CENTRAL EUROPEAN UNIVERSITY

THE CONSTITUTIONAL VALUES OF THE GUARANTY CLAUSE

by RAUNAQ JAISWAL

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SUPERVISOR: Arun Kumar Thiruvengadam
Central European University

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To my parents

DECLARATION

I, Raunaq Jaiswal, declare that this Capstone thesis titled "The Constitutional Values of the Guarantee Clause submitted to the Department of Legal Studies at the Central European University in partial fulfilment of the program requirement of the LLM in Comparative Constitutional Law is a presentation of my original research work. Wherever the contributions of others are present, every effort has been made to indicate this clearly, to the best of my knowledge. I have taken reasonable care to ensure that the work is original and has not been taken from other sources except where such work has been cited and acknowledged within the text. The interpretations that have been put forth are based on my own reading and understanding of the original texts.

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Abstract

The moment which defines the inclusion of Guarantee Clauses have been periods of violence. By the Guarantee Clause, I refer to Art. IV §4 of the U.S. Constitution, s 119 of the Australian Constitution and Art. 355 of the Indian Constitution. The inclusion of the Guarantee Clause was a necessity at the time the Constitutions were written to ensure that the newly formed union does not crumble apart. Madison, Griffith and Ambedkar all included this provision in their respective Constitutions due to the benefits they perceived it would serve the Federation. However, the powers of this constitutional provision have been used to suppress the people in perpetuity. In this article, I shed light on what the historic and normative values of the Guarantee Clause are, and I make the argument that there are inherent constitutional protections which inherently limit the powers of this clause.

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1. Introduction

There have been moments in the history that have been memorialised and immortalised by the Constitutions.[1] The drafters of the constitutions that follow such historic moments would inherently seem to have been influenced by the events, and as such they often have a recognised tendency to pursue some kind of benefit or avoid some kind of ills and put forward their intentions for mitigatory mechanisms to prevent future incidents of such sorts from ever occurring in their countries ever again.[2] It is unfortunate that the defining moment which underlines the inclusion of Guarantee Clauses in constitutions has been periods of violence.[3] Chronological evidence which we will discuss later, bear testament to the fact that these constitutional provisions were included in the debates riding in the immediate backgrounds of periods of violence which compelled the drafters to steps to prevent recurrences in the future.[4]

By including the Guarantee Clause provision in their respective Constitutions,[5] the benefits which the framers of the constitutions of United States, Australia and India were presumably pursuing was that of preserving the new federation of States from crumbing in the face of adversity which could come in form of insurrections, invasions and domestic violence. By including these provisions, the framers were also trying to avoid the ills that the lack of such

1 *See* Bruce Ackerman, *The Holmes Lectures: The Living Constitution* 120 HARV. L. REV. 1737, 1762-63 (2007).
2 *Id.* at 799-1800.
3 *See Infra*, Section 2.
4 *See Infra, Section 2*.
5 *See* Art. IV (4) of U.S. CONST. which reads as: "The United States shall guarantee to every state in this union a republican form of government and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."; *Australian Constitution* s 119 which reads as — "Protection of States from invasion and violence— The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."; INDIA CONST. Art. 355 which reads as — "Duty of the Union to protect States against external aggression and internal disturbance It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

provision would entail, namely the federal government's lack of authority to intervene in state matters when faced with situations of violence, the constitutional conundrum of how to protect the States, when their capabilities have been overrun.[6] At the same time, they were also trying to preserve the federation against rebellions that could come in the form of State Governments rebelling against the Federal Government.[7]

In spite of all the good intentions that the framers envisaged it will have on the Federation, and the role they presumed it would serve in the Constitution, and the repeated assurances which the framers had to offer that these provisions were above and beyond from being abused, textual ambiguities have provided some flexibility to the Constitutional Courts to put forward some controversial opinions,[8] which interpret the provisions of the Guarantee Clause without taking into account the proper purpose for which it was included in the constitution.[9] In effect, while the modern understanding which this Clause serves seems oriented towards only deploying the armed forces domestically, sometimes for routine law and order infractions, it is not something which is consistent with the scope of the powers envisaged by the drafters of the Guarantee Clause.

6 Jonathan K. Waldrop, *Rousing the Sleeping Giant - Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 272 (1999); Amanda L. Tyler, *The Forgotten Core Meaning Of The Suspension Clause* 125 HARV. L. REV. 901, 965-68 (2012); Michael Morea, *Guaranteeing Republics to the Confederate States: A Guarantee Clause Justification for Lincoln's Response to Civil War*, 42 Pepp. L. Rev. 59, 62 (2014).

7 *See* Stephen I. Vladdeck, *Emergency Power & The Militia Acts* 114 YALE L. J. 160-63 (2004).

