

[29] 2003 (2) Arb.L.R. 241.

> legislature has consciously and clearly considered the decision on jurisdictional aspect to be not an 'award' but an 'order' or a 'decision'".

It is held that it is a conscious decision on part of legislature to term a decision under Sec. 16 as 'order' and not 'award' and provide a relief to aggrieved party where tribunal decides jurisdictional issue against it[30].

A different but similar question was raised in *Harinarayan G Bajaj* v. *Sharedeal Financial Consultants Pvt. Ltd*.[31] before Bombay High Court. In this case petitioner had made an application under Sec. 27 of *the Act of 1996* before arbitral tribunal. Arbitral tribunal rejected this application. The order of rejection was challenged as interim award before the Court. Issue before the Court was whether such order or decision is 'award'. If it is held as an award, it can be questioned under Sec. 34 of the Act. Court held that such order cannot be termed as award and cannot be challenged under Sec. 34. Court gave following reasons;

> "An order / decision under section 16 is an order in respect of which an appeal is provided under Section 37 of the Act of 1996. The power under Section 16 is the power in the Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of an arbitration agreement. In other words, issues pertaining to jurisdiction will be the subject matter of an order or decision under Section 16. In the event the Tribunal comes to a conclusion that it has no jurisdiction, the remedy under the Act is conferred under Section 37 which is an Appeal. If the Tribunal holds that it has jurisdiction that order or decision does not become final, but such order/decision can be subject to a challenge when the Award is finally challenged under Section 34. Section 34 provides that recourse to a Court against an Arbitral Award may be made only by an application for setting aside such an Award. It is, therefore, clear from the reading of Section 16 of the Act of 1996 that a decision that the Arbitral Tribunal has no jurisdiction or that there is no arbitral dispute, under the Act is not treated as an award. There is also no deeming fiction by which it is taken out from the definition of award. It is an order which if it

[30] *Union of India* v. *M/s. East Coast Boat Builders and Engineers Ltd*., 76 (1998) DLT 958.

[31] AIR 2003 Bom. 296: 2003 (2) Arb L R 359.

culminates in the closure of proceedings an appeal is provided. If it does not terminate the proceedings, that order/decision can be challenged when the Award itself is challenged".

Different expressions like order, award used in Sec. 16 and Sec. 34 carry different purposes, and any interpretation given without appreciating the scheme of the enactment would lead to undermining the intention of the legislation.

V. The Riddle Resolved by Supreme Court

There are many factors that determine jurisdiction of arbitral tribunal. 'Jurisdiction' is a wider term and it can include many aspects within its fore[32]. Jurisdiction of arbitral tribunal depends on aspects like validity of arbitration agreement, existence of arbitration agreement, arbitrability of subject matter of the dispute, scope of arbitration agreement, reference within limitation period etc.

Parties who object to the jurisdiction of arbitral tribunal can raise any one or more of these grounds. When such objection is raised, arbitral tribunal decides and gives a ruling. This ruling is termed as order. In the event of arbitral tribunal naming such ruling as interim award, then can it get challenged as such under Sec. 34 is the issue on which *the Act of 1996* is silent. The Supreme Court judgment before which this issue was raised is discussed here after.

In *M/S Indian Farmers Fertilizer Co-operative Ltd.* v. *M/s. Bhadra Products*[33] (hereinafter referred as IFFCO case), the issue before Division Bench of Hon'ble Supreme Court of India was whether the decision of arbitral tribunal on the preliminary issue of limitation can be termed as 'interim award' and can it be challenged under Sec. 34 of the Act.

Arbitral tribunal's jurisdiction can be objected on the ground of limitation; i.e., the lapse of time from the date of cause of action. If party proves before arbitral tribunal that the dispute has crossed limitation period, then the tribunal cannot exercise its jurisdiction over such dispute. *The Act of 1996* expressly states that *Limitation*

[32] *National Thermal Power Corporation Ltd*. v. *Simens Atkeiengesellschaft*, AIR 2007 SC 1491.

