SIKKIM AND THE INDIAN CONSTITUTION: EXPLORING THE JURISPRUDENCE OF MERGER

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DECLARATION

I Jigme Dorjee Bhutia, declare that this dissertation titled "**SIKKIM AND THE INDIAN CONSTITUTION: EXPLORING THE JURISPRUDENCE OF MERGER"** submitted for the award of degree of Master of Philosophy (M. Phil.) from the Centre for Study of Law and Governance, Jawaharlal Nehru University is a faithful record of my research work carried out by me under the guidance of my Supervisor. This work is original and has not been submitted for the award of any other degree or diploma in this University or any other University. The assistance received from various sources during the course of the study has been duly acknowledged.

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CERTIFICATE

We recommend that this dissertation be placed before the examiner for evaluation.

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DEDICATED TO

MY NIECES

SONAM PALMO AND SONAM YANGCHEN

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IST OF ABBREVIATIONS

1.	AIR	ALL INDIA REPORTER
2.	SGER	SIKKIM GOVERNMENT ESTABLISHMENT RULES
3.	CAD	CONSTITUENT ASSEMBLY DEBATES
4.	SC	SUPREME COURT
5.	HC	HIGH COURT
6.	SCC	SUPREME COURT CASES
7.	SCR	SUPREME COURT REPORTS
8.	VOL.	VOLUME
9.	S.	SECTION
10.	SS.	SECTIONS

CONTENTS

CHAPTER: 1

INTRODUCTION

INTRODUCTION

The Backdrop

The relationship of India and Sikkim dates back to history, during British rule, the Government of India helped Sikkim in restoring its territory of Tarai from the Goorkha (Old Nepal). After the end of the Goorkha war in 1817, Treaty of Titalya was signed between the Government of India and Sikkim which was negotiated by Captain Barrie Latter on February 1817.[1] An assurance and guarantee was given to the Sikkim with regard to safety and security by the treaty and the British government also return the territory annexed by the Nepal. And in return the British had to be given free Trading Right and Right to Passage till its Tibetan borders, the main intention of the British was to use Sikkim to establish a trade link with the Tibet and China. In order to establish a trade link with the Tibet, the English encouraged lots of Nepali labourer to settle in Sikkim; they were mostly required for improvement of communication network which would link Sikkim with the Tibet. Nepalese people relentlessly migrated and settled in the Sikkim, the Nepalese settlers multiplied rapidly in numbers which lead to a completely change of ethnic panorama in Sikkim.

In 28th March 1861 another Treaty was concluded between Government of India and Sikkim at Tumlong, which resulted in Sikkim becoming a British Dependency.[2] "The Tibetan and the Chinese agreed upon Sikkim being the Protectorate State of the British in the Anglo Chinese Convention held at Calcutta on March 1890."[3] This development led to the appointment of the first Political Officer at Gangtok, the capital of the State of Sikkim on 1888.[4] To put a check on the Anti British plotting by the Bhotia aristocracy, the English had encouraged Nepalese to settle in Sikkim which paid a huge dividend in the later phase of history, and also resulted in *completely changing its demography*. A British administer had written in 1894. "From the commencement of our relations with Sikkim there have been two parties in that state, one which may be called the Lepcha or National Party, consistently friendly to our government, and a foreign or Tibetan party, steadily hostile. The family of Chiefs has generally been by way of siding with the latter, partly in consequence of the habit of marrying Tibetan women

[1] Risley, H H., The gazetteer of Sikkim,2001, Low Price Publication, Delhi
[2] Sinha, Awadhesh Coomar, politics of Sikkim, Thomas press limited, 1975
[3] Gupta, Ranjan, Sikkim: The merger with India, Asian survey, Vol. 15, No.9(sep.1975), pp 786-798, University of California
[4] Supra Note 2 p 17

and partly through there fondness for Chumbi. Of late years a further complications has been introduced by the settlement of colonies of Nepalese in parts of Sikkim, a measure favoured by the Lepchas generally. Theses settlers look to our (the British) Government, but their presence is regarded with disfavour by many influential lamas, who allege that they waste the forests, allow their cattle to trespass, and make themselves unpleasant to neighbour in other ways. So long as these three parties maintained what may be called their natural relations, there was no fear of our influence declining and the internal affairs of the country could be trusted to adjust themselves with the minimum of interference on our(the British) part."[5]

On 22nd January 1947, a resolution was passed by the Constitution Assembly of India that the committee shall take due consideration in dealing with special problems of Sikkim and Bhutan. An agreement was reached between the Sikkim Durbar and the Government of India. It was signed on 27 February 1948 by which all agreements, relations and administrative arrangements as to the matter of common concern existing between the Crown and Sikkim on 14 August 1947 was deemed to continue till a new treaty was negotiated.[6]When India had gained its independence at 1947 from the British rule, a treaty was entered between the Chogyal, the ruler of Sikkim and the Government of India. It was decided that the Indian government would look into defence, external affairs and communication of Sikkim, thus Sikkim became a protectorate of India.

During 1973 there was a popular uprising in Sikkim which resulted in complete breakdown of law and order. An agreement known as "*Tripartite Agreement*" was signed between the Chogyal of Sikkim and the leaders of the political party's representation the interest of the common people of the Sikkim on one side and the Government of India on 8th May 1973; it resulted in the association of Sikkim with the political and economic institution of India.[7] The 35th amendment of the Indian Constitution was made and Article 2A was inserted, which gave Sikkim the status of the '*Associate State'*. One each seat was allotted to State of Sikkim in the Council of State and House of the People, but such membership did not enjoy the voting rights in the Indian Parliament. The alleged harmful activity of the Chogyal was considered to be destroying the democratic set up agreed in the Tripartite Agreement, such an act of

[5] Supra Note 1,p 27

[6] Kazi, Jigme N, Inside Sikkim:Against the tide, 1992, Gangtok, Hill Media Publication.

[7] Rose, Leo E, India and Sikkim: Redefining the relationship, vol 42, No 1(spring, 1969) pp 32-42, University of British Columbia

Chogyal led to passing of the resolution by the Sikkim Assembly on 10th April 1975, the main content of the resolution was to abolish the institute of Chogyal and to make Sikkim a part of India. The resolution passed by the Sikkim Assembly was kept before the people of Sikkim to seek for its approval. A special opinion poll was conducted by the Government of Sikkim on 14th April 1975. The result was 59637 votes in favour of the resolution and 1496 against it from the total electorate of 97000 in the Sikkim.[8]The result of opinion poll led to the 36th amendment of the Indian Constitution; which resulted in the inclusion of the Sikkim as the 22nd State of the India in the first schedule of the Indian Constitution. One seat each was allotted in the House of the People and Council of State, this time the member enjoyed the voting rights in the Indian Parliament. It also led to inclusion of the Article 371F in the Indian Constitution which opens with a *Non-Obstante Clause.* Such a protection in the form of non-obstante clause was mostly given to protect the interest of the Sikkim and its people. Article 371F of the Indian Constitution is also referred as the '*Mini Constitution'* of Sikkim, which mostly lays down the norms, aspiration, condition and understanding reached between the people of Sikkim and the Government of India in order to make Sikkim a part of India.[9]

The Sikkim Government Establishment Rules 1974 was passed by the Sikkim Assembly which is the main area of the research, the most important part of the said rule is the Rule4 (4) which mostly deals with the appointment to the government services. This Rule states that the preference shall be given to the *local candidates over non locals in matter of the employment in government sectors*; however a non local shall be appointed when there is an absence of such local candidate who do not meet suitable qualification and experience but later when there is availability of local candidates who full fills all the norm and criteria, than the non local candidate shall be replaced by the local one.[10] Article 371F of the Indian Constitution further states, "Special provisions with respect to the State of Sikkim notwithstanding anything in this Constitution" and sub clause 371F (k) states that all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority. The Sikkim Government Establishment Rule of 1974 was in force before Sikkim became a part of India; Article 371F begins with a non- obstante clause which safeguards the old laws of the Sikkim that was in existence before its merger with India by virtue of sub clause (k) of Article 371F, until and unless amended or repealed by a competent

[8] R. C. Poudyal v. Union of India , AIR 1993 SC 1804
[9] Kazi, J. N, Sikkim for Sikkimese: Distinct Identity within Union, (2009), Gangtok: Hill Media Publication.
[10] Sikkim Government Establishment Rule, 1974

legislature or other competent authority. The crucial area of research is to see if such old law can withstand its validity even if it violates the basic structures of the Indian Constitution. We try to take an overview of the aforementioned problem in the light of not only constitutional provisions but also international developments.

Scheme of study

The present study is divided into five chapters. The **first chapter** deals with the broad spectrum of the back ground history of Sikkim and its relationship with the Government of India. The **second chapter** deals with the problems and issues relating to Sikkim Government Establishment Rule 1974 and its interaction with the Article 371F along with the other Articles of the India constitution; and also to do an indebt study of the validity of such rule which still stands even though it violates the basic structure of the Constitution. The **third chapter** provides an insight into the numerous judgements of the Court which draws an exception to equality embodied in the Indian Constitution. The **fourth chapter** mostly deals with the international perspective; this chapter is mostly concentrated with Quebec province and its distinctive identity; and deals with various laws and matters which help in preserving its local interest and identity. A comparison has been draw between the Sikkim and Quebec in this chapter. The **fifth chapter** is a conclusion of the whole study of the research.

CHAPTER: 2

CONSTITUTIONAL VALIDITY OF SIKKIM GOVERNMENT ESTABLISHMENT RULE OF 1974

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The intent of this chapter is to assay the apparent conflict between the Constitutional provisions and the 'old laws' of the Sikkim, the tone of the analysis for the most part is legal (as it gyrates around the case law and the legal provisions) though historical events surrounding the merger of Sikkim with Union of India are enumerated to propel a limpid backdrop of the controversy. Analysis largely relies on the case law relating to the issue, more specifically *State of Sikkim v. Surendra Prasad Sharma*[11] which addresses the principle issues appurtenant to the current debate. We start this discussion from the historical occurrences which encircle the merger of Sikkim, though later we delve into much earlier events and try to appreciate their relevance from the point of view of the localist sentiment.

