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"FISCAL FEDERALISM: DURING DEVOLUTION OF UNION REVENUE AND GRANTS-IN-AID."

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"It is... a necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect of the wants of the Union."[1]

I. INTRODUCTION:

The complete separation of Union State taxing powers is one of the two chief characteristics of the financial provisions of the Indian federal system. The entire taxing area has been divided between the Union and the States and in that way, the possibility of double taxation has been totally precluded. Article 246 of the Constitution of India provides separate legislative heads of taxation to the Centre and States. The taxes enumerated in the Union List (List I, Entries 82 to 92, 92A, 92B, 96 & 97) are leviable by the Centre exclusively. The taxes enumerated in the States List (List II, Entries 45 to 63 and 66) are leviable by the state exclusively. There are a few tax entries in the Concurrent List (List III Entries 35, 44 and 47)[2]. It is so to avoid problems of overlapping and multiple - taxation between the Centre and

[1] 31 HAMILTON, FEDERALIST (149).
[2] https://www.mea.gov.in/Images/pdf1/S7.pdf.

the States which have arisen in other federation. The two major sources of Union Revenue[3] is, (1) Tax Revenue, i.e. CGST, Income Tax, Corporation Tax, Capital Gains Tax, Tax on Foreign Travel etc., and, (2) Non-Tax Revenue, i.e., Interest Receipts, Surplus Profits of RBI, Coinage and Mint, Railways, Profits of Public Enterprises, and other Non-Tax Sources of Revenue etc.

The Constitution envisages the appointment of an independent Finance Commission by the President of India every five years to make recommendations on the devolution of Union taxes and grants to be given to the States. Article 280 of the Constitution mandates the President to appoint a Finance Commission every five years. The Commission has a Chairman and four other members whose qualification for appointment is laid down in the Finance Commissions (Miscellaneous Provisions) Act, 1951.

The terms of reference (TOR) of the Commission are:

- ***i.*** *the distribution of the net proceeds of Union taxes between the Union and States and among the States inter-se;*
- ***ii.*** *grant in aid of revenues to be given to the States;*
- ***iii.*** *measures to augment the consolidated funds of the States to supplement the resources of rural and urban local governments in the States based on the recommendations of the State Finance Commissions and*
- ***iv.*** *any other matter referred to the Commission by the President in the interest of sound finance.*

Under the last item, a number of tasks have been assigned to the Commission in the past such as setting the fiscal rules and targets for the Union and States, measures to be taken for sustainable development and the protection of ecology and environment, rescheduling and writing off of States' loans, examination of public expenditure management systems, review disaster management systems, strategic approach to public enterprise reform and incentivizing the States to undertake tax reforms. So far 14 Finance Commissions[4] have submitted their reports. Their recommendations have been well regarded and mostly accepted

[3] Sanket Suman, *2 main sources of Government Revenue in India*, ECONOMICS DISCUSSION (Oct. 2, 2019, 10:04 AM), http://www.economicsdiscussion.net/india/government-revenue/2-main-sources-of-government-revenue-in-india/12786.
[4] https://fincomindia.nic.in/ShowContent.aspx?uid1=3&uid2=0&uid3=0&uid4=0.

and implemented by the Governments. In addition to the tax devolution and grants given to the States based on the recommendations of the Finance Commissions, the Central Government gives specific purpose grants, also known as Discretionary Grants, for various purposes through the respective ministries. The objective of specific purpose transfers, as mentioned earlier, is to ensure minimum standards of services in respect of those services that are considered meritorious or those services with significant inter-state spillovers. However, in Indian context, this has been used as a patronizing instrument to serve political objectives of the ruling parties at the Centre to woo the States and the electorate by expanding its reach to spend on the State subjects.

