Consti project essay

The financial allocation in the 1 lath five year plan is almost five times that in the tenth five year plan and the Prime Minister has rightly called the eleventh Lana an ‘ education plan’. L With an aim to improve the higher education system in India, the government introduced three bills in the Look Saba on May 3, 2010, the Educational Tribunals Bill, 201 0, the National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 201 0 and the Educational Institutions and Universities Bill, 2010. All four pieces of legislation, however, have attracted immense controversy and questions have been raised not only on the effectiveness of the provisions but also on the constitutionality of the bills itself. This paper is focused on the Prevention of unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 201 0 and the controversy surrounding the attempts of the Parliament to regulate universities along with technical and medical educational institutions.

An introduction to the Bill, its objectives and the main provisions is followed by a brief summarization of the controversy surrounding it. This is followed by an evaluation of the question of legislative competence in the light of various doctrines of legislative relations and judicial interpretation of the relevant entries in the Union, State and Concurrent Lists.

Research Methodology Aims and Objectives The aim of this paper is to critically analyses the question Of legislative competence of the Parliament with reference to the Prohibition of Unfair Practices Bill.

The objective is to draw inferences on the constitutional validity of the Bill under question by analyzing different doctrines, case-laws and constitutional

provisions in this context Scope and Limitations The scope of the paper is limited to the application of Supreme Court judgments and doctrines of legislative relations to the Bill at hand. The limitation is the lack of case-law directly on the issue of the legislative impotence of the Parliament in curbing corruption in the education sector. Analogies have therefore been drawn to substantiate the view of the researcher.

Research Questions How is federalism implemented through the Indian Constitution? What are the doctrines of legislative relations that can be applied to resolve conflict between legislating powers of the Join and the States? What are the Constitutional provisions relevant to the Bill under discussion? What is the core of the conflicting opinions on its constitutionality? Does the Bill infringe upon the power of the State Legislature? Is this infringement ancillary to the actual aim of the Bill? Does the Bill, in essence, pertain to an Entry in the Union List? Is the Parliament legislatively competent to introduce it?

Is the Bill constitutionally valid? Cooperation The first chapter is a broad discussion of principles of federalism and doctrines of legislative relations.

The second chapter introduces the provisions of the Bill and the questions being raised on its Constitutionality. The third chapter presents the researcher’s own analysis and Opinions on the issue in light of judicial interpretation of the relevant Constitutional provisions. Sources The researcher has relied on secondary sources. Mode of Citation The Uniform INS mode of citation has been followed. Mode of Writing The mode of writing is both descriptive and analytical.

I.

Federalism and the Constitution India is a federation of states. The distribution of legislative powers between the Union and the States forms the core of the federal system. A federal constitution envisages a division of governmental functions and powers between the Centre and the States.

Any invasion by one level of government on the area assigned to the other level of the government is a breach of Constitution. 3 The basic provisions laying down the distribution of powers teen the Union government and the State governments are found under Part XSL of the Constitution, entitled ‘ Relations between the Union and the States’. The Constitution provides for the distribution of legislative powers through Articles 245 to 255 and administrative powers through Articles 256 to 261. 5 Article 246 makes a threefold distribution of legislative powers between the Union and the States drawing this principle from the Government of India Act, 1935.

6 The Constitution of India places restrictions on the power of the Union and the States to make laws with respect to both territory and subject-matter.

While Article 245 covers the territorial extent of legislative powers, the subject-matter based division is supplemented in the Constitution in the form of three lists: the Union List which is exclusively for the Centre, the State List which is exclusively for the States and the Concurrent List within which the Centre and the State can operate simultaneously subject to an overall supremacy of the Centre. 9 It is impossible, however, for the Union and the State governments to function in water-tight compartments and they come in contact with each other at many points causing their operations, powers

and functioning to intersect. This overlap of powers and legislative heads often causes conflicts between the Union and the States regarding the legislative competence of the legislating body. Several doctrines are used to resolve these conflicts and determine what Entry of what List a particular piece of legislation actually falls under. Conflicts between the Union List and the State List are decided by applying the doctrine of ‘ pith and substance’.

1 This doctrine, in essence, asserts that if an enactment substantially falls within the scope of the power expressly conferred by the Constitution on the Legislature enacting it, it cannot be held invalid merely because it incidentally encroaches on matters assigned to another Legislature. 12 According to the Doctrine of Pith and Substance, Objection cannot be entertained merely on the grounds that a provision covers an aspect beyond the legislative scope of the legislating body if the provision is made for a matter germane to a purpose it is competent to legislate upon. 3 Thus, when a law is impugned to be ultra fires, the true character of the legislation has to be ascertained and on such examination, if the legislation, in substance, is found to be one on a matter clearly assigned o the Legislature, then it must be held valid in its entirety, even if it incidentally entrenches upon matters that are beyond its legislative competence. 4 This paper aims to critically analyses the question of legislative competence of the Parliament in enacting the Prevention of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010. An attempt has been made to analyses and interpret the provisions of the Bill keeping in mind the above discussed constitutional provisions and doctrines

and to reach a conclusion as to the selective competence of the Union in enacting it.