In Sikkim after the popular uprising in 1974 an agreement was reached between Government of India on one hand and the Chogyal and leaders of political parties on the other hand. The Government of Sikkim Bill, 1974 which was passed unanimously by the Sikkim Assembly and consequently promulgated by the Chogyal on 4th July, 1974 as the Government of Sikkim Act, 1974, was the by-product of the above mentioned agreement. This Act empowered the Government of Sikkim to undertake efforts to seek representation of the people of Sikkim in Indian Parliament and thereupon a formal request was also sent to the Government of India. The Government of India accepted the request and amended the Constitution of India making way for the Sikkim to be associated with Union of India. The Constitution 35th amendment Act, 1974, Article 2A was inserted in the Constitution which is as follows:

2A. Sikkim to be associated with the Union. – Sikkim, which comprises territories specified in the Tenth Schedule, shall be associated with the Union on the terms and conditions set out in that Schedule.

Part B of the Tenth Schedule of Constitution provided the terms and conditions of the Sikkim's association with Union of India. On 14th April 1975 a special opinion poll was conducted by the Government of Sikkim which was the basis of request by Chief Minister of

[11] MANU/SC/0483/1994; AIR 1994 SC 2342

Sikkim to Government of India for admission of Sikkim into Union of India as a full-fledged State. As a result by the 36th Amendment Act, entry 22 was inserted in the First Schedule to the Constitution of India by which Sikkim became a member state of the Union of India. Also, the said amendment repealed Article 2A form the Constitution as Sikkim was no more an associate of Union of India but a full-fledged state. The said amendment also added Article 371-F to the Constitution which provides for special status of State of Sikkim. Clauses (k) and (l) of the above mentioned Article are relevant to our debate and therefore are worth mentioning here:

371-F. Special provisions with respect to the State of Sikkim – Notwithstanding anything in this Constitution,

(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority;

(l) For the purpose of facilitating the application of any such law as is referred to in Clause (k) in relation to the administration of the state of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, any such adaptation or modification shall not be questioned in any court of law.

A plain reading of the above mentioned provisions indicates that A. 371-F (k) tries to protect the laws of Sikkim which were in force there immediately before the date of the merger and extends their life till they are amended or repealed by a competent legislature or other competent authority. Interesting thing about Article 371 F is that it opens with a non-obstante clause which means it is not subject to any other provision of the Constitution. Such a protection can be due to various reasons but the most common logic will suggest that it is generally for facilitating the transition process of such laws into the mainstream laws to the country into which the merger is being made, or in other words to avoid a sudden change in the legal framework as it might be problematic to deal with.

Now let us delve into the debate by invoking the controversy which surfaced in 1984 in the famous case of *State of Sikkim v. Surendra Prasad Sharma* which was finally decided in year 1994 by the honourable Supreme Court of India. The facts of the case were that in the year 1976 i.e. after Sikkim became part of India, the Directorate of Survey and Settlement of the Government of Sikkim notified certain posts relating to the survey work of the Directorate and invited applications for filling up of the said temporary posts. Accordingly the applications were presented and the posts were filled in the same year. Later when the survey work of the Directorate was concluded the surplus employees were removed from their posts during the years 1980, 1981 and 1982. In the year 1982 some of the surplus employees who were relieved of their jobs filed writ petitions in the High Court on the ground that they were terminated on the ground that they were 'non-locals' i.e. in terminating the employees from the service a methodology was adopted which was that the employees were first classified into 'locals' and 'non-locals' and after such classification the employees belonging to the 'non-local' category were relieved of their jobs while those belonging to the 'local' category were retained. In response to the above the plea of the State was that this discriminatory treatment was within the limits of law as it was justified under the proviso to Rule 4(4) of Sikkim Government Establishment Rules, 1974 read with Clauses (k) and (l) of Article 371 F of the Constitution. Let us have a look at the above mentioned Rule 4(4) of the Sikkim Government Establishment Rules, 1974 which is as follows:

Rule 4(4) Appointments. - (A) Appointment to service under the Government shall be by one or both the methods indicated below:

(a) Direct recruitment;

(b) Promotion from one grade to another.

(B) Direct recruitment shall include appointment on contract, and appointment on deputation:

Provided these two types of appointment shall be made having due regard to the exact nature of specific duties and responsibilities and the qualifications required for the post, and further provided that

> (i) non-Sikkimese nationals may be appointed only when suitably qualified and experienced Sikkimese nationals are not available, and
> (ii) replacement of such appointees by suitable Sikkimese candidates may be made as and when available.

Thus, it was argued on behalf of the State that in the light of the above provisions it becomes clear that candidates who were not from Sikkim cannot be directly recruited when there were already 'local' candidates available for such posts. Moreover, in the present case the posts were temporary so these employees could be relieved of their jobs with a one month prior notice.

On the basis of these arguments two issues were framed by the Learned Single Judge of the High Court, which were:

> (i) Whether the termination of employment on the basis of the aforesaid classification is justified under the extent laws, and
> (ii) If so, whether the relevant laws are valid and constitutional?

I quote the answer given by the learned Judge of the High Court to the above issues from the text of the Judgment of *Surendra Prasad Sharma Case* as under:

"…the relevant provisions of Rule 4(4) of the Sikkim Government Establishment Rules, 1974, which, when these Rules were framed, directed the "Sikkimese-nationals" to be preferred to the non-sikkimese-nationals in all employments or appointments under the then Government of Sikkim, have become unworkable as a result of Sikkimese-nationality having ceased to exist as a legally cognizable concept with the incorporation of Sikkim as a component State in the Union of India in 1975. I have also held further that even assuming that the construction of the expression "Sikkimese-nationals" in the relevant Rules to mean permanent residents of Sikkim would have made the Rules workable in the post-1975 context, such a construction is not possible or locally permissible as one can be a national of one country without being a resident thereof and with his domicile in another country. And I have also held that even if such a construction was possible or permissible, the relevant Rules, so construed, would be violative of Article 16 of the Constitution as being discriminatory on the ground of residence and I have also pointed out hereinbefore in considerable details that nothing in Article 371 F (k) or Article 35 (b), their non-obstante clauses notwithstanding, would protect them from the challenge of Article 16(1) and (2) read with Article 14 of the Constitution."[12]

Thus, the learned Single Judge of High Court allowed the writs filed by the terminated employees and quashed the termination orders. Aggrieved by the said Judgment the State of

[12] Id. para 4, at p. 2344

Sikkim went in appeal to the Supreme Court. Broadly following issues emerged in the said case:

(i) Whether the classification of candidates as 'locals' and 'non-locals' is justified under the extent laws?

(ii) Whether the law protected by virtue of the power conferred by Article 371 F is immune from being tested on the touchstone of the requirement being consistent with the basic structure of the Constitution in view of the non-obstante clause with which the said provision opens?

(iii)Whether the Establishment Rules of 1974 as modified in 1980 under Article 309 of the Constitution can be regarded to have come into force immediately before the appointed day, i.e. 26th April, 1975 to attract the provision of Clause (k) of Article 371 F?

We now proceed to discuss these issues (in that order) form the point of views taken by High and the Supreme Court. Let us discuss the issue regarding the classification of candidates as locals and non-locals. With the Sikkim joining the Union of India the concept of Sikkimese nationality ceased to exist and the Sikkim Subjects Regulation, 1961 was expressly repealed with effect from 26.4.1975 by the Adaptation of Sikkim Laws (No. 1) Order, 1975, promulgated under Clause (1) of A. 371 F of the Constitution of India. Also an Oder called Sikkim (Citizenship) Order, 1975, was issued by the President of India under S. 7 of the Indian Citizenship Act, 1955, declaring that "every person who immediately before the 26th day of April, 1975, was a Sikkim Subject under the Sikkim Subjects Regulation 1961, shall be deemed to have become a citizen of India on that day."

As noted earlier, the High Court's view was that after the merger of Sikkim with Union of India and Sikkim acquiring the status of a full-fledged State the idea of Sikkimese-nationality ceased to subsist as a politico-legal abstraction and consequently Rule 4(4) ceased to have have legal potency. Thus, High Court opined that it is not correct to interpret the term 'Sikkimese-nationality' as equivalent to 'locals'. What it further observed was that even if we assume that 'Sikkimese-nationality' can be equated with the term 'locals' with the aid of Article 371 F (k) the classification of 'locals' and 'non-locals' cannot be justified on the basis of non-obstinate clause as it has to pass the test of equality under Articles 14, 15 and 16 of the Constitution. Argument of the High Court is simply that the scheme of above mentioned Articles does not allow an arbitrary classification (as it is in present case) which is not based

on a rational nexus with the objective sought to be achieved by the legislation. Another important observation which High Court makes is that even if we assume that the immunity provided by Article 371 F of the Constitution saves the said Rules from passing the test laid down by the above mentioned Articles of the Constitution, it should not be overlooked that there is a technical irregularity regarding the same. The technicality is that the said rule has undergone a change in nature by virtue of Notification dated 17.11.1980 which added the following paragraph:

"In exercise of the powers conferred by the provision of Article 309 of the Constitution of India, the Governor of Sikkim is pleased to adopt the Sikkim Government Establishment Rules 1974 as the rules regarding recruitment and conditions of service of persons appointed to the services and posts in connection with the affairs of the State of Sikkim with modifications set out herein below with effect from the 26th day of April, 1975."

The High Court observed that such an adoption of Rules under Article 309 gave a distinct legal personality to the Rules which were different from the one which existed prior to the 26.4.1975 and therefore the Rules adopted under Article 309 cannot escape the test of equality under Articles 14, 15 and 16.