II. JUDICIAL REVIEW ON FISCAL POLICIES FORMULATED BY THE FINANCE COMMISSION:

II.I DOCTRINE OF CHECKS AND BALANCE:

The Doctrine of Checks and Balance has been the sole power of Judiciary to have the look over the acts done by the Constitutional Bodies, Legislature and Executive. The Courts can exercise power is exceptional circumstances to prevent miscarriage of justice.[5] The term '*exceptional circumstances*' cannot be defined by a set of formula. However, the Court may exercise its power in cases where there has been an illegality or irregularity of procedure or violation of principles of natural justice resulting in gross miscarriage of justice.[6] The main thrust of the Court is that any individual acting *bona fide* and having sufficient interest can have access to the Court for the purpose of redressing public injury, enforcing public duty, protecting social, collective, diffused rights and interests or vindicating public interest.[7] This desired liberalization of the concept of judicial review would not only make the administrative more responsible and responsive to the people but also make it possible for the Courts to effectively police the corridors of power and prevent violation of law.[8] Among many justifications provided, ***Hon'ble Justice Bhagwati***[9] stated that *"First, the rule of law*

[5]Pritam Singh v. State, AIR 1950 SC 169.
[6]State of U.P. v. Ram Manorath, AIR 1972 SC 701.
[7]S.P. Gupta v. Union of India, AIR 1982 SC 149.
[8]*Ibid.*
[9]I.M. Chagla v. P. Shiv Shankar, (1981) 4 SCC 1975; Prof. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, Mimeographed* (1991-92).

will be 'substantially impaired' if "no one can stand to maintain an action for judicial redress in case of public wrong or public injury". it is "absolutely essential that the rule of law must wean people away from lawlessness on streets and win them for the Court of law". If the breach of public duties was 'allowed' to go undressed by Courts, it would "promote disrespect for rule of law". It will also lead to inefficiency. It might also create possibilities of the "political machinery" itself becoming a participant in the misuse or abuse of power. Finally, the newly emergent social and economic rights require new kind of enforcement."

Judicial review of any administrative action can be exercised on four grounds, (1) illegality, (2) irrationality, (3) procedural impropriety and (4) proportionality. These grounds of judicial review were developed by **Lord Diplock** in ***Council of Civil Services Union v. Minister of Civil Services***.[10] Though these grounds of judicial review are not exhaustive and cannot be put in watertight compartments yet these provide sufficient base for the Courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability.

It is also to be noted that all administrative powers must be exercised fairly, in good faith for the purpose it is given, therefore, if powers are abused it will be a ground of judicial review. The abuse of power may arise in 'non consideration of relevant material' which is an abuse of jurisdiction under illegality.

While reviewing an administrative action on the ground of Doctrine of Proportionality, which tries to balance means with ends, the Court, should generally examine (1) whether the relative merits of different objectives or interests have been appropriately weighed and fairly balanced? and (2) Whether the action under review was, in the circumstances, excessively restrictive or inflicted and unnecessary burden? In the case of formula or the recommendation of the Finance Commission under Article 382, the Centre and The Commission fails to appropriately weigh and fairly balance on the basis of relative merits of different objectives and interest of needs of the residents of the State.

[10]Council of Civil Services Union v. Minister of Civil Services, (1984) 3 All ER 935 (HL).

In the 9-bench judgment of ***Jindal Stainless Ltd. and Ors. v. State of Haryana and Ors.,***[11] the Court held that: *"It is a settled principle of law that matters relating to framing and implementation of policy primarily falls in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing the same. Normally, the Courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The Courts have repeatedly taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala fide.*"

But the Supreme Court took a divergent view in the case of ***K.M. Vijayan and others v. Union of India and others***,[12] ruled that rules of natural justice were not applicable to such a legislative action, *"Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the Legislature or its agents as to matters within the province of either."*[13] Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields in as much as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution.

It was beautifully explained by the Court in ***Narmada Bachao Andolan v. Union of India***[14] and reiterated in ***Federation of Railway Officers Assn. v. Union of India***[15] in the following words: *"In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the Court would leave the matter for decision of those who are qualified to address the issues.*

[11]Jindal Stainless Ltd. and Ors. v. State of Haryana and Ors., AIR 2016 SC 5617.
[12]K.M. Vijayan and others v. Union of India and others, [1995] 214 ITR 93 (Mad).
[13]Shri Sitaram Sugar Co. Ltd. v. Union of India, [1990] 1 SCR 909.
[14]Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.
[15]Federation of Railway Officers Assn. v. Union of India, AIR 2003 SC 1344.

Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters."[16]

Also, in the seven bench judgement of ***Prag Ice and Oil Mills, and Nav Bharat Oil Mills v. Union of India***,[17] which stated it is not the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them.[18]

II.II DOCTRINE OF SEPARATION OF POWERS:

The legal system derives its authority from the Constitution and is deeply embedded in the political system; the presence of judiciary substantiates the theory of separation of power wherein the other two organs, *viz.* legislature and executive stand relatively apart from it. Parliamentary democracy works on the principle of 'fusion of power,' and in the making of law, there is direct participation of the legislature and the executive, it is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. It acts as a check on the arbitrariness and the unconstitutionality of the legislature and the executive. Judiciary is the final arbiter in interpreting constitutional arrangements. It is in fact the 'guardian' and 'conscience keeper' of the normative values that are 'authoritatively allocated by the State'[19]. The Courts should not normally interfere with fiscal policy of the government when decisions are taken in public interest and where no fraud or lack of *bona fide* is alleged much less established[20].

But in the seven Judge Bench decision of Supreme Court in ***P. Ramachandra Rao v. State of Karnataka***[21] has taken the view that: *"In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should*

[16]Centre for Public Interest Litigation v. Union of India (UOI) and Ors., AIR2016SC1777.
[17]Prag Ice and Oil Mills, and Nav Bharat Oil Mills v. Union of India, AIR 1978 SC 1296.
[18]Centre for Public Interest Litigation v. Union of India (UOI) and Ors., AIR 2016 SC 1777.
[19]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[20]State of Haryana and Ors. vs. Mahabir Vegetable Oils Pvt. Ltd, (2011) 3 SCC 778.
[21]P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856.

execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law...through directions...is not a legitimate judicial function."

Also, in the cases of ***Divisional Manager, Aravali Golf Club and Anr. v. Chander Hass and Anr.***[22] and ***Asif Hameed v. State of Jammu & Kashmir***[23]etc. In other words, while expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function, the making of a new law which the Courts in this country have sometimes done, is not a legitimate judicial function. The Courts of the country have sometimes clearly crossed the limits of the judicial function and have taken over functions which really belong either to the legislature or to the executive. This is unconstitutional. If there is a law, Judges can certainly enforce it. But Judges cannot create a law by judicial verdict and seek to enforce it.[24]

The people must know that Courts are not the remedy for all ills in society. The problems confronting the nation are so huge that it will be creating an illusion in the minds of the people that the judiciary can solve all the problems. No doubt, the judiciary can make some suggestions/recommendations to the legislature or the executive, but these suggestions/recommendations cannot be binding on the legislature or the executive, otherwise there will be violation of the seven-Judge Bench *ratio decidendi* of this Court in ***P. Ramachandra Rao v. State of Karnataka***,[25] and violation of the principle of separation of powers. The judiciary must know its limits and exercise judicial restraint. The people must also realize that the judiciary has its limits and cannot solve all their problems, despite its best intentions.[26] It is evident that the Supreme Court can act only from the powers inherent from

[22]Divisional Manager, Aravali Golf Club and Anr. v. Chander Hass and Anr., (2008) 1 SCC 683.
[23]Asif Hameed v. State of Jammu & Kashmir, AIR 1989 SC 1899.
[24]Common Cause v. Union of India ,AIR 2008 SC 2116.
[25]P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856.
[26]University of Kerala v. Council, Principals', Colleges, Kerala and Ors., AIR 2010 SC 2532.

the Constitution, thus acting beyond its powers will be violative of doctrine of separation of powers and the Constitution itself.

III. FORMULA OF FINANCE COMMISSION VIZ-A-VIZ FEDERALISM:

III.I FEDERALISM FOLLOWED IN INDIA:

The clause (1) of Article 1 of the Constitution, "*India, that is Bharat, shall be a Union of States"* indicates the intend of the makers of the Constitution for intentionally excluding the word "Federation". Emphasis is provided, to the provisions of the Constitution setting up what, in the words of Dr. B.R. Ambedkar, one of the promising architects of our Constitution, is "a Dual Polity" by which he meant a Republic "both unitary as well as federal" according to the needs of time and circumstances[27]. The Constitution is not a Federal constitution as that of other Federal Countries of the World. In plethora of cases the words like "semi-federal",[28] "more unitary than federal",[29] "amphibian",[30] "quasi-federal",[31] "pseudo-federation"[32] and "pragmatic federalism"[33] were used to define the Federal structure of the Constitution by many learned judges.