[33] Civil Appeal No. 824 of 2018. Arising out of SLP (C) No. 19771 of 2017.

Act applies to arbitration proceedings like it applies to any other proceedings before normal courts[34]

Background of the case

In this case, parties had entered into an agreement for supply of Defoamers. As per the agreement, repeated supply and payments were made. Parties were at dispute regarding quantity of supply. When respondent demanded payment, appellants denied on the ground that the claim is time barred. Respondent invoked arbitration and a sole arbitrator was appointed. Amongst many issues that were raised before arbitrator, one was relating to the issue of limitation. On consent of both parties arbitrator choose to decide on the issue of limitation as a preliminary issue. Arbitrator decided that the claims of respondent had not become time barred and passed 'First Partial Award'. This was challenged under Sec. 34 of the Act before District court. District Court dismissed the petition stating that the decision of arbitrator cannot be called as an interim award. The same was appealed before Orissa High Court. The High Court too arrived at the same conclusion as that of District Court. The decision of High Court was challenged before Supreme Court.

The question before the Court was whether First Partial Award given by arbitrator on the issue of limitation could be treated as interim award and whether it can be challenged under Sec. 34 of *the Act of 1996*.

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[34] Sec. 43 of *Arbitration and Conciliation Act, 1996.*

Limitation – (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

Supreme Court held that the decision of the arbitrator on issue of limitation can be termed as interim award[35] and is subject to challenge under Sec. 34 of *the Act of 1996*. This decision is on par with the jurisprudence developed internationally with respect to treating jurisdictional decisions.

Question of limitation is a question of law that tribunal decides. When tribunal decides on the question of limitation, certainly it is final for the purposes of that dispute and therefore decision can be termed as 'interim award'. However, section 16 of *the Act of 1996* treats it otherwise. As per Sec. 16, any issue relating to jurisdiction would become jurisdictional issue and it is treated as order. Going by this logic, it can be inferred that decision on issue of limitation be treated as order under Sec. 16.

Post this decision, it can be said that an interim award passed on the preliminary issue by tribunal is subject to challenge. This interpretation will mean that if arbitral tribunal terms it as order, there is restricted judicial review provided under legislation. On the other hand, if such ruling is termed as interim award by arbitral tribunal, it would be susceptible to challenge as award under Sec. 34. On the contrary, if the arbitral tribunal proceeds with arbitration upholding its jurisdiction and passes final award, party aggrieved can challenge the same only when the final award is passed. This is a visible departure from the scheme provided under Sec. 16 and Sec. 37 of the Act.

Thus the form of the decision has become determining factor for immediate judicial review of jurisdictional ruling. This approach is not in consonance with the jurisprudence developed so far in India and goes contrary to well accepted principles.

VI. Contours of Order and Interim Award

The term award is not defined under *the Act of 1996*. Sec. 2 (1) (c) merely states that "arbitral award" includes an interim award. Sec. 31 (6) empowers arbitral tribunal to make interim arbitral award during arbitral proceedings on any matter with respect to which it may make a final arbitral award.

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[35] Sec. 2 (1) (c) of *Arbitration and Conciliation Act, 1996.*

a. Whether order passed under Sec. 16 can be termed as award/interim award

The Act has specifically mentioned that decisions on jurisdiction should be termed as order and not interim award. In other words, the issue of jurisdiction is subject matter of order and not award. If an order under Sec. 16 terminates the arbitral proceedings then appeal is provided and if it does not, then such decision can be challenged when final award is passed. In a case where order passed under Sec. 16 was challenged as award, Court held that orders couldn't be challenged under Sec. 34 as it permits challenge of award only[36]. Even though an order under Sec. 16 can terminate arbitration proceedings, it is not treated as award because it is not finally deciding the claims submitted by parties for adjudication before arbitral tribunal.