While discussing the opinion of the High Court with regard to its refusal to equate 'Sikkimese-nationality' with the term 'locals' the Supreme Court observed:

"With respect we find it difficult to accept this highly technical approach. In the first place since this was an existing law which continued in force, it would naturally contain expressions which were in vogue before the appointed day. These expressions have to be understood in the sense in which they were defined in the Sikkim Subjects Regulations, 1961. Regulation 3 defines Sikkim Subjects and Regulation 7 explains who shall not be Sikkim subjects. Therefore, if these expressions 'Sikkimese-nationals' and 'non-Sikkimese-nationals' used in the proviso to Rule 4(4) are read and understood in the context of provisions of the aforesaid regulations, the difficulty expressed by the learned Judge in the High Court would appear to be imaginary."[13]

Thus, the Supreme Court dismissed the reasoning given by the High Court on the above question. Regarding the equality test observation Supreme Court accepted the contention of the counsel from Appellant's side who brought to their attention Article 16 (3). The said

[13] Id. para 16, at pp. 2348-49

Article permits Parliament to make a law prescribing, in regard to a class or class of employment or appointment to an office, any requirement as to residence within the State or Union Territory, notwithstanding the other clauses of the same Article.

Let us move to the issue whether the law protected by virtue of the power conferred by Article 371 F is immune from being tested on the touchstone of the requirement being consistent with the basic structure of the Constitution in view of the non-obstante clause with which the said provision opens? The Respondents in their arguments relied on the case of *R. C. Poudyal v Union of India*[14] in which the Supreme Court was "…required to consider the scope and validity of Clause (f) of Article 371 F, since it was challenged on the ground that it violated the 'one person one vote' rule and, therefore, contravened the essence of democracy, a basic feature of the Constitution. This court by majority upheld the validity of the said provision and held that the non-obstante clause therein cannot be construed as taking Clause (f) of Article 371 F outside the limitations of the amending power itself. The majority held that the provision of Clause (f) of article 371 F read with Article 2[15] have to be harmoniously construed, which construction must accord with the basic features of the Constitution. It, therefore, rejected the contention that the vires of the said provision and its effect are not justiciable. Agarwal, J. while concurring with the said view observed that the power conferred by Article 2 is not wider in ambit than the amending power under Article 368 and must, therefore, be read subject to the limitation that it must conform to the basic structure concept."[16]

The ratio of the case was that if a new State is admitted into the Union then the terms and conditions on which the new state was admitted have to be consistent with the basic structure of the Constitution. Though the validity of the Clause (f) of Article 371 F was upheld but the conditionality of it being consistent with the basic structure was attached.

The Appellants' counsel argued that while it may be true that terms and conditions of admission of a new state have to be consistent with the basic structure of the Constitution, the same cannot be held true of the existing law protected by the non-obstante clause in Article 371 F read with Clause (k). "He pointed out that in 'Poudyals' case the question of

[14] [1993] 1 SCR 891

[15] Article 2. Admission or establishment of new States.—Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

[16] Supra note 1, para 9, at p. 2346

recognition and enforcement of the rights which the petitioners had as residents of the ceded territory against their own sovereign did not actually arise, vide paragraph 31 of that decision, and hence the said decision is not an authority for the proposition that even the law as it existed before Sikkim became a part of India, which stands protected by clause (k) of the Article 371 F, must comply with the basic feature doctrine for its enforcement."[17] The learned counsel for the appellants also brought to the notice of the Court Article 16 (3) which allows Parliament to legislate prescribing, in regard to a class or class of employment or appointment to an office, any requirement as to residence within the State or Union Territory, notwithstanding the other clauses of the Article. Argument was simple, that since the classification in the concerned case was on the basis of requirement as to residence which itself has been provided by the Constitution as a ground under 16 (3), therefore is within the vires of the Constitution and hence there is no need to stand the test of equality enshrined in Articles 14, 15 and 16.

Next thing which brought the notice of the Court was Articles 35 and 372 which are as follows:

35. Legislation to give effect to the provisions of this Part.—Notwithstanding anything in this Constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

[17] Ibid, para 10

Explanation.—In this article, the expression "law in force" has the same meaning as in article 372.

Article 372 (1) says that subject to the provisions of the Constitution, all laws in force in the territory in India immediately before the commencement of the constitution shall continue in force therein until repealed, altered or amended by a competent legislature or authority.

The argument build up on this scheme was that since the classification based on requirement as to residence was allowed under Article 16 (3) which was a part of the Constitution therefore the law if made would be intra vires. Moreover, with the aid of Article 35 (b) any law in force immediately before the commencement of the Constitution in relation to any matter in Article 16 (3) shall continue in force, notwithstanding anything in the Constitution. And the expression 'law in force' has the same meaning as provided in Article 372.

The High Court rejected the above arguments on the basis that since the Establishment Rules of 1974 were the subject matter of Adaptation Orders issued by the President, they ceased to be existing law within the meaning of Article 371 F clause (k) and thus they do not have the immunity provided by non-obstante clause. The Supreme Court observed the following in this regard:

"*We are afraid the entire approach of the learned Judge is, with respect, wrong. In the first place in relation to Clause (k) the non-obstante clause seeks to extend protection to all existing laws even if they may conflict with any provision of the Constitution and in absence of such protection would be declared ultra-vires the Constitution*. Since the law which were in force before the appointed day had not to go through the test of satisfying the requirements of the Constitution, the possibility of those laws being in conflict with the provisions of the Constitution could not be rule out and hence they had to be protected by the non-obstante clause. There is no question of Clause (k) itself being in conflict with any of the provisions of the Constitution but there were every possibility of the laws in force immediately before the appointed day being in conflict and they had to be protected from being assailed to be unconstitutional. Secondly, Article 372(1) had a limited role to play. By Article 395, the Indian Independence Act, 1947, The Government of India Act, 1935, and all related enactments amending or supplementing the same, except Abolition of Privy Council Jurisdiction Act, 1949, came to be repealed. *Notwithstanding their repeal, all laws in force in the territory of India immediately before the commencement of the Constitution were continued in force therein, until altered or repealed or amended by a competent legislature or*

other competent authority, subject of course to the other provisions of the Constitution, a limitation that is not found in Clause (k) of Article 371 F. it is, therefore, obvious that the scheme and scope of the two provisions is totally different, in that, Article 371 F extends a total protection to matters listed in Clauses (a) to (p) thereof by non-obstante clause while the protection extended by Article 372(1) was qualified by the word 'subject to the other provisions of this Constitution', a phrase which is totally absent in the scheme of the former provisions."[18]

Thus, on the basis of above reasoning the Supreme Court over-ruled the logic given by the High Court. The Supreme Court on the above mentioned logic held that non-obstante clause protects not only Clause (k) of Article 371 F but all the Clauses i.e. Clause (a) to (p) of the said Article. The Court mentions how this scheme of protection was specifically provided in Article 371 F while it is absent from the above discussed provisions.

The next issue was whether the Establishment Rules of 1974 as modified in 1980 under Article 309 of the Constitution can be regarded to have come into force immediately before the appointed day, i.e. 26.04.1975 to attract the provision of Clause (k) of the Article 371 F?

The High Court in regard to the above issue observed:

"Therefore, as the Sikkim Government Establishment Rules, as they now stand after being adopted and promulgated by the Governor under the Proviso to Article 309, have been made effective only from, and not immediately before 26th April 1975 these Rules cannot acquire any immunity against the provisions of the Constitution, even assuming that any such immunity was sought to be and could be given by Article 371 F (k)."[19]

Supreme Court gave a clever reply to the above reasoning of the High Court, it observed:

"If any adaptation or modification is made in the law in force prevailing prior to the appointed day, the law would apply subject to such adaptation and modification. It is thus obvious that the adaptation and modification made by the President in exercise of this special power does not have the effect of the law ceasing to be a law in force within the meaning of Clause (k) of Article 371 F. Therefore, on the plain language of the said provision it is difficult to hold that the effect of adaptation or modification is to take the law out of the purview of 'law in

[18] Id. para 17, at p. 2349
[19] Id para 18

force'."[20] Thus, it simply said that even if any adaptations or modifications are made in the existing law it does not have the effect of the law ceasing to be in force, simple modifications do not stop the law from being in force it just operates subject to such modifications and adaptations.

Another interesting observation by the Court which most regard as the driving force behind the decision was:

"From what we have said earlier it is crystal clear that certain political developments of considerable significance to the People of Sikkim had preceded its merger into the Union of India. This merger was based on certain solemn assurances given to the People of Sikkim. The constitutional provisions cannot be read as torn from the historical developments which preceded the merger. The laws which were in force immediately before the merger were enacted at a time when Sikkim was under the Chogyal's rule and could not, therefore, be in accord with the constitutional mandates of the free democratic republic. Therefore, to give effect to the political commitments and assurances given to the People of Sikkim, special provisions had to be made in respect of the new state of Sikkim by insertion of Article 371 F in the Constitution."[21]

Thus, the observation was significant from the point of view of the political and historical underpinnings. As we have discussed in other chapters the demography of the Sikkim underwent a change ever since the British contact. The British encouraged immigration of the Nepalis to the Sikkim which had ethnic repercussions for the Sikkim and there is resentment even to this day regarding the events. The same fears were expressed when the question of merger with India came up and hence certain political commitments and assurances were given to the people of Sikkim to overcome these fears and maintain their culture and traditions within the space carved out for them.

The decision as a whole is significant due to following reasons, first, the Supreme Court picked upon the technical and narrow interpretations given by the High Court and categorically answered them in a rational and logical way. They even criticized the High court for their narrow approach on various occasions and gave a harmonious interpretation to the concerned provisions. Secondly, the court acknowledged the historical and political peculiarities involved and showed respect to the assurances give to the People of Sikkim. As a

[20] Id. para 22, at p. 2350
[21] Ibid para 21

result of which the efficacy of Article 371 F, which provides for special provisions for the State of Sikkim, stands tall and protects their ‘old laws’ from the mandates of the test of basic structure.