It is also to be noted that our Constitution creates a Central Government which is amphibian in the sense that it can over either on the Federal or Unitary plane, "according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether an assessment of the 'situation' in which the Union Government should move either on the Federal or Unitary or matters for the Union Government itself or for this Court to consider and determine each organ. The exercise of powers, legislative and executive, in

[27]Kuldip Nayar v. Union of India, AIR 2006 SC 3127.
[28]State of Haryana v. State of Punjab, (2002) 2 SCC 507.
[29]Shamsher Singh v. State of Punjab, AIR 1974 SC 2192.
[30]State of Rajasthan and Ors. v. Union of India, AIR 1977 SC 1361; State of Karnataka and Ors. v. Union of India, AIR 1978 SC 68.
[31]Supreme Court Advocate-on-Record-Associations and Ors. v. Union of India, (2016) 5 SCC 1.
[32]Kuldip Nayar v. Union of India, AIR 2006 SC 3127.
[33]S.R. Bommai and Ors. v. Union of India, AIR 1994 SC 1918.

the allocate fields is hedged in by the numerous restrictions so that the powers of the States are not co-ordinate with the Union and not in many respects independent.[34]

In his book, ***'The Discovery of India', Jawaharlal Nehru*** had pointed to the necessity of encouraging co-operation among the provincial governments in the economic and industrial sphere. They represented forms of 'executive federalism' which have promoted regular and useful Centre-State consultation and coordination in sectoral issues.[35] Federalism in India is quite different from federations that come into being in the West under different conditions. The traditional concept of federalism is that the constituent units must have a great deal of financial autonomy. It is rather well-known that one who controls the purse, controls the will and therefore, in federation like that of United States of America, the constitutional fathers were very particular that revenues must be properly distributed so that States do not become completely dependent upon the Central government for their finances and have to act as a second fiddle to the central authority.[36]

The Co-operative federalism is the underlying principle of India, as stated by Nehru. Co-operative federalism as defined in terms of federal-regional co-operation and interdependence, especially with reference to the schemes of development, predominantly financed by the federal government and administered primarily by provincial governments has become a fact of life in all federations, the attendant tensions in inter-governmental areas notwithstanding.[37]

The fact that Indian Constitutional system stands on the foundation of 'co-operative federalism', is traceable in the existence, formal as well as tacit and operation of various institutional agencies such as 'Inter-State Council, Finance Commission, Planning Commission, National Development Council etc. The Constitution envisages the appointment of a number of high-level Commissions, both Parliament and *ad hoc* for the

[34]State of West Bengal v. Union of India, (1964) 1 SCR 371.
[35]JOHARI, J.C., COMPARATIVE POLITICS 290-291 (Sterling Publishers, New Delhi) (1992).
[36]GOYAL, O.P., INDIAN GOVERNMENT AND POLITICS 77 (Light and Life Publishers, New Delhi) (1979).
[37]POLITICAL SCIENCE ANNUAL1997 131 (Deep & Deep Publications, New Delhi) (1998).

specific purpose of reconciling diverse and conflicting interests with the co-operation of Union and State Governments.[38]

III.II FORMULA BEING INCONSISTENT WITH THE CONSTITUTION:

In various instances the Government has taken a stand that certain States does not utilize the revenue given to them properly, thus providing the States having and showing higher development might increase the development as well as act as an incentive to those States, whereby the other States tend to move towards the position of developing the State and get incentive form the Union. Union Government always has exercised its dominance while allocating the criteria for the distribution of the revenues to the State, the Union Government should feed States that are in need of the financial help, and not feeding the States that are already financially wealthy. Criteria that are favoring the already developed States, in the name of incentivization to the developed States creates a master-servant relationship between the Union and the State, which directly encroaches upon the basic essence of the Federalism. It was necessary in America to evolve implied powers to implement national policies; in India the Constitution has conferred on the Union ample powers in that direction. In such a situation this Court should be very reluctant to curtail the already limited powers of the States and should not, be construction, convert the federal structure into a unitary form of government which the Constitution has rejected.[39]

It is implied from all the provisions of the Constitution itself that, they have to do it equitably. They should not make any discrimination, such discrimination in the distribution of revenue will be discrimination to the people of the State, because ultimate sovereignty lies with the people and ultimately the money is distributed to the people. Articles 14, 19 and 21 forms the essence of the basic structure and anything in violation of this is unconstitutional. The 'essence' of Article 14 is also a basic structure which is also violated on the grounds of inequitable distribution of revenues to the States, which directly affect the doctrine of reasonable classification. It's the duty of the Union under a federal structure to provide funds to States which are in need of assistance, but not arbitrarily classify the States unreasonably.