This view is further strengthened when we look at Sec. 32 of the Act. This provision provides for termination of arbitral proceedings. It says that passing of final arbitral award and some orders mentioned under Sec. 32 will lead to termination of arbitral proceedings. And all those orders that terminate the arbitral proceedings are not considered as award.

Further, Sec. 31 provides for form and contents of arbitral award. If the decision conforms to the requirements mentioned under Sec. 31, then only it can be termed as award and can be challenged as such. The legislative intention behind providing for such distinction is to rule out every decision of arbitral tribunal terminating arbitral proceedings subject to judicial scrutiny. This is in tune with the objective of expeditious resolution of disputes. Thus there is a practical and advisable dichotomy with respect to decisions or rulings, which are subject to judicial scrutiny.

The nature of award and its distinction from order and direction is explained in the book Russell on Arbitration as;

> "In principle an award is a final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. Such procedural orders and directions are not necessarily final in that the

[36] *Hindustan Petroleum Corporation Ltd*. v. *Batliboi Environmental Engineers Ltd*, 2001 (Supp. 2) Bom. C. R. 547.

tribunal may choose to vary or rescind them altogether. Thus, the questions concerning the jurisdiction of tribunal or choice of the applicable substantive law are suitable for determination by the issue of an award. Questions concerning the timetable for the reference or the extent of disclosure of documents are procedural in nature and are determined by the issue of an order or direction and not by an award. The distinction is important because an award can be the subject of a challenge or an appeal to the court, whereas an order or direction in itself cannot be so challenged".

b. Circumstances under which decision of a tribunal can be termed as award

HC of England and Wales in *ZCCM Investments Holding Plc.* v. *Kansanshi Holdings PLC and Kasanshi Mining PLC*[37], has elaborately stated as to when and under what circumstances, a decision of a tribunal can be termed as award. Court opined that following aspects may guide in treating a particular ruling as award.

i. substance of the decision will have more weight than the form,

ii. ruling is final and disposes of the matter once for all and tribunal becomes *functus officio* either entirely or on that issue,

iii. The ruling deals significantly with substantive rights and liabilities of parties as against procedural issues,

iv. Arbitral tribunal's own description of the decision is relevant,

v. the approach taken by recipient of such decision,

vi. objective attributes of decision like the language used, level of detail, description of decision etc.,

vii. if the decision complies with formal requirements for an award,

viii. context in which decision was made and arbitral tribunal's intention.

After analyzing all these factors, it can be concluded that a decision on jurisdiction can be treated as award since it has all the attributes of an award. Since *the Act of 1996* treats such issue as order and provides for limited judicial review, this approach needs to be changed.

[37] [2019] EWHC 1285 (Comm)

VII. Conclusion

Though minimal judicial intervention is contemplated under *the Act of 1996*, role of judiciary in supervising arbitral process cannot be undermined. Wherever necessary, judiciary will have to give suitable orders and decisions to make arbitral process fair and efficient. Jurisdictional issues raised before arbitral tribunal must be decided first before deciding other issues. Immediate judicial review of jurisdictional issues will go a long way in giving finality to decisions and saves time and cost. If a final award is set aside for lack of jurisdiction of arbitral tribunal, it will undo the entire process of dispute resolution done by arbitrator. It undermines the very purpose for which parties choose arbitration in the first place. Immediate juridical review of jurisdictional issues will in fact further the process of arbitration.

In this regard it is suggested that rulings on jurisdiction of arbitral tribunal either positive or negative should be subjected to immediate judicial review. The confusion created due to use of different terminologies by arbitral tribunal must be clarified. Arbitral tribunal's terminology of its ruling on jurisdiction – either 'order' or 'award' – should not be a determining factor for judicial review.

Further, in the light of jurisprudence developed in other countries and the nature of rulings on jurisdictional issues, proper terminology for such rulings is award and not order. Therefore, it is suggested that Sec. 16 be suitably amended to bring it on par with Supreme Court decision.

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