CHAPTER: 3

INEQUALITY WITHIN EQUALITY

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Each and every individual has to be given equal treatment, it is the basic rule of law, which has been embodied as Right to Equality in part III of the Indian Constitution' which deals with the Fundamental Rights. Article 14 of the Indian Constitution states that, *the state shall not deny to any person equality before the law or to equal protection of the law within the territory of India*. Equality before law refers to equal treatment to all the individuals before law and absence of any sort of privilege and favours. It consists of two concepts i.e. 'equality before law' and 'equal protection of laws'. Regarding 'equality before law' it has been observed that "the term is the negative concept and is borrowed from the English law. It is negative implying the absence of any special privilege in favour of individuals and equal subjection of all classes to the ordinary law."[22] Equality before law is a negative concept in the sense that there is an absence of any special treatment or privilege to any individual or a group, each and everyone is equal before the law. No one is superior or inferior in the face of the law; law shall prevail and be superior. On the other hand 'equal protection of laws' is a positive concept. "The term equal protection of the law is a corollary of the first expression and has its origin from the American Constitution. It is a positive concept which means that State shall treat all the persons equally under equal circumstances; thus, it implies equality of treatment in equal circumstances".[23] It implies that like should be treated alike and not that unlike should be treated alike. "Our constitution has used both the above expression in Article 14. These two expressions make the concept of equal treatment a binding principle of State actions. The nature and extend of the guarantee is the same."[24] The term equal protection of the law is more of a positive in nature, which seek for the participation by the state, it seeks for some positive involvement by the State to seeks that there shall exist equality within a society, an equal treatment in an equal circumstance and situation is the main component of the equal protection of the law.

It should be briefly mentioned at the outset that it is this concept of 'equal protection of laws' which can be invoke in our discussion to argue that within the concept of equality it has been provided that only like should be treated alike and not that unlike should be treated alike. To

[22] Mehta, S M, a commentary on Indian constitution law, pp 59, vishal publication, kurukshetra, 1982
[23] Diecy, Law of the constitution, 10th Ed.pp.49
[24] Supra Note 22

be ‘like’ people should be similarly circumstanced and from this logic we build upon our contention that people of Sikkim cannot be treated alike with the mainstream Indians as they were not similarly circumstanced. Due to various historical reasons people of Sikkim were not similarly placed as compared to the people of other states.

In Sri Srinivasa Theater v. Government of Tamil Nadu[25] the Supreme Court have clearly distinguish the difference between *equality before law and equal protection of law* even though there might be many things in command between them. According to Supreme Court’s interpretation, equality before law is a dynamic concept which has a much wider interpretation and one such interpretation is abolition of any preference given to an individual or class, and also emphasis law to be superior. It assert that State to take actions through the mechanism of the law to create a more just and equal society.

The concept of equality embodied in the Article 14 to Article 18 of the Indian Constitutions mostly puts an emphasis that “*equal should be treated alike*”, it does not state that the unequal should also be treated equally. If an individual or a group of persons are not situated in an equal footings, than they cannot be treated in a same way along with the other people. There exists equality before law only when there is an equal society, but a society is never equally divided, all the individuals who are a part of the society are never equal by nature, attainment and circumstance, therefore application of the equality in a strict sense shall result in injustice. If all the people are treated in an equal manner, than such an act shall lead to unjust and would violate the basic principle of equality. Some people need to be treated in an unequal manner by giving them privilege and preference. Any such law which guarantees such treatment shall not be violating the basic concept of equality and shall not be considered as discriminatory. But such differential treatment and classification of any individual and groups ought to be done in rational manner. A law which is based on rational classification cannot be considered as discriminatory.[26] Article 14 does not allow class legislation but permits reasonable classification of persons; it permits such classification in order to meet specific ends.

The Supreme Court has given the true meaning and scope of Article 14 of the Indian Constitution by the numerous judgements. The following propositions was established by the Supreme Court in the Shri Ram Krishna Dalmia v. Shri Justice S.R.Tendolker -

[25] Sri Srinivasa Theater v. Government of Tamil Nadu AIR 1992,at 1004
[26] Ashutosh Gupta v. State of Rajesthan (2002) 4 SCC 34

"(a). Article 14 condemns discrimination not only by substantive law but by a procedural law.[27]

(b). Article 14 forbids class legislation but does not forbid classification.[28]

(c) Permissible classification must satisfy two conditions, namely, (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group, and (ii) the differentia must have a rational relation to the object sought to be achieved by the statue in question.[29]

(d) The differentia and object are different and it follows that the object by itself cannot be the basis of the classification.[30]

(e) In permissible classification mathematical nicety and perfect equality are not required. Similarly, not identity of treatment is enough.[31]

(f) The classification may be founded on different bases, namely, geographical or according to object or occupation or the like;[32]

(g) If a law deals equally with the members of a well defined class, it is not open to charge of the denial of equal protection on the ground that the law has no application to other persons.[33]

(h) Even a single individual may be in a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.[34]

(i) The legislature is free to recognise degree of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;[35]

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[27] Shri Ram Krishna Dalmia v. Shri Justice S.R.Tendolker (1959) S.C.R. at p. 297

[28] Ibid. p. 296. In D.D.Joshi v. union 1983 A.SC, 420, 425(per Desai J. "It is well settled and not controverted on behalf of the respondent that Art. 14 forbids class legislation but does not forbid classification for the purpose of legislation")

[29] Ibid. Das J. in Anwar Ali Sarkar's case 1952 S.C.R. 869 pp 340- 341, foll. In Om Prakash v. J n K 1981 ASC. 1001{ held that the allotment of raisin, contrary to the industrial policy, to some allotees violated Art.14} D.D.Joshi v. union 1983 A.SC, 420, 425, where the test in proposition (c) is treated as well settled.

[30] Anwar Ali Sarkar's case, Supra Note 1952, S.C.R. p. 341;

[31] State Of Bombay And Another vs F.N. Balsara, 1951 AIR 318, 1951 SCR 682, pp 708-10

[32] Dalima's Case, Supra Note, 1959, SCR 279, p. 297

[33] State Of Bombay And Another v. F.N. Balsara, 1951 SCR 682, 709

[34] Supra Note 32, p 297

[35] Khyberi tea Co. Assn v. Assam 1964 5 SCR 975

(j) There is always presumption in favour of the constitutionality of an enactment and the burden is upon the person who attacks it to show that there has been a clear transgression of the constitutional principle.[36]

(k) In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived.

(l) It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its law are directed to problems made manifest by experience and that its discrimination are based on adequate grounds.

(m) while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminatory legislation. The principle must be born in mind in deciding whether a law violates Article 14."[37]

What we can draw from the above propositions is that the basic principle embodied under Article 14 is that a law must be operated in such a manner that it should treat all the people in an equal manner under like circumstances. Although there is prohibition on any type of class legislations but it favours classification.

In Laxmi Khandsari v. State of Utter Pradesh the courts has laid down the norm for reasonable classification, "it has stated that for the classification to be a reasonable it must accomplish two basic tests:

> **1.** It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

[S] Supra Note 32, p. 297

[37] Ram Prasad Narayan Sahi v. Bihar 1953 SCR 1129, ASC 215

2. The differentia adopted as the *basis of classification must have a rational or reasonable* nexus with the object sought to be achieved by the statue in question."[38]

In UP Electric Co. v. U.P, Shah J. has rightly observed, "Article 14 ensures equality among equals. Its aim is to protect persons similarly placed, against discriminatory treatment. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice."[39]

When there is a different source of the two laws which deals with the same subject matter than application of such laws cannot violate Article 14. The Supreme Court has observed in State Of Madhya Pradesh v. G. C. Mandawar dealing with the difference of the scale of dearness allowance in the State Government and the Union Government dealing with the same class of work had observed that. "Article 14 does not authorize the striking down of a law of one State on the ground that in contrast with the law of another State on the same subject, its provision is discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with the similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statues being different, Article 14can have no application."[40] If there is a challenge to the Sikkim Government Establishment Rule, 1974 on the ground that it is in contrast with the rest of the States of the Union of India, such a contention will not be sustainable in view of the above reasoning given by the Supreme Court. Article 14 also does not permit to strike down the law of the one State on the ground that comes into conflict with the law of the other States of the Indian Union on the same subject matter. Article 14 also does not contemplate that the law of the Centre or the State Government dealing with the similar subjects has to be the same or similar in nature, two different laws with regard to the same subject matter cannot be held as unconstitutional by a process of comparative study of the provision of the two because the source of the authority of the two being completely different from one another, on such conditions article 14 do not have any effect and application.

Das C.J, had stated that the decision of the Supreme Court in numerous cases have affirmed to the several proposition laid down by the Supreme Court in the Dalmia's case and such decision of the Supreme Court fell under the five categories which are-

[38] Laxmi Khandsari v. State of Utter Pradesh, AIR 1981 SC 873.891(1981)2 SCC 600
[39] U.P Electric Co. v. U.P,(1970)A.SC, pp 24
[40] State Of Madhya Pradesh v. G. C. Mandawar (1995) 1 SCR 599 pp 606

1. When a statue itself reflects to whom its provision were intended to apply and the base of such classification of a person or thing may appear on the face of the statue or which may be brought to notice from the surrounding circumstances known to, or brought to attention to the court, if the classification made satisfied the test laid down in proposition than law would be upheld.[41]

2. When a statue directs its provisions against one individual person or things or against numerous individual or things but there is an absence of reasonable basis of classification and also it cannot be brought to notice from the surrounding circumstances or matters of common knowledge than such law would be null and void.[42]

3. When a statute does not make any sort of classification of person or things to whom its provision should apply but it totally leaves on the discretion of the government to select and classify, than still the statute would not be null and void on the ground that the statue did not provide for the classification or it had given discretion power to the government hands. But the court would look if the statue contains any sort of principle and policy for the government to exercise their discretionary power. And in absence of such guidance than court would strike down such statue under the ground that it would provide the government with uncontrolled and arbitrary power to distinguish and discriminate between the people and things similar situated. So that the discrimination was inherited in the statue itself.

4. If the statues lay down certain policy and principle for the guideline to be followed by the government while exercising such discretion power relating to classification and selection than the law would not be null and void but would be upheld.