8 *See, e.g., Ruddock v Vadalaris* [2001] FCA 1329; Sarbananda Sonowal v. Union of India (2005) 5 SCC 665, 725-27. *See also* J. Andrew Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 477, 514-16 (1985).

9 Sarbananda Sonowal's case is particularly revealing in this aspect, as a panel of three Supreme Court judges lead by Justice Mathur, held that illegal immigrants are a cause of external aggression. To reach this conclusion, the learned judge relied on the US Supreme Court judgement in Chae Chan Ping v. United States, 130 U.S. 581 (1889). *See* Sarbananda Sonowal v. Union of India (2005) 5 SCC 665, 720-27.

The contemporary utility of the Guarantee Clause, as witnessed from how the statutory instruments are being put to use,[10] indicates that Executive in the United States, Australia and India use the powers under the Guarantee Clause in a manner which is neither consistent with the purpose for which this provision was envisaged, nor in its textually permissible interpretations. As such a perfunctory glace would show that it has served merely as a constitutional justification for deploying the armed forces supposedly domestically, for a variety of reasons, which may range from sporadic violence, suppressing exercise of freedom of peaceful protests,[11] or to something as drastic as turning away immigrants and refugees.[12] In effect, the modern understanding of the purpose of this Clause seems quite limited in its understanding of the full powers which this Clause envisages. This, as it will be argued, is not consistent with the scope of the powers of the Guarantee Clause. In order to support this argument, this article will rely on the contextual situations surrounding the drafting of this provision to highlight, *firstly*, that the scope of powers envisage greater threshold of violence than what its purpose is perceived as these days, as such, the argument will be that the proper scope of the terms "domestic violence", "internal disturbance", "invasion" and "external aggression", as conceived by the drafters of this provision anticipated violence of a far greater magnitude, than mere law and order problems for which it is being used for; *secondly*, that the deployment of armed forces domestically in exercise of the powers given by the Guarantee Clause is nothing but a *de facto* proclamation of emergency within a State, and as is the norm with any emergency proclamation of in a democratic country, they need to be temporary and

[10] *See, e.g.*, Khagesh Gautam, *Martial Law In India: The Deployment Of Military Under The Armed Forces Special Powers Act, 1958*, 24 S.W. J. INT. L. 177 (2018); Michael Head, Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions 5 UNSW L.J. Forum 1, 14 (2019).

[11] *See* Special Correspondent, *Anti-Citizenship Bill protests: Army deployed in Assam, Tripura; Internet suspended* Dec. 11, 2019, THE HINDU https://www.thehindu.com/news/national/other-states/anti-citizenship-bill-protests-army-deployed-in-assam-tripura-internet-suspended/article30277108.ece; Christine Hauser, *What Is the Insurrection Act of 1807, the Law Behind Trump's Threat to States?* N.Y. TIMES, Jun. 2, 2020 https://www.nytimes.com/article/insurrection-act.html.

[12] *See, Ruddock v Vadalaris* [2001] FCA 1329; Sarbananda Sonowal v. Union of India (2005) 5 SCC 665.

should be open to periodic parliamentary review. As a result of these, it will be submitted that recourse to such powers should be taken in the rarest of cases subject to strict procedural safeguards to prevent the abuse of these powers. Before we proceed further, it is imperative to understand the textual similarities and dissimilarities it represents in different constitutions and understand the power it represents, and the difficulties it presents.

1.1. Guarantee Clause— A Sleeping Giant, or A Wallflower or A Pious Declaration?

A textual comparing the provisions of the Guarantee Clause provisions of the constitutions of United States, Australia and India highlights three-fold differences in the formalist conceptions, namely the differences in the reasons for federal intervention, who may invoke this power and who may ask for the assistance. *Firstly,* the Guarantee Clause in the United States provides the States of the Federation three forms of protections, namely a republican form of government, and protections against invasion and domestic violence. The Australian Constitution provides for protections against invasion and domestic violence but does not provide for a republican form of government. The Indian Constitution for protections against internal disturbance and external aggression as well a duty to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. *Secondly,* textually, the provision in the India does not give does not contain any mention about a request for Federal Assistance being made by States, and as such, envisage that a *suo moto* deployment is possible, as opposed to its American and Australian counterparts, which envisage that a request for federal assistance has to be made by the State Government. *Thirdly*, in Australia, the request for federal assistance is made by the Executive Government of the State while its American counterpart stipulates that the request for assistance can be made by the State

Legislature in the first instance and should they be unable to convene, it can be made by the Executive of the State, while the Indian provision is however silent on this aspect.