The pith and substance of a piece of Legislation is determined with reference to the provisions of the statute itself. 1 5 Therefore, the following chapter is a brief overview of the aims, objectives and basic provisions of the Bill before delving into the controversy surrounding it. II. The Bill and the Issue of Competence This chapter presents the Bill under question in a nutshell and introduces the issue of legislative competence by shedding light on the controversy and the conflicting opinions of eminent jurists and Parliamentarians.

It also lists the Constitutional provisions that are relevant to the issue and form the basis of all arguments for and against the Parliament. A.

A Brief Overview of the Bill Corruption in the education sector has for long been a serious impediment to development of the quality of higher education in India and the existing remedies against unfair practices of institutions for higher education are woefully inadequate.

Enacted with a view to address this shortcoming, the prevention Of Unfair practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010 (hereinafter “ the Bill”) has a Hereford objective: first to curb specific malpractices in educational institutions, such as charging of capitation fee and ensure issuing of receipt for every transaction made between the student and the institution; secondly to ensure that the institutions furnish authentic details on the quality of education provided and the infrastructure available, through their

prospectus, enabling the students to make an informed choice; and thirdly to impose severe penalties, including fine and imprisonment, on those institutions that fail to adhere to the provisions of this Act. 1 6 Over and above Hess objectives, the Bill aims to introduce transparency in the process of admission to institutions for higher education by mandating the pre-eminence of merit during candidate selection. 7 The Bill classifies malpractices into civil and criminal offences depending on the seriousness Of the offence and provides for remedies in the form of both imposition of fine and imprisonment. 18 It completely prohibits collection of capitation fee or any form of donation in lieu of admission to the institution.

1 9 It also prohibits admission without the specified admission test or inter SE merit. 0 The Bill mandates the publication of a prospectus with certain basic information about facilities and infrastructure and its sale at a reasonable price. 21 It also imposes sanction on misleading advertisements regarding the infrastructure or other facilities available at the institution. 2 It provides for adjudication in every state and at the centre, by the educational tribunals established under the Educational Tribunals Act, 201023, for quick and effective redressed.

24 Moreover, the Bill shifts the burden of proof from the plaintiff to the institution. 25 B. The Question of Constitutionality The provisions of the Bill, as discussed above, have raised the hopes for a better regulated and more transparent educational sector in the country. On the whole, the Bill has been welcomed by parents and students.

26 However, while students, parents and academicians have responded positively to the Bill, doubts have been cast on its legitimacy and constitutionality by legal luminaries.

No act or bill can be allowed to violate federal principles even if it has popular sanction or has been introduced with a bona-fide intention. The most important question that now needs to be answered is whether the Parliament has the legislative competence to enact the Bill. The Bill aims to provide for prohibition of unfair practices in technical educational institutions, medical educational institutions and universities. 27 Entry 44 and Entry 66 in the Union List, Entry 32 in the State List and Entry 25 in the Concurrent List are the entries pertaining to education and educational institutions and thereby relevant for discussing the constitutionality of the immediate Bill.

Entry 44 List I gives the Union exclusive power to form laws relating to the " incorporation, regulation or winding up" of corporations but it explicitly excludes universities.

28 This exclusion is incorporated in Entry 32 List II, according to which the State alone can legislate on the " incorporation, regulation and winding up" of universities. 29 Entry 66 List I empowers the Union to co-ordinate and determine standards in institutes of higher education or research and scientific and technical institutions. 30 Under Entry 25 in the Concurrent List, both the Union and the State can legislate on education, including technical education, medical education and universities but subject to the provisions of Entry 66 List 1. 1 The inclusion of Universities n the Bill inspire of the prohibition under Entry 44 List is the central issue in the debate on the

constitutionality of the Bill. According to Justice Madman Moan Punchier, the Bill violates the Constitution and the Federal Structure of the country. 33 Justice A S Indiana opines that the Parliament does not have power to legislate in matters of universities to establish any regulatory regime because the State Legislatures alone have the power to constitute the regulatory regime regarding universities.

The same point Of view is supported by several other luminaries. 35 The government in turn has ride to justify its position by claiming that the Bill has not been introduced under Entry 44 at all.