[38]JOHARI, J.C., COMPARATIVE POLITICS 290-291 (Sterling Publishers, New Delhi) (1992).
[39]State of West Bengal v. Union of India, AIR 1963 SC 1241.

Every provision of a Constitution must be interpreted in such a way as to avoid injustice and absurdity. Employing such interpretation to Article 275 and Article 280, which allows the central government to distribute in a manner which they like according to their wings and fancies will lead to injustice and arbitrariness. Thus, the provisions of the Constitution should be harmoniously in accordance with the main object and the main crux of the Constitution i.e., the intent of Constitutional Makers. It would be unfair and unjust to believe that even though the words justice fair is not been given, it is implied, the interpreters of the Constitution must pull out the implied meanings and intentions of the Constitutional makers, because the constitution should be read as a whole. The principles of articles 14, 19 and 21 should be considered when distributing the funds, so it should be equitable and fair this suggests that when literal interpretation leads to unfairness and injustice it should be avoided by the Court and harmoniously constructed.

III.III CRITERIA/FORMULA ADOPTED BY 14TH FINANCE COMMISSION OF INDIA:

The Fourteenth Finance Commission of India (XIV-FC), constituted on 2nd Jan, 2013, headed by former RBI governor, Y. V. Reddy, which came into force on April 2015, they take effect for a five-year period form that date. The Government of India accepted the recommendations of the Finance Commission on 24th Feb, 2015.[40] The XIV-FC recommends to increase the division pool to 42%, which is 10% more compared to 32% target set by 13th Finance Commission.

The XIV-FC recommended that the new tax devolution should be the primary route of transfer of resources to States, however, if the formula-based transfers do not meet the basic needs of the transfer, they need to be supplemented by Grants-in-aids.

The XIV-FC put forth the New Formula to divide the 42% share of divisible pool between the states, as in terms of,

a) Area:

The XIV-FC followed the previous finance commission's method and put the slab limit of 2% to the smaller states and assigned 15% weight to it.

[40] K.T. Jagannathan, *All you need to know about finance commission*, THE HINDU (Oct. 1, 2019, 12.32 AM) https://www.thehindu.com/business/Economy/all-you-need-to-know-on-finance-commission/article6928860.ece.

b) Forest Cover:

As a new criterion to balance the benefit of the huge ecological benefits, the FFC assigned 7.5% weight to forest cover.

c) Population:

The XIV-FC felt the allocation based on the single dated population is not fair, so assigned a 17.5% weight to 1971 population and assigned 10% weight to 2011 population to capture the demographic changes i.e. in terms of migration and age structure

d) Income distance (GSDP):

The XIV-FC assigned 50% weight to income distance as it is the only measure of fiscal capacity.

Total income of the State and valuation according to the income as under income distance, are with-in the ambit of Article 41 of Part IV of the Constitution. As stated in Article 41, *the State shall, within the limits of the economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in certain cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want,* so the Finance Commission for the development of the States under the control of the Union Government, the criteria where laid down. The development of the State stays behind in education of the citizens and the total income of the State (GDSP) divided by the total population. It is not the average income, because it includes children and non-working population, but serves as an indicator of a State's living standard.[41] Thus, in order to receive increased share, the State should develop the State by educating all and employing all, which leads to improvement on literacy rates as well as reduction in unemployment rates.

The criteria that deal with forest cover, of the State are with-in the ambit of Article 48A of Part IV of the Constitution. As stated in Article 48A, *the State shall Endeavour to protect and improve the environment and to safeguard the forests and wild life of the country,* so the Finance Commission for the development of the States under the control of the Union Government, the criteria where laid down. It is the duty of the State to save the natural resources, mainly the forest cover of the State and wildlife. But making so vague in words,

[41] *Per capita income*, BUSINESS DICTIONARY, (Sep 30, 2019, 01:00 PM) http://www.businessdictionary.com/definition/per-capita-income.html.

the confusion arises where the States such as Rajasthan, though ready to create a forest cover, the geographical nature of the presence of Thar Desert, makes it tough for the State to fall with this ambit. Thus, the FFC should have taken as approach which, instead of simply giving States money for having retained forest cover, they could have rewarded the states which have taken active measures increase forest cover. Even an increase of forest cover from 2 hectares to 4 hectares will be 100% increase as to promote States like Rajasthan, Goa and other States fully covered by snow.