1.2. Understanding the Power of The Guarantee Clause

The key feature of the Guarantee Clause is that it essentially places a positive obligation on the Federation to protect the States from being invaded and from domestic violence. This obligation is expected to be discharged by the Federal Executive by deploying armed forces within the borders of his own country. The philosophical underpinnings of these provision trace their lineage to the first limb of Montesquieu's dictum, *"that should popular insurrection happen in one of the States* (sic)*, the others are able to quell it."*[13] Before incorporating this provision in the Constitution, Madison and other drafters of the respective at their Constitutional Conventions modified this dictum so that in its present incarnation, the Guarantee Clause empowers the Federal Executive to protect the States of the Federation not only from 'popular insurrections' but also from invasions and domestic violence, which the Federal Executive can suppress by deploying the armed forces under the guise of rhetorical semantics which seem to signify the gravity of the situation.

1.3. Problems with the Utility of Guarantee Clause

The open-ended nature of the terms "internal disturbance", "external aggression" and "domestic violence" do not give any indication about the severity of disorder which would justify the deployment of armed forces. In particular, there is a lack of indication in the constitution as to *firstly*, what powers this constitutional provision grants to the Federation, and how is the Federation supposed to discharge their obligations to the States in pursuance to fulfilling their constitutional obligations; *secondly*, what were the situations which have been

[13] *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU THE SPIRIT OF LAWS 54 (Thomas Nugent trans., 2003)(1752); *See also* THE FEDERALIST NO. 43 (James Madison).

construed as situations of "invasion", "domestic violence", or "internal disturbance" or "external aggression"; *thirdly*, what are the procedural requirements which need to be fulfilled before the deployment can occur, as such, who requests it and how; *fourthly*, whether these measures are meant to be used in reaction to some incidents or whether they can be use pre-emptively; *fifthly*, whether there are any constitutional limits on the powers ; and *lastly*, whether there are any inherent limits as to the length for which these powers can be invoked, and if not, what other constitutional safeguards exist which can prevent the abuse of these powers. Added to these dimension is the factor of inadequacy of judicial safeguards against the abuse of this provision, and the lack of protection against the abuses apparently made at the behest of the Government, when "*abuses creep in one part, they are reformed by those that remain sound."*[14] Since a textual reading of these clauses does not indicate any discernible constitutional limit on the duration for which armed forces may be deployed domestically, nor do they indicate any mechanism for oversight over the actions of the armed forces, a review of the debates of the constitutional convention is necessary to illuminate that the intention of the framers for including this provision in their respective constitutions so as understand the inherent constitutional limitations of this provision.

1.4. Structure of the Article

In order to understand how this change has seeped through in three countries which boast of being purveyors of democracy and of harbingers of rule of law, it is necessary to understand the reasons which necessitated the adoption of the guarantee clause in the constitutions and the purpose which it was meant to serve; and as a consequence, it is necessary to understand that, what kind of situations amounted to "domestic violence", "internal disturbance", "invasion" and "external aggression" as envisaged by drafters of this Constitutional provisions and the

[14] *See* THE FEDERALIST NO. 43 (James Madison).

inherent limitations they implicitly place on the exercise of this power. Consequently, this paper, in the first part draws upon the debates and discussions during the drafting of the Guarantee Clause and attempts to define the scope of powers under it; in the second part examines the historical foundations of the Guarantee Clause, in the third part, it studies the statutory embodiments of this provision. In effect, the purpose of this article is to analyze the historical and normative values of the Guarantee Clause. It does not discuss the entire gamut of issues surrounding the deployment of armed forces, such as the situations of natural calamities, even though deployments in such situations may be justified. What it does argue is that the exercise of the powers under the guarantee clause to deploy armed forces domestically dehors the spirit of constitution, and while they may be necessary to meet the exigencies of the situation, an exercise of this power to meet situations of 'domestic violence' and 'internal disturbance' should be firstly, temporary and secondly open to periodic parliamentary review.

2. The Defining Moment for Including The Clause

2.1.Shays Rebellion

Under Articles of Confederation, the Congress lacked the power and the political authority to sanction or coerce the States to comply with the Federal Government's 'desideratum', as a result which, one of the things that was severely impeded was the Congress's power to maintain armed forces.[15] The Shays Rebellion in particular highlighted the problems this could cause, as suppressing internal rebellion became "one of the most pressing national issues" in 1786.[16] In response to suppress this rebellion of some roughly 1800 farmers, the Congressional Committee acknowledged the necessity for federal aid to suppress the insurgents, which if not achieved, will potentially "subvert the government" and put the United States in a civil war.[17] The resolution paved the way for the Congress to begin the process of raising money and military to suppress the rebellion.[18] These problems with the Articles of Confederation accentuated the fact that the Congress lacked the capacity and the constitutional mechanism to ensure domestic tranquillity of the States and catalysed the departure to an arguably better union. As such, when Madison wrote to Washington highlighting the vices of the political system of the United States, he was not only highlighting the difficulties centralization of the federal system in times of crisis, he was also cautioning him of the consequences which the double-edged sword of despotism and domestic violence would trigger within the Federation without an obligation to "guaranty" the States from future