5. If the government did not exercised its discretion power according to the policy and principle laid down by the statue than the executive action would be held null and void not the statue. The executive action would be held unconstitutional not the statue. [43]

[41] Supra Note 27
[42] Ibid
[43] Ibid

The Supreme Court has observed in K.Thimmappa v.Chairman, Central Board of Directors that, "when a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relations to the object of legislation. Mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view".[44] It is submitted here that on the line of above reasoning the Sikkim Government Establishment Rules, 1974 though may prima facie appear to be arbitrary, in reality they are grounded on a rational basis. That rational basis was based on the concern for protecting the ethnicity of the people of Sikkim as it underwent rapid changes when British encouraged settlement of Nepali people in territories belonging to Sikkim. The interests of the British were both economic and strategic, the repercussions of which were gradually realised by the then leaders of Sikkim which prompted them to make such rules to protect the interests of the people of Sikkim which were under threat from such uncontrolled immigration.

The Supreme Court again observed in Union of India v. M.V.Valliappan case that, "it is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."[45] The first thing to be considered while evoking Article 14, is to see that the person against whom the discrimination has been alleged falls under the same class or not.

It is not a necessary that for a classification to be a valid, its basis must always appear on the face of the law; the court may refer to the relevant material to find out the reason for the justification of such classification. The relevant matter in concern may include object and reason appended to a Bill, affidavits of the parties, parliamentary debates, matter of common knowledge, the background circumstance leading to the passing of such act. [46]

[44] K.Thimmappa v. Chairman, Central Board of Directors, AIR 2001 SC 467(2001)2 SCC 259
[45] Union of India v. M.V.Valliappan,(1999) 6 SCC 259,269:AIR 1999 SC 2526
[46] State of Jammu and Kashmir v. T.N.Khosa, AIR 1974 sc 1 : (1974) 1 SCC 19

When anyone seeks to impeach the validity of the law on the ground, that it has offends the Article 14 of the Indian Constitution; than onus to prove lies upon the person who has challenge the validity of such law, he must prove to the court that there has been unequal treatment. He must provide the court with necessary facts and figures to establish, that he was not only treated differently from the others, but also prove that there was a similar situation and circumstance without any reasonable basis. And such treatment has lead to violation of the Article 14. The initial presumption is generally in favour of the validity of the law.[47]

The Supreme Court has explained the principle of the initial presumption of validity in the case of Ashutosh Gupta v. State of Rajesthan: "there is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attack it to show that there has been a clear transgression of the constitutional principle. The presumption of constitutionality stems from the wider power of classification which the legislature must, of necessity posses in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people"[48]

On the other hand, if the discrimination is written largely on the face of the legislation, than the onus may shift to the State to sustain the validity of the legislation in question.[49] In Deepak Sibal v Punjab University, the Supreme Court has stated that for a classification to me reasonable it need not be made with the *mathematical precision*, but when there is very little or no difference between the person or things which has been group together than those who have been left out of the group; than such classification cannot be regarded as a reasonable classification. The Supreme Court further said that, while considering reasonable classification one has to see the main object, purpose and intention of such a classification. "If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. Also, surrounding circumstances may be taken into consideration in support of the constitutionality of a law which may otherwise be hostile or discriminatory in nature, but the circumstance the circumstance must be such as to justify the discriminatory treatment or the classification sub serving the object sought to be achieved."[50]

[47] G.K.Krishnan v. State of Tamil Nadu, AIR 1975 SC 583 (1975)1 SCC 375
[48] Ashutosh Gupta v. State of Rajesthan (2002) 4 SCC at 41
[49] Deena v. UOI, AIR 1983 SC 1154,1167(1984) 1 SCC 29
[50] AIR 1989 SC903:(1989)2 SCC 141

There was lots of doubt with regard to the existence of the law of the State or territory which were not part, and when they become part of Indian in the form of the State or a unit of the State; than does the laws of such part or territory become null and void and violates Article 14. The same problem has been raised by the Successive State Re-organization Acts passed by Parliament. "Decided cases show that the weight of authority is in favour of the view that the laws which were in force in a State or a part of the State, which had a distinct and separate existence did not become void on the merger or the reorganization of a State on the ground that in other parts of the merged or reorganized State, similar law were not in force. A classification based on the historical reasons has been held; it is submitted rightly to justify the existence of such laws. Thus in Bhaiyalal Shukla v. M.P[51] the C.P and Berar Sales Tax Act, 1947 as extended to Vindhya Pradesh was held not to violate Article 14 because the Sale Tax Law in Vindhya Pradesh was different from that in other parts of Madhya Pradesh of which it became a part. These different laws were upheld because the differentiation arose from the historical and geographical classification based on historical reasons.

Sikkim became a part of Indian federation by the 36th amendment of its Constitution and Article 371F was inserted to the constitution which gave special treatment to Sikkim. Article 371F (k) gives protection to all the existing law in the State of Sikkim or any part thereof, until and unless amended or repealed by a competent legislature or other competent authority, and hence the said Rule 4(4) of the Sikkim Government Establishment Rule of 1974 would also come under the meaning of the existing law of Sikkim; and so shall enjoy the protective blanket; even if it comes into direct conflict with the other provision of the Constitution. The said Rule was mostly framed in order to safeguard the interest and identity of the people of Sikkim. The members of the Sikkim Legislative Assembly were well aware of the past history. There were numerous old law of Sikkim which seek for the protection of the local interest, a circular which was issued in 27th October 1908 prohibiting Marwari to settle anywhere in Sikkim except in the town areas of Gangtok, Rhenok and Rongali, such a circular was mostly passes by the Durbar to see that the outsider do not come and settle in Sikkim, most of the Sikkim Darbar Gazette very clearly spoke of the *preference* to be given to the Sikkimese people over the others in the matter of public employment. "*The post are open to Sikkimese nationals only, but in the event of unavailability of suitable Sikkimeses candidate,*

[51] 1962 Supp 2 SCR 257, 1962 ASC 981

others mal also apply"[52] the said Sikkim Government Establishment Rule was the results of the practice which had been following from the past.

In Anant Prasad Lakshminivias Generiwal v. A.P. The Hyderabad Endowment Regulation of 1940 and the rules framed under the regulations was held to be valid, though two different laws were in force in respect to religious endowments in the two areas of the Andhra Pradesh, one of the law came from the State of Madras in 1953 and the other was from the former State of Hyderabad in 1956.[53]

The constitution also guarantees the safeguard in relations to the '*geographical difference'*, the Indian Constitution speaks very loud with regard to geographical consideration and it may form a valid base of a classification for the purpose of legislation which would treat the people from tone particular area differently from the rest of the India. The Supreme Court has observed in the case of Clarence Pais v. Union of Indian, "Historical reasons may justify differential treatment of separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded. Uniformity in law has to be achieved, but that is a long draw process."[54]

"Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

[52] Sikkim Darbar Gazette, October 1961, Part VII
[53] 1963 Supp 1 SCR 844, 1963 ASC 853
[54] Clarence Pais v. Union of Indian AIR 2001 SC 1151,1151: (2001) 4 SCC 325.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[55]

On a plain reading of Article 15(1) we come to understand that, it forbids any sort of discrimination which is based on the ground of religion, race, caste, sex or place of birth. And sub clause (2) is not only directed to the State but also to any person, and this provision states that no one shall be subjected to any disability, liability, restriction or condition regarding to the matter set out in sun clause (a) and (b) of the Article 15(2). The sub clause (1) and (2) of Article 15 confers the legally enforceable Fundamental Rights, where as Article (3) does not confer any Rights, much less a Fundamental Right, on a women and children but confers a discretionary power on the State to make special provision for them. And sub clause (4) of Article 15 merely confers a discretionary power on the State to make any special provision for the advancement of the socially and educationally backward classes and also for the Scheduled Castes and the Scheduled Tribes.

Article 16 guarantees *equality of opportunity to all the citizens of India in the matter relating to the employment or appointment to any offices*, under the State. It also prevent from any sort of discrimination against employment to office under any State on the ground of religion, cast, race, descent, place of birth or residence or any of them.

In India we follow the concept of the Single Citizenship unlike United State of America, so it reflects the universality of Indian Citizenship. The common citizen for the whole country allows for the non requirement of residence qualification for the services in any State. In other words it means that any individual who is an Indian Citizen can seek for employment in any part of the country and also have the Right to residence any part of India. It must be noted that equal protection of the law does not denote for an equal treatment of all the individuals without discrimination. It simple means that there shall be application of the same laws alike without any sort of discrimination to all the people 'in a similar situation'.[56]

[55] Constitution Law of India, Bare Act, universal law publishing Co. Pvt. Ltd
[56] Indian railways SAS Staff Association v. UOI (1998) 2 SC651: AIR 1998 SC 805

"Article 16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."[57]

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any

[57] Supra Note 55

local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

Article 16(1) and (2) confers Fundamental Rights to every citizens relating to equality of opportunity in matters of the public employment and it prohibits any sort of discrimination be it on the basis of religion, caste, race sex, decent, place of birth, residence or any of them. Article 16(3) is an exception to Article 16(2). This sub clause (3) confers the power upon Indian Parliament to make a law prescribing in regard to a class or classes of employment or appointment to any office under the Government, of all or any local or other authority within a State or Union Territory. This provision therefore empowers the parliament to restrict certain post in a State for its residence. Power under this Article has been given only to the Parliament, the State legislature has been excluded so that State legislature does not succumb to local pressure and put abuse this article.