Population criteria has been accepted as the satisfactory index of fiscal need by different finance commissions giving weightage to it, since(1) population can serve as a suitable guide only when there is a lack of significant differences among the States in the spheres of development and resources endowments; (2) relative population is a neutral or non-discriminatory criterion as it treats unequal equally and all States are economically equally placed; and(3) population has a very modest distributive effects and that too when the tax system is progressive. Therefore, population can serve as a sound criterion only when it is adjusted with other progressive criteria like 'backwardness' and other economic indicators.[42] In the present case the population is becomes a progressive criterion since it is accompanied with an economic indicator, 'per capita income of the State'.

Now, the 15th Finance Commission has been constituted on 27th Nov, 2017, for a five-year period, April 2020 to March 2025. The States are expecting an increase of 10% form the XIV-FC, i.e. 42% to 50% as the weight for the division pool of Union Revenue.

IV. FEDERALISM VIZ-A-VIZ GRANT-IN-AIDS:

IV.I POWER OF JUDICIARY TO ENFORCE THE RECOMMENDATIONS:

Every Finance Commission makes a similar or the same recommendation, 'if the formula-based transfers do not meet the basic needs of the transfer, they need to be supplemented by

[42]G THIIRANAIAH AND HEMLATA RAO, FINANCE COMMISSION AND CENTRE-STATE FINANCIAL RELATIONS 42-43 (New Delhi- Ashish Publishing House Ch IV. 1986).

Grants-in-aids', which is generally accepted by the Union Government *in toto.* In many cases the Union has rejected to provide with Grants to the States even if they show deficit. The Supreme Court, under Article 32(2) of the Indian Constitution has the power to issue the writ of *mandamus.* The purpose of *mandamus* being to supply defects of justice; and accordingly, it will issue to the end that justice may be done in all cases where there is a public interest.[43]

The policy decision of the State should be in public interest and taken objectively. Adhocism or uncertainty in the State policy particularly relating to vital factors of governance, may not bring the requisite dividend. Reasons for taking a policy decision would squarely fall in the domain of the State, but it should be free from element of arbitrariness and mala fide. There are three basic pillars of our constitutional governance i.e. the Executive, the Legislature and the Judiciary.

In ***S.P Gupta v. Union of India***[44], it has been held that the writ of *mandamus* can be issued perhaps not as regards to manner of discharge of public duty with respect to the due exercise of discretion in the course of such duty, it is also held that:

"*Notwithstanding the principle of separation of powers found entrenched in the Constitution of the United States of America, as can be seen from the last part of Para 141 of Vol. 52 of the American Jurisprudence 2d. under the title 'Mandamus' if it is the constitutional or statutory duty of a governor or the President to exercise his discretion with respect to a certain matter he may be required by mandamus to do so but the manner in which he has to discharge that duty cannot be directed by the Courts. As observed in the English decisions referred to above it is manifest that a statutory discretion is not necessarily or indeed usually absolute, it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision. is taken, whether to act and how to act".*

According to Article 275 of the Constitution, it is the duty of the Parliament to provide grants to those States which are "in need of assistance". The Supreme Court in a plethora of cases[45]

[43] R. v. Commissioner of Police Metropolis exp. Blackburn, (1968) 2 QB 118.
[44] S.P Gupta v. Union of India, AIR 1982 SC 149.

held that the *mandamus* must be based on the principle that there should be a demand and refusal before an application for such is made. Where, a State on facing deficit in revenues has to make a demand for grants which should further be refused by the Union Government.