Matt Barmaid, has sought to clarify the matter by saying that the competence to legislate on matters concerning coordination and determination of standards of higher education and research lay with Parliament by virtue of Entry 66 of Union List and that the Bill was formulated under and derived authority from the same Entry. She added that charging of capitation fee and other issues addressed by the Bill were matters of public concern and could be legislated upon by the Union under Entry 66. 37 Thus he debate and controversy surrounding the constitutionality of the Bill boils down to the question of whether the scope of the ‘ maintenance of standard’ envisaged in Entry 66 of List I can be broadened to include the regulatory provisions sought to be enforced through the Bill and whether the Entry gives the Union ancillary powers to regulate Universities in order to maintain and harmonies standards.

The following chapter is an examination of the Bill in light of case law, judicial interpretation and doctrines of legislative relations. It is also a

presentation of the inferences drawn from the analysis by the searcher to reach a conclusion regarding the constitutionality of the Bill. Ill. The Issue of Constitutionality: Analysis and Opinion This chapter compiles together the Constitutional provisions and the case-law on the matter and presents and justifies the researchers opinion on the issue of legislative competence. It also looks at how the Courts have interpreted the powers under the relevant entries and what scope and extent they have assigned to the respective Legislature.

While it is true that Entry 44 of the Union List places universities beyond the scope of the legislative powers of he Parliament, it is also important to note the use of the term ‘ institutions of higher education’ in Entry 66 of the same List. The Bill relies mainly on the University Grants Commission Act for definitions and this Act simply defines ‘ university as “ a university established or incorporated under a Central Act, Provincial Act or State Act’38. Thus the meaning of university has largely been left to commonsense interpretation. The Webster Dictionary defines ‘ university as “ an educational institution for higher instruction” 39. It is clear from this definition that universities form a part of ‘ institutions of higher education’.

Thus Entry 66 of List I also encompasses universities and universities can therefore not entirely be said to fall outside the scope of the legislative powers of the Parliament. The powers are divided only to the extent that the State Legislature can legislate on the incorporation, regulation and winding up aspects while the Parliament is concerned with the maintenance, co-ordination and harmonistic of standards. 40 Thus the legislation cannot be ultra fires merely because it applies to universities. The constitutionality

needs to be decided based on whether the provisions fall ender only regulation or they supplement a broader aim to maintain standards of education. It was held in R. C.

Cooper v.

Union of Indiana that the scope of Entry 44 of the Union List is limited to the ‘ incorporation, regulation and winding up’ of certain classes of corporations. It is not implied that any law relating to the corporation would come under either of the two entries even if the pith and substance of the law pertains to some other Entry. This ruling of the Supreme Court can easily be applied to Entry 32 of the State List as the wording of the Entry is essentially the same though it applies to reparations not covered under Entry 44. It can thereby be concluded that just because Entry 32 talks of universities, all laws pertaining to universities will not necessarily come within its ambit. They might relate to a different Entry in pith and substance.

Thus the Bill cannot be considered ultra fires simply because it applies to universities and the pith and substance of the Bill needs to be determined to classify it under a certain Entry’. In Kraal Electricity Board v. Indian Aluminum Co. 42, a distinction is drawn between the ‘ regulation’ of an institution and ‘ regulation of the business’ of the institution. The court held that the regulation contemplated in Entries 43 and 4443 was not regulation of the business of production, distribution and supply of electricity. Similarly, the Bill aims to regulate the advertising gimmicks and the admission procedure of educational institutions like universities and not the universities themselves.

The Court, in the above mentioned case, relied on the Preamble of the Act to ascertain that the object of the Act was to rationalist the production and supply of electricity so as to facilitate electrical development and provisions relating to the regulation of the Electricity Board itself were considered incidental and ancillary to the provisions regarding the production, demand and supply of electricity. An analogy can be drawn to the Bill under question. According to the Preamble, the Bill aims to prohibit unfair practices in technical and medical educational institutions and universities so as to protect the interests of students seeking admission thereto. 4 The Bill also includes all institutions of technical and medical education in addition to universities and its objective, very clearly, is not regulation Of Universities in particular but regulation of the education sector as a whole. Just like the Act in the Kraal Electricity Board case aimed for electrical development and not regulation, the Bill aims for student welfare and prevention of unfair practices. It is thus safely covered by Entry 66 in the Union List.

Any infringement upon Entry 32 in the State List is purely incidental and ancillary to the power granted under Entry 66. Education was earlier Entry 11 in the State List. It was moved to Entry 25 of the Concurrent List by the Constitution (42nd Amendment) Act. 6 This deletion and redrafting have made it clear that all aspects of education including admission of students to any educational institution would be covered under Entry 25, Concurrent List but would be subject to entries 63 to 66 of List 1.