It has been very clear that article 16 of the Indian Constitution does not prohibit a reasonable classification in matter relating to employment or a reasonable test of selection. Equality of opportunity of employment not only denotes treatment of all the individual in matter of employment in an equal and just manner but also refers to an equal treatment of an individual within a same class of employment; and not equally between the members of different, independent or separate classes. This concept has been nicely dealt in the case of UOI v. S.C. Bagariv it was observed; " that the army act resulting in the classification of the offices army into numerous categories which was based on the requirement of the arm forces didn't not promote any sort of discrimination. The supreme court was in favour of such classification and had stated that such type of classification was not any arbitrary actions and there cannot be violation of article 14 and article 16 if different perks, privileges and pay scale are granted to them on the bases of such category of classifications which an individual belong to."[58] A distinction made between a commission officer on the one hand and the other non commission officer with regard to the grant of the study leave could not be treated as discrimination, irrational and arbitrary. It however cannot be said that the distinction in this instant case is not found on any intelligible differentia and it has no relation with the object sought to be achieved. The duty and the character of the two classes of the officers were completely different.[59]

[58] UOI v. S.C.Bagari AIR 1999 SC1412 (1999)3 SC 709
[59] Ibid

The executive who has the power to appoint to any public services has to follow the statutory norms and rule while conducting any sort of appointment. They need to exercise such power based on such statutory rules and follow such rules, norms, regulation and guidelines. The executive power can also supplement the rules by filling the gaps therein, but cannot supplement the same.[60] Appointment has to be made strictly in accordance with the rules and regulations.

Thus, in our discussion we have produced numerous cases manifesting the line of thinking of the Supreme Court in context of equality. We have shown that the case for differentiation is permitted within the scheme of Constitution itself. Not only there are express provisions which allow for that but there have been numerous cases in which differentiation on geographical basis has been allowed. Also, we have produced the cases which justify the validity of old laws of a region on the basis of 'historical reasons'.

Chapter: 4

COMPARISION WITH QEUBEC

[60] J n K Public Service Commission v. Narindrer Mohan, AIR 1994 SC 1808(1994)2SC630

CHAPTER 4

COMPARISION WITH QEUBEC

On the issue of cession of a State there are concerns about the effects of changes in Sovereignty. In International Law in connection with cession, question has always aroused regarding to the effect of transfer upon political relations and private rights within the transferred territory. If we go through various Treaties there have been explicit and detailed provisions on these points. There are not any fixed stipulations but there are certain principles and practices which are being followed. In International Law it is settled principle that "A change in sovereignty serves directly to transfer to the new sovereign all legislative and political power with respect to the territory concern."[61] But is equally settled in the same public law that the great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler.[62]

In the context of European Economic Community, Article of 211of the Treaty of Rome gives broadest legal entity under the domestic law. It talks of the Harmonization of laws, between the national laws and supra national laws, where the interest of the local community is protected.[63]

The greater part of Community conflicts rules arise from a typically "federal" problem, and serve to relate the legal relations of a Community with restricted purposes and powers to the full-fledged legal systems of the member states. Harmonization of law by international conventions permits the use of conflicts rules, substantive rules, or both. Conflicts rules are also indispensable to the determination of the territorial delimitations of Community law.[64]

Protection of Minorities, Equality in Fact rather than Equality in Law: The tendency to secure the effectiveness of the manifested itself, early in the history of the Court, in the matter of the treaties providing for the protection of minorities. A provision of a Minorities Treaty may be violated by a municipal enactment referring directly to the minority in question. The Polish

[61] William, Bishop W, "*International Law: Cases and Materials,*" Third Edn. Little Brown & Company, Boston, (1953), pg.420
[62] Alvarez vs. United States, 216 U.S.167
[63] Drobnig, Ulrich, Conflict of laws and the European Economic Community, , The American Journal of Comparative Law, Vol.15, No.1/2 (1966-67) pp.203-229 at 206.
[64] Ibid

Law of 1920 which as the Court had no difficulty in ascertaining aimed at dispossessing the German colonists settled in pursuance of the Germanisation policy of Prussia before the First World war didn't refer to German settlers *eo nomine*. There must be equality in fact as well as ostensible legal; equality in the sense of the absence of discrimimination in the words of law. Equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes equilibrium between different situations. "***The system of different treatment for the minority and the majority is to establish equilibrium between them*".** The Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added or substituted for it. The Court is in position to make these important and progressive contributions to the system of minorities because it proceeded from the assumption that its task was to give effect to what is called the value the purpose of the Minorities Treaties. The result would have been different in every case if the starting point had been different.[65]

Quebec Case

Quebec is only one province of Canada with a predominantly French speaking population and its official language is French at the provincial level. The case of Quebec is similar to that of Sikkim because both of them being a part of the Federation have still maintained their distinctive identity and have protected there local interest. We will now undertake an enquiry into the case of Quebec and try to appraise the special provisions which have been made to provide it with opportunity to protect its identity.

The Canadian Charter of Rights and Freedoms came into force on 17th April 1982. It has been considered as the fundamental freedom and right of the Canadian people.

Section 6 of the Canadian Charter of Rights and Freedom states about the Mobility Right, which has been state as follows:

"(1) every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the Right.

(a)To move to and take up residence in any providence; and

[65] Lauterpacht. Hersch, "The Development of International Law by International Court", First Edn. Stevens & Sons Limited, London, 1958, Chapter Two, Pg.257-263

(b) To pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subjected to

(a) Any law or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) Any law providing for *reasonable residency* requirements as a qualification for the receipt of publicly provide

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada."[66]

In a democracy the Right to enter, remain in or leave a country are the basic and fundamental rights enjoyed by its citizens. Right to move freely without any restrain, Right to take up residence in any province of a country and Right to work in any province are the basic Right which each and every individual should enjoy, and the State should see that there is no difficulty and obstruction to its citizens in enjoyment of such Rights. However it is important to note that "Subsection (1) refers to every citizen of Canada, while subsection (2) refers to every citizen of Canada and every person who has the status of a permanent resident (i.e. landed immigrants who have been allowed to enter Canada to establish permanent residence). There is a limit on the right to move from place to place and the freedom to come and go as one pleases placed on certain individuals. For example, extradition laws state that people in Canada who face criminal charges or punishment in another country may be ordered to return to that country. Basically, every province must open its doors to any Canadian to allow him or her to pursue a livelihood. Mobility rights (the right to move around within or leave the country) allow for a free flow of labour throughout Canada. Some provinces voiced concerns that unrestricted mobility rights would result in a rush of people to those provinces where social services were most generous or where the economy was particularly strong, causing a strain on the existing social services (such as hospitals). Subsection (3) makes it clear that provinces may decide to give social benefits, such as welfare, only to persons who have lived in the province for a certain period of time. Subsection (4) allows each province to give preference to local persons and refuse people from other provinces entry for the purpose of

[66] The Constitution Act of 1982

getting a job if the employment rate in the province is below that for the whole country. Even though this might be considered a form of discrimination, the government is allowed to make such laws or create programs that favour its own citizens. This is an example of what is called employment equity."[67] Thus, the aforesaid provisions show that how within a federation there have been arrangements which restrict the freedom to move and settle freely, which usually is considered as fundamental, in the backdrop of providing employment opportunities to the local people. These provisions are a result not only of the employment concerns but also there were concerns regarding the rush of the people to a particular territory in view of better social services or economic resources. The concern of our discussion relating to Sikkim has similar concerns. We have already mentioned the historical demographic changes which occurred in Sikkim during British period after the treaty of Titalya. In addition to that there are concerns regarding inflow of immigrants in the Sikkim as it provides better opportunities and rich resources when compared with neighbouring states.

"Section 6(2) seems to create prima facie rights to receive social services in different provinces, as well as a prima facie prohibition against employment restrictions based on province of previous or present residence. These rights are limited both by the provisions of section 6(3) and (4), and section 1 of the Charter. These paragraphs create several limits to mobility rights. Laws requiring reasonable residence periods in order to qualify for social service programs, laws that do not discriminate on the basis of province of previous or present residence, and laws designed to improve conditions in areas of Canada with lower than average employment rates, are all exempted from the mobility rights guarantee in section 6. In other words, these types of provisions can infringe mobility rights, without being unconstitutional. Additionally, a law that is not saved by section 6(3) or (4) may be saved by analysis under section 1 of the Charter as being demonstrably justified in a free and democratic society. Under section 6(4) the courts will be required to look at the object of the law, program or activity, as well as at how the law is specifically tailored to benefit those individuals in the province who are socially or economically disadvantaged."[68]

The mobility right guarantee all the Canadian Citizens to move freely throughout the Canadian territory, to reside and settle in any part of the provinces; and to practice any

[67] Youth Guide to the Canadian Charter of Rights and Freedoms, John Humphrey Centre for Peace and Human Rights and the Department of Canadian Heritage

[68] Dunsmui, Mollie and Kristen Douglas, Mobility Rights and the Charter of Rights and Freedom, Law and Government Division, *19 August 1998*

profession, or to carry on any occupation, trade or business. But however there are other certain exceptions also, if law requires for the residence than such law shall prevail over the mobility rights. Henceforth is certain provincial law requires for the residency than such law shall not be violating any of the provisions of Canadian Charter of Rights and Freedoms.