But it is a well said principle that in the case of ***Asif Hameed v. State of Jammu and Kashmir and Anr.,***[46] the Court held as under:

"The function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution. While doing so the Court must remain within its self-imposed limits. The Court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the Court is not an Appellate Authority. The Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

The Articles 112, 264, 280 and 281 of the Constitution detail the budgeting provisions and presentation of annual financial statements before the Parliament. Thus, it will not be appropriate for this Court to step into the functions of the Executive, as specific powers under the Constitution are vested with the latter in relation to finances of the States.[47]

Article 266 of the Constitution refers to consolidated funds and public accounts of India and of the States. In view of specific embargo, in the absence of separate law, the money from the consolidated fund could not be spent, thus it is purely the work of legislation and with the recommendation of the Executive, i.e., The Finance Commission, and not the work of Judiciary. Such intervention by judiciary will merely be judicial Intervention affecting the Legislative wisdom and against the restriction made under the Doctrine of Separation of Powers.[48]

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[45] State of Haryana v. Chanan Mal, AIR 1976 SC 1654; Commissioner of Police v. Gordhandas Bhanji, AIR 1952 SC 16; Kamini Kumar v. State of W.B., AIR 1972 SC 2060; Amrit Lal Berry v. CCE, AIR 1975 SC 538.
[46] Asif Hameed v. State of Jammu & Kashmir, AIR 1989 SC 1899.
[47] Brij Mohan Lal v. Union of India (UOI) and Ors., (2007)15SCC614.
[48] *Ibid.*

IV.II DOCTRINE OF PROMISSORY ESTOPPEL:

The Union Government by accepting all the recommendation of the Finance Commission *in toto,* to provide with Grants-in-aid for the States not able to meet with formula-based devolution, in turn made an assurance to the States to provide them with adequate funds when they are in need of it. The Doctrine of promissory estoppel has been evolved by the Courts, on the principle of equity, to avoid injustice. This doctrine applies also to Government and public authorities however it would yield where equity so demands.[49] The core of the doctrine is the 'faith of the people' in governance which has assumed tremendous importance in this era of global economy.[50] Also in the case of ***Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd v. State of Kerala,***[51] where non-application of estoppels against the government creates real hardship for the persons who act on its advice and representation. Therefore, in such situations, the Court on the basis of equity may grant relief.

The Supreme Court also observed that the Government on some undefined and undisclosed ground of necessity or expediency can neither refuse to carry out the promise solemnly made by it, nor it can claim to be the judge of its own obligations to the citizens as an *ex-parte* appraisement of the circumstances.[52] The basic requirement for invoking the principle must be present, namely, that the factual situation should be such that "Injustice can be avoided only by the enforcement of the promise"[53] Thus the decision of the court in ***Motilal***[54] which marks a significant development in the law relating to doctrine of promissory estoppels stands for the propositions (1) the doctrine could be used as a shield or as a sword, (2) the doctrine is not based on any contract and, therefore even when government contract is void for non-compliance with Article 299, the government could still be bound by estoppels, and (3) the doctrine cannot be defeated on the plea of executive necessity or freedom of future executive action.

[49] Central Airmen Selection Board v. Surinder Kumar Das, (2003) 1 SCC 777.
[50] U.P Power Corptn. v. Sant steel and Alloys(P) Ltd., (2008) 2 SCC 777.
[51] Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. State of Kerala, AIR 1973 SC 2734.
[52] Commissioner of Commercial Taxes (Asstt.) v. Dharmendra Trading Co., (1988) 3 SCC 570.
[53] Motilal Padempet Sugar Mills v. State of U.P., AIR 1971 SC 1021.
[54] *Ibid.*

The point on the doctrine was further explained by the Court in ***Delhi Cloth and General Mills Co.Ltd. v. Union of India,***[55] when it held that alteration in position by acting on the assurance or representation is enough and consequent detriment, damage or prejudice to the promise is not to be proved. It is also immaterial whether such representation was wholly or partially responsible for such alteration in the position. The Supreme Court rightly observed that the concept of detriment now is not monetary loss but whether it appears unjust, unreasonable or inequitable that the promisor should be allowed to resile from the assurance or representation having regard to what the promise has done or refrained from doing in reliance on the assurance or representation. Since the doctrine is based on equity or obligations, "public interest" is the *suprema tex* it can override individual equity.[56]

The literal interpretation of Article 275 of the Constitution states about Grants from Union to certain States, where the verbals "to be in need of assistance, and different sums maybe fixed for different States" shows that it is the duty of the Parliament to provide the sum from the consolidated fund as Grants to the States which are in need of financial assistance.