47 Any good teaching institution has to take into account the caliber of the students it admits and their existing level Of knowledge and skills. If there are students with noticeably lower skills and knowledge, either the standard

of education will have to be lowered to reach these students, or these students will not be able to benefit from or assimilate higher levels of teaching. As a result, opportunities for specialized training and knowledge which are by their very nature, limited, will be asset. 8 Thus, making merit the sole basis for admission to an educational institution as well as setting minimum basic standards for admission is an integral part of maintaining standards of education.

The Bill prohibits admission without the prescribed admission test or inter SE merit. 49 This is nothing but an attempt to ensure that a certain criteria or lower limit is set for admissions and to prevent an arbitrary selection of students irrespective of skill and intellect. The Bill also prohibits acceptance of capitation fee or donation as consideration for granting admission . 50 This again is a step awards making merit and not economic well being the basis of admission to an educational institution and to make resources available to deserving students irrespective of their economic background.

Both these provisions can play a substantial role in maintaining and uplifting the standard of education in India and are not merely regulatory provisions for universities.

These provisions therefore are squarely covered under Entry 66 of the Union List. Other provisions under the Bill include mandatory publication of prospectus with the listed basic information at least sixty days before enhancement of admission procedure and the sale of such prospectus at the reasonable cost of printing, publication and distribution without any profit margin . 51 The Bill also imposes a penalty for publication of untrue

information through advertisements in an attempt to mislead the public. 2 These provisions, very clearly, seek to help students make an informed choice about the institution they wish to seek an admission to thereby enabling them to find the best possible option that suits their requirements. They can hardly be called regulations imposed on the Institution itself.

While it is true hat the directions issued through the Bill will place restrictions on the working of universities, these restrictions do not form the pith and substance of the Bill and are only ancillary to the broader goal of making the education sector more efficient and uniform in India. Entry 66 should not be given a narrow or restricted interpretation and the power of the Parliament to legislate should normally be held to extend to all ancillary or subsidiary matters. 53 There is no overlapping or common ground between Entry 66 of List and Entry 32 of List II.

The power of the State Legislatures is applicable only to the aspects of incorporation, regulation and winding up of corporations and universities. The Parliament alone has the power in terms of Entry 66 List I to legislate on co-ordination and determination of standards in institution which provide higher education. Once this power is read in favor of the Parliament it becomes an exclusive power to the exclusion of the State Legislatures' power.

; Thus only the Parliament has the power to legislate on maintaining the standards Of education and denial Of this power WOUld result in none of the Legislatures having competence to enact such laws.

While enacting a law in exercise of a particular legislative power, the Legislature is also entitled to make all incidental and ancillary provisions necessary to make the law effective. 55 In order to examine the true character of the enactment, one must take into consideration the enactment as a whole, its objects and the scope and effect of its provisions. It is erroneous to view a statute not as an organic whole, but as a mere collection of sections, to disintegrate it into parts and examine under what heads of legislation the each part would severally fall and thereby determine what portions are intra fires. 56 The ejaculatory provisions of the Bill should not be looked at individually but in the broader context of the entire legislation before a conclusion is reached as to its constitutionality.

Looking at the Bill as a whole, its purpose clearly appears to be student welfare and improvement of the educational sector and not regulation.

Questions on the legality of both Central and State Legislations pertaining to Universities have been raised time and again before the Supreme Court. The Court has generally stressed on a wider interpretation of the relevant entries. In Prep Chain Join v. R. K. Chaparral the legislative impotence of the Union was questioned as it tried to define ‘ University’ and to impose sanction on any institution not confirming to the established norms but using the word ‘ University’ in its name through the University Grants Commission Act, 1956.

The Court held that the entries incorporated in the lists were fields and not powers and that if the Parliament, while legislating on an issue germane to an Entry in the Union List, found it essential to implement a regulating

measure to prohibit the use of the word ‘ University’ except by institutions established or incorporated under a special legislation, t was under its legislative powers to do so. In the immediate Bill too, though the Parliament has issued certain regulations for universities, the regulations are only ancillary to the larger motive of setting standards for education by attacking corruption in the higher education sector. It was held by the Supreme Court in professor Yashmak v.

State Of Chastiser’s that though Universities are incorporated as a legislative head in the State List, aspects such as teaching, quality of education being imparted, curriculum, standard of examination and evaluation and research activity will not come within the review of the State Legislature. These issues were held to be covered only under Entry 66 in the Union List making the Parliament alone competent to legislate in these respects.

It can easily be concluded that a transparent examination and admission procedure, which is provided for by the Bill, forms an essential part of maintenance of standards of education. The Bill to a large extent aims to establish transparency and fairness in the admission procedure by providing for a merit-based entrance system. It also strives for increasing overall transparency in the system by mandating issue of receipts,