"Although unreasonable limits to interprovincial mobility are unlikely to survive Charter scrutiny, the courts have held that section 6 mobility rights do not include the right to establish oneself professionally anywhere in Canada regardless of qualifications. Specifically, *it is clear that the right to interprovincial mobility does not create a right to work.* Section 6(2)(a) was termed to be "pure mobility" as it speaks of moving to and residing in a province. If (b), "the gaining of a livelihood," is joined with (a), it is also a mobility provision. However, if (b) is separate from (a), it may give a "right to work" without reference to mobility as a prerequisite. The court has concluded that section 6(2)(b) could not be separated from the nature and character of the rights granted in section 6 and therefore the rights relate to movement into another province, either for the taking up of residence, or to work without establishing residence. Several other courts have similarly found that section 6 does not guarantee a right to work."[69]

We now move into the discussion on Section 15 of the Charter. The Section 15 of the Charter also talks about the Equality Rights which has been stated as-

"(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[70]

The Section 15 of the Charter came into force from 17th April 1985, three years after the rest of the Charter. This delay gave the government of Canada ample full of time to bring their laws into line with the Equality Rights embedded in Section 15 of the Charter. This Section of

[69] Ibid
[70] Supra Note 66

the Charter mostly speaks about the equally treatment to be given to people in Canada, regardless of the race, national, religion, ethnic origin, sex, colour, age or physical or mental disability. "This means that governments must not discriminate for any of these reasons in their laws or programs. It is important to realize that these are not the only characteristics that are protected under this equality section. It is possible to claim discrimination on the basis of other characteristics not listed, such as sexual orientation. The phrase "every individual," which starts of this section, makes clear the **i**ntention of the drafters of the Charter is to exclude corporations from this protection. Equality "before the law" ensures every person has access to the courts. Equality "under the law" makes certain the legislation applies equally to all Canadians. There are exceptions to equality rights. For example, age requirements for drinking or for driving, retirement and pension have all been considered reasonable limitations on rights in a free and democratic society. Section 15 says that every individual is entitled to equality without discrimination. In 1989, the Supreme Court considered a very important case on equality rights called Andrews v. Law Society of British Columbia. In this case, the Supreme Court stated that "*the different in treatment between individuals under the law will not necessarily result in inequality and, as well, the identical treatment may frequently produce serious inequality*; the main consideration must be the impact of the law on the individual or group concerned". The Supreme Court went on to say that a disadvantaged person or group must also show that a discriminatory law has resulted in a loss to human dignity. In a case of Law v. Canada, Supreme Court has said that discrimination occurs when a person or group, for example, because of a personal characteristic such as age, sex or race, is denied an opportunity that exists for other members of society. This section is meant to protect those individuals or groups who suffer social, political, and legal disadvantage in Canada. Subsection (2) recognizes the need for a policy that gives disadvantaged groups special help so that they will be able to obtain equality with other people; this is known as affirmative action. An example of an affirmative action program that the Canadian government might adopt is a hiring policy which involves setting aside a certain number of places for women, Aboriginal peoples, visible minorities, or those with mental or physical disabilities."[71]

There is a certain exception given for unequal treatment under sub-section 2 of the Equality rights as well. There cannot be unequal treatment of the citizens of Canadian if such unequal treatment is for promoting the well being of the disadvantaged individuals or groups. Hence forth if there is a law which seeks to promote the well being of certain disadvantage individual

[71] Supra Note 68

or group and whose marginalisation is mainly due to race, national or ethnic origin, religion, colour, age, sex or mental or physical disability than such a law would not be violating the Equality Rights of the Canadian citizens engraved in the Canadian Charter of Rights and Freedoms.

Generally the Canadian Charter of Rights and Freedom contains three type of restriction over the Individual Rights, firstly in Section 1 there is a '*general restrictions' a*nd secondly there is number of '*specific restrictions'* in numerous individual Articles and lastly the Charter contains in Section 33 'notwithstanding *clause'*. These restrictions have been discuss hereunder-

The General Restriction

Section 1 of the Charter deals with the general restrictions, Section 1 of the Charter makes it clear that the Right defined in the 34 Articles are not without possible limits. These Rights can be restricted either by the Parliament or the Provincial legislature. Section 1 states that , "*The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*."[72] A legislation can make law which can infringe upon or puts a limits on the Rights and Freedom of the individual mentioned in the Charter and such law shall be deemed to be a valid if it has a reasonable backing, " The language used is very clear: a legislative body may issue a law, though it infringes upon the rights defined in the Charter, if this law merely just ***'limits'*** the right (presumably it could not abolish it), if such limits may be deemed ***reasonable*** in a free and democratic society. Thus, any legislature that enacts laws of a restrictive nature is bound to show up before the courts to argue that their "restriction" is justified to protect a free and democratic society. To use examples: in the Second World War, newspapers were suppressed to protect our society and it was argued that Japanese Canadians were interned for the same reason. Would a Charter with a Section 1 have made a difference? In 1970, the Trudeau government adopted the War Measures Act, and many innocent people went to jail because of it. Would they have been saved this ordeal had a Charter of Rights with a Section. 1 existed? Supporters of the clause argue that it is necessary to protect minorities

[72] Ibid

from hate literature, children from exploiters, the people from powerful lobbies etc. Still, it is clear that Canada does not consider that individual rights are absolutes."[73]

Specific Restrictions

Several Articles of the Charter have been written with a qualifier that controls the generality of the Rights defined in the Charter. The main intention is to narrow down the range of the Rights and Freedom granted by the Charter. For example Section 2 states that there is a Right to peaceful Assembly, Section 8 guarantees protection against the unreasonable search and seizure; Section 11 of the Charter states that upon arrest the accused must be informed of the charges not immediately but without unreasonable delay; an individual may not be denied reasonable bail without just cause. Section 12 guarantees protection against cruel and unusual treatment, Section 23 of the Charter guarantees that linguistic minorities right to establish minority institutions to protect such language. And Section 24 states that the evidence improperly obtained shall be excluded if it is established that entraining such evidence in the proceedings would bring the administration of justice into disrepute.[74]

The Notwithstanding Clause

Section 33 of the Canadian Charter of Rights and Freedom, deals with the Notwithstanding Clause or an overriding power, it confers the power upon the Parliament or the Provincial legislature to override certain parts and Section of the Charter. "The article stipulates that a law that infringes upon the Charter may still apply if such a law specified that it is enacted notwithstanding (regardless of) the provisions of the Charter. Thus, Section 33 clearly reintroduces a measure of Supremacy of Parliament. The legislative bodies of Canada can have the last word on a number of issues. Sections 33 do not apply to the whole of the Charter. It can be used to derogate from ss. 2 (fundamental freedoms), 7-14 (legal rights) and 15 (equality rights, the non-discrimination clauses). It cannot be applied to the following category of rights: democratic rights (ss. 3-5), mobility rights (s. 6), official languages (ss. 16-22), minority language rights (s.23) and aboriginal rights (s. 35; this section is not specifically in the Charter of Rights). In general, the legislative bodies can legislate notwithstanding individual rights but not collective rights. The notwithstanding declaration only has validity

[73] Belanger, Claude, Supremacy of Parliament and the Canadian Charter of Rights and Freedoms Department of History, Marianopolis College, 2001
[74] Ibid

for five years (s. 33 – 3) after which it dies unless it is reissued. It can never apply to gender rights (equality of male and female persons) as Section 28, with a notwithstanding clause of its own, forbids it. Some have argued that the notwithstanding clause renders the Charter "not worth the paper it is written on". Such views are exaggerated as the right is restricted in scope and time. It has rarely been used and might be used to actually enhance Rights of some individuals or groups. Others believe that its presence, by allowing that democratically elected individuals can have the last word, has had a beneficial effect on Rights in Canada. The Supreme Court of Canada generally a liberal court in any case, has not had to exercise judicial restraint in interpreting Rights, as is customary in such situations, since it can leave the legislative bodies with the last word. The parliamentarians have rarely dared curtail the liberal interpretations of the Court."[75]

In Quebec there is mostly a French speaking resident who have a unique identity and have different culture, language, religion from the rest of the population of Canada. The uniqueness of Quebec is that it enjoys a lot of power even though it is a part of the Canadian federation. There was lot of parliamentary debate on the issue connected to confederation of United Canada. Etienne Paschal, than the Prime Minister of United Canada stated:

"Lower Canada had constantly refused the demand of Upper Canada for representation according to population and for the good reason that, as the union between them was legislative, preponderance to one of the sections would have placed the other at its mercy. It would not be so in a Federal Union, for all question of a general nature would be reserved for the General Government, and those of a local character to the local government, who would have the power to manage their domestic affairs as they deemed best. If a Federal Union were obtained it would be tantamount to a separation of the providences, and Lower Canada would thereby preserve its autonomy together with all the institutions it held so there and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired."[76]

John A. Macdonald, leader and Attorney General of the Canada West was of the view that the federal type of Government would be best suited for the French Canadian people rather than a Unitary one. He stated, "We found that such a system (the Legislative Union) was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position- being in a minority, with a different language,

[75] Ibid

[76] Speech of February 3, 1865, Confederation Debates, p. 9.

nationality and religion from the majority, in case of a junction with the other provinces, their institution and their laws might be assailed. And their ancestral association, on which they pride themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada would not be received with favours by her people."[77]

George Etienne Cartier, Attorney General of Canada East, was of the view that by accepting federal type of government, it would be able to recognize French Canadian nationality, he stated, "such is the significance that we must attach to this Constitution, which recognizes the French- Canadian Nationality. As a distinct, separate nationality, we form a State within the State with full use of our Rights and formal reorganization of our National Independence."[78]

The Royal Commission of Inquiry on Constitutional Problems which was established by Quebec Government stated that. The activities leading to the Federation revealed that, " the French Canadian only gave this necessary support in favour of Confederation on two clear conditions, that the Union should be Federative and that, in this Union, they should be recognized as a 'distinct national group' and that they should be placed on the same footing as the other ethnic groups."[79] The House of Commons agree to a resolution on the 11th December 1995 which approved that, "Quebec is a distinct society within Canada and that this distinct society includes its French speaking majority, unique culture and civil law tradition."[80]

The Prime Minister Pearson of Canada had publically acknowledged the reality that Quebec was a distinct and unique province as compared to other province of Canada, he stated,
"While Quebec is providence in the National Confederation, it is more than a province because it is the heartland of the people: in a very real sense, it is a *Nation within a Nation*"[81]

The Constitution Act of 1987 granted a few fundamental guarantees of the minority languages Rights and Denominational Rights to religious education in Quebec and Ontario. "Both Ottawa and the provinces have the power to legislate in this contentious area. The Federal

[77] Speech of February 6, 1865, Confederation Debates, p. 29.
[78] La Minerve, Montréal, July 1, 1867.
[79] Report of the Royal Commission of Inquiry on Constitutional Problems,
[80] Canada, House of Commons Debates (29 November 1995) at 16971.
[81] This was contained in a 1963 statement to a meeting of the Canadian French-Language Weekly Newspapers Association at Murray Bay, Quebec. It is similar to a 1964 statement made to English Canada, on CBC television, that Quebec is "in some respects not a province likes the others but the homeland of a people". Both are quoted in NEWMAN, Peter C.: *The Distemper of Our Times.* Toronto, McClelland & Stewart, 1968, p. 320