IV.III DOCTRINE OF LEGITIMATE EXPECTATION:

Legitimate Expectation has been defined as the expectation which shall be protected must be 'legitimate' though it may not amount to a right in the conventional sense.[57] It means that even where a person has no legally enforceable right or interest, he might yet have some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.[58] ***Wharton's Law Lexicon***[59] has defined legitimate expectation as, means the expectation may be based on some statement or undertaking by or on behalf of the public authority which has the duty of making the decision, if the authority has, through its officers acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.[60] He also defines that, it means the legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established

[55]Delhi Cloth and General Mills Co.Ltd. v. Union of India, (1988) 1 SCC 86.
[56]M.P Mathur v. DTC, (2006) 13 SCC 706.
[57]BASU, D.D., HUMAN RIGHTS IN CONSTITUTIONAL LAW 457, (2003).
[58]Schmidt v. Secretary of State, (1969) 1 All ER 904(909), C.A.
[59]WHARTON'S LAW LEXICON 984-985, (2009).
[60] A.G. v. Ng Yuen, (1983) 2 All ER 346(350) P.C.

procedure followed in regular and natural sequence, Again it is distinguishable from a genuine expectation. Such expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.[61] The Doctrine of Legitimate Expectation takes its place besides the principles of natural justice, rule of law,[62] non-arbitrariness, reasonableness, fairness etc. ***Punjab Communications Ltd v. Union of India,*** [63] The Court held that: "*The legitimate expectations are of two types, (1) Substantive Legitimate Expectation, and (2) Procedural Legitimate Expectations. Substantive part of the principle relates to representation that a benefit of a substantive nature will be granted or will be continued."*

Whereas, a fair procedural legitimate expectation will be used to denote the existence of some species of process right, whether in the form of natural justice, fairness or to a related idea of consultation, which the applicant claims to possess as the result of some behavior by the public body which generates the expectation. Natural justice is an important component of the Doctrine of Legitimate Expectation without following the principles of natural justice.

Though the Union, not acting according to the Constitutional language and not falling within the Doctrine of Promissory Estoppel, still they must according to the Doctrine of Legitimate Expectations, thereby fulfilling the legitimate expectations of the States, in need of grants after showing deficit in their State revenue.

V. CONFLICT BETWEEN ART. 282 AND SEVENTH SCHEDULE (ART. 246):

Shri K Santhanam, Chairman of the 2nd Finance Commission stated that:

"*This was not intended to be one of the major provisions for making readjustments between the Union and the States, if that was the idea, then there was no purpose in evolving such a complicated set of relations of shares, assignments and grants. There is no purpose in having two Articles enabling the Center to assist the states-one through the Finance Commission and the other by more executive discretion. In the latter case, even parliamentary legislation*

[61] Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499.
[62] GARRNER, J.F., ADMINISTRATIVE LAW 21, (1967).
[63] Punjab Communications Ltd v. Union of India, (1999) 4 SCC 727.

is not needed. Of course, it will have to be included in the Budget. But, beyond being an item in the Budget, no further sanction needs to be taken. Therefore, in my view, this Article was a residuary a reserve Article to enable the Union to deal with unforeseen contingencies. That was how this Article was used both by the British Government and, after transfer of power, before the first year of the First Five Year Plan. Under this Article, only some grow-more-food grants and some rehabilitation grants were given."[64]

VI. CONCLUSION:

India, Union of States, follow a policy as followed by all federal countries of the World, may be, even in strict sense than them. The Union Government should not bring in political ideologies into the Constitutional mandates, thereby by violating it. The Colorable Legislation that provides grants to the State, which is ruled the same political party in the State and the Union.

The Judiciary, independent constitutional body, has limited power over the fiscal policy decisions of the Union Government, making those decisions to escape the scrutiny of Checks and Balance postulated by the Constitution, thereby acting according to their wings and fancies, which might end up in monopolistic ideas in a long run, which is a violent threat to the greater public interest. The remedy of for such violation of public interest is only in the Good Governance, being guided by the Judiciary, being the sole interpreter and savior of the Constitution, the supreme law of the land.

[64] Shri K Santhanam on art. 282, Chairman of the 2nd Finance Commission.