Government had passed the Official Language Act in 1969 which was designed to provide for French language services in Federal Institution across the country and to ensure greater equality of French and English in the makeup an operation of the Federal Public Services"[82]

In 1991 a *Mc Dougall Gagnon Tremblay Agreement* was signed between Canada and Quebec. It is also called as '*Canadian Quebec Accord of 1991'* and this accord give Quebec the authority to select the immigrants and manage its own settlement services. "The federal Government on the other hand has reserved the responsibility for defining immigrant categories, setting targeted levels of immigration and enforcing immigration laws. The Canada Quebec Accord of 1991 has given the Quebec the power to select all the independent immigrant and refugees abroad who wishes to settle in Quebec. The selected candidates receives a '*Certificat de selection du Quebec'* and the providence advices the visa office responsible. "Quebec has acquired enormous power in the immigration process and in the control of foreign nationals on its territory, including foreign students and temporary workers. The main argument used by the 'Quebecto' justifying its demand has always been that the province is a distinct society and therefore, needs a special status and autonomy to determine who settles in the province."[83]

The last two immigration agreement signed between Canada and Quebec infringes upon one of the Fundamental Rights i.e. the Right of free mobility, of every permanent residence and citizens of the Canada. "Even though once admitted to Quebec all immigrants can move freely to other provinces. If an immigrant is approved by the federal government but denied by Quebec, he/she cannot land directly in Quebec, which de facto infringes upon the Mobility Rights of that new permanent resident of Canada. If Quebec manages to restrict further the Mobility Rights of new immigrants, the Provence will, in effect, become a distinctively separate entity formally attached to the Canadian Confederation."[84]

The Charter of the French Language or La Charte de la language Francaise which is generally known as Bill 101 makes French as an official language of the Quebec province. The main reason for passing of the Bill was to safeguard the local interest of the predominant French speaking Quebecer population, because lot of the immigrants in the province were registering

[82] Balthazar, Louis, "History and Language Policy," Languages and the State: The Law of Politics and Identity, ed. David Schneiderman (Cowansville: Editions Yvon Blais, 1991), p.84

[83] Kosto, Chris, Canada –Quebec Immigration Agreement(1971-1991) and their Impact on Federalism. American Reveiew of Canadian Studies

[84] The Cullen-Couture Agreement of 1978, and The McDougall-Gagnon-Tremblay Agreement,known as the Canada-Quebec Accord of 1991

their children in English schools and the English language was gaining popularity and preference, so the fear of dilution of their French culture and heritage lead to the passing of this Bill. The said Bill was passed in 26th August 1977 and it mostly stipulates that French to be the official language of Quebec province, all the signs in its territory to be written in French language. All the children within the territory of Quebec were required to attend French Schools, though there were some exceptions to it, and children whose parents had themselves attended the English school in Quebec were exempted. The Bill 101 also made French to be the official language at the work place and was also be the language of operation in Quebec public administration. There were resentment amongst the other community which lead to passing of Bill 178 by the Quebec Government in 1988 which gave a bit of consideration to the earlier bill, this Bill allowed for posting of signs in other language in Business, provided that French was given precedence.

Quebec is unique province in Canada not only due to its language and culture but also of its legal system. All the other provinces of the Canada follow British Common Law tradition but the Quebec private Law is mostly based on Civil law and Napoleonic Code[85] from France. The juridical legal system in the Quebec province is governed by the French Civil law in the civil matters and the criminal and other federal matters are governed by the English Common Law. It is very clear from the above statement that there is operation of two codes in the Quebec province.

1. Civil Code of Quebec
2. Canadian Criminal Code

The Civil Code of Quebec is operated in matters which are in civil in nature and it is mostly based on the Napoleonic Code. And the Canadian Criminal Code is mostly based on the British Common Law.

Thus, in our discussion we try to demonstrate that Quebec province of Canada enjoys certain special provisions to protect its cultural, ethnic and economic interests. We have discussed various provisions, judicial interpretations and debates to show that how this special case coincides with the case of Sikkim and how the provisions relating to equality within and without the territorial boundaries of India incorporate within their bounds certain privileges

[85] Set of civil laws that was instituted by Napoleon in France in 1804. The code took over 14,000 decrees that had been passed under revolutionary governments, and simplified them into one one unified set of laws. Many countries created their own laws according to Code's provision or even adopted them in whole. Lower Canada(today's Quebec), along with many European Countries, based its first codification in the Structure and provisions of the Napoleonic Code(Markesinis, 561-579)

given to a set of people on numerous considerations which range from territorial to geographic to ethnic and so on. This account corroborates our argument for special treatment of State of Sikkim and strengthens its case for protection of its old laws.

Chapter: 5
Conclusion

CONCLUSION

The term equality denotes that all men are equal and all of them are entitled to be treated in an equal manner, but a society in not equally divided. The Article 14 to Article 18 deals with the Right to Equality in the Indian Constitution. The Articles mostly lays an emphasis that 'Equal should be treated alike' and it forbid treatment of unequal in an equal manner with the rest of the people. A society can never be a just and equally divided, there will always be a difference. All the individuals in a society are never equal by nature, attainment and circumstances, equal treatment to all the members shall result in injustice and would violate the basic principle embodied in our Constitution. For a society to be just and fair, some individual or groups of a society needs to be treated in an unequal manner by giving them protection, privileges and preference over the rest of the members of the society. Any law which promotes and preserves such special or different treatment shall not violate the basic concept of Equality; but while doing such a classification, one has to see that a classification and different treatment to any individual or groups should be done in a rational and reasonable manner; any law which stands the test of such reasonable classification cannot violate the general norms of Equality embedded in our Constitution.

The Indian Constitution permits the validity of laws of the State or Territories which had joined the Indian federation, even if it violates any of its provisions; such laws shall remain in force until and unless amended or repealed by the competent legislature or other competent authority. The Constitution also favours for a special treatment to a people of a particular area, it encourages 'geographical differences'.

The 36th amendment of the Constitution resulted in Sikkim becoming a fully fledged 22nd State of the Indian Federation. It also resulted in carving out a special provision in the form of Article 371 F for Sikkim. This Article seeks to protect the interest of the Sikkim and its Sikkimese people, and henceforth is also known as the 'Mini Constitution' of Sikkim. Article 371F has a vital position in the Constitution of India, as it had to adapt with the special situation along with special historical background. This Article opens with the Non Obstante clause and the reason behind it was to see that the various clauses under it must be preserved and protected; and all the matters which are in concern with the State of Sikkim are not struck down as unconstitutional. In the absence of such a protective cover, than all the laws which was in force in the Sikkim before the merger would not withstand the test of Constitutional

validity, these laws would be declared as ultra virus and struck down as unconstitutional. Such a protective cover was essential for the transfer of Sikkim as a protectorate to the one of the State of Indian Federation. "These ethnic and demographic diversities of the Sikkimese people, apprehensions of ethnic dimensions owing to the segmental pluralism of the Sikkimese society and the imbalance of opportunities for political expression are the basic of and the claimed justified for the insertion of article 371 F. the phenomenon of deep fragmentation, societal cleavages of pluralist societies and recognition of these realities in the evolution of pragmatic adjustments consistent with basic principle of democracy are the recurrent issues in political organisation"[86]

As we have discussed in this work that the demography of the Sikkim underwent a change ever since the British contact. The British encouraged immigration of the Nepalis to the Sikkim which had ethnic repercussions for the Sikkim and there is resentment even to this day regarding the events. The same fears were expressed when the question of merger with India came up and hence certain political commitments and assurances were given to the people of Sikkim to overcome these fears and maintain their culture and traditions within the space carved out for them.

The decision of *Surendra Prasad Sharma Case* in this regard is significant due to following reasons, first, the Supreme Court picked upon the technical and narrow interpretations given by the High Court and categorically answered them in a rational and logical way. They even criticized the High court for their narrow approach on various occasions and gave a harmonious interpretation to the concerned provisions. Secondly, the court acknowledged the historical and political peculiarities involved and showed respect to the assurances give to the People of Sikkim. As a result of which the efficacy of Article 371 F, which provides for special provisions for the State of Sikkim, stands tall and protects their 'old laws' from the mandates of the test of basic structure.

What emerges from our discussion is that certain political developments of considerable significance to the People of Sikkim preceded its merger into the Union of India. The basis of this merger was basically the 'solemn assurances' given to the People of Sikkim. What Supreme Court also assured was the fact that the constitutional provisions cannot be read as torn from the historical developments which preceded the merger. The laws which were in

[86] R.C. Poudyal and Ors vs Union of India and Others. 1993 AIR 1804, 1993 SCR (1) 891

force immediately before the merger were enacted at a time when Sikkim was under the Chogyal's rule and could not, therefore, be in accord with the constitutional mandates of the free democratic republic. Therefore, to give effect to the political commitments and assurances given to the People of Sikkim, special provisions had to be made in respect of the new state of Sikkim by insertion of Article 371 F in the Constitution.

In the Chapter on equality we discussed that the concept of 'equal protection of laws' which we invoke in our discussion to argue that within the concept of equality it has been provided that only like should be treated alike and not that unlike should be treated alike. To be 'like' people should be similarly circumstanced and from this logic we build upon our contention that people of Sikkim cannot be treated alike with the mainstream Indians as they were not similarly circumstanced. Due to various historical reasons people of Sikkim were not similarly placed as compared to the people of other states.

Thus, in our discussion we have produced numerous cases manifesting the line of thinking of the Supreme Court in context of equality. We have shown that the case for differentiation is permitted within the scheme of Constitution itself. Not only there are express provisions which allow for that but there have been numerous cases in which differentiation on geographical basis has been allowed. Also, we have produced the cases which justify the validity of old laws of a region on the basis of 'historical reasons'.

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