[15] *See* Editorial Note to James Madison, *Vices of the Political System of the United States*, available at <https://founders.archives.gov/documents/Madison/01-09-02-0187> (last accessed 3rd June, 2020); M. Cain, & K. Dougherty, *Suppressing Shays' Rebellion: Collective Action and Constitutional Design under the Articles of Confederation*, 11(2) J. THEORETICAL POL. 233, 233 (1999).
[16] M. Cain, & K. Dougherty, *Suppressing Shays' Rebellion: Collective Action and Constitutional Design under the Articles of Confederation*, 11(2) J. THEORETICAL POL. 233, 233 (1999).
[17] M. Cain, & K. Dougherty, *Suppressing Shays' Rebellion: Collective Action and Constitutional Design under the Articles of Confederation*, 11(2) J. THEORETICAL POL. 233, 234 (1999).
[18] *Id*.

"internal or external dangers".[19] To resolve these imperfections, the framers of the U.S. Constitution sought to include a new provision in the proposed constitution, which would guarantee the States a protection from insurrections, domestic violence, and internal disturbance and would ensure a 'republican form of government *and* territory'.[20]

2.2.Shearer's Strike

Some scholars have indicated that the catalyst for including this provision was the Sheep Shearer's Strike of 1891.[21] According to them, the Sheep Shearers went on strike in protest against the Pastoralists' Agreement, which had a severe impact on the working conditions of the shearers.[22] In response, the labour from other colonies was called in, which resulted in the shearer's picketing railway stations. After receiving reports which "*suggested that the conflict could escalate*"[23] the Premier of Queensland, Samuel Griffith, who by some accounts is also credited with including the Guarantee Clause in the draft Constitution,[24] decided to deploy the armed forces "for special service in the aid of civil powers."[25] This **aid**, by one account has been described as comprising of "permanent artillerymen armed with field pieces and Gatling Guns, mounted infantry of the Defence Forces and mounted infantry of the Defence Forces, besides armed police…".[26] While some have authors have claimed that Griffith's role was key

[19] Madison to Washington— April 16, 1787 "An article should be inserted expressly guarantying the tranquility of the States against internal as well as external dangers." *See* James Madison, *Vices of the Political System of the United States*, available at <https://founders.archives.gov/documents/Madison/01-09-02-0187> (last accessed 3rd June 2020). *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION ¶ 1808 (1829), who notes—

> The want of a provision of this nature was felt, as a capital defect in the plan of the confederation, as it might in its consequences endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government.

[20] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 121 (1907) (5th of June).

[21] *See, e.g.*, MICHAEL HEAD & SCOTT MANN, LAW IN PERSPECTIVE: ETHICS, SOCIETY AND CRITICAL THINKING, 357-59 (2005); Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 293 (2015).

[22] *Id*. at 294.

[23] *Id*.

[24] *Id*. at 293.

[25] *Id*. at 294.

[26] Geoffrey Bolton & Helen Gregory, *Commemorative Address: The 1891 Shearers Strike Leaders: Railroaded?* 62 LABOUR HIST., 116, 116 (1992).

to toning done the measures to be employed against the shearers,[27] Griffith's justification for deploying these armed forces on them are particularly revealing—

> It is all very well for the pastoralists to demand largely increased protection from the government. It appears to me that they wish to settle all the preliminaries of a war between classes to be carried on at the expense of the government. *The must understand that the forces of the government will not assume the position of being allies of one class only.*[28]

Griffith had called in the assistance of the armed forces of 1442 troops,[29] to purportedly to *prevent* any escalation of confrontation between the two groups in Queensland. By his own understanding, the necessity for calling out federal troops could be based on providing increased protection, but it cannot be deployed to settle disputes between two groups of people, with the assumption that the armed forces will be expected to remain partial to a class of people. The necessity to provide "increased protection" could have possibly made him to push forward for the inclusion of the guarantee clause in the Australian Constitution, which was initially not present in Andrew Inglis Clark's initial draft, despite it drawing several inspirations from the US Constitution.[30]

2.3.India Police Action in Hyderabad

The chronology of events that brought the Indian Guarantee clause into existence are quite interesting. Earlier drafts of the proposed constitution had empowered the Governor of a State to declare a two-week state of emergency. During the debates of Drafting Committee on 3rd October 1948, it was pointed out by one of the members of the Committee that the Constitutions of other federations, likes those of United States and Australia, conferred an

[27] R.B. Joyce, *S. W. Griffith: Towards the Biography of a Lawyer* 16 HIST. STUD. 235, 247 (1974).
[28] R.B. Joyce, *S. W. Griffith: Towards the Biography of a Lawyer* 16 HIST. STUD. 235, 247-48 (1974) (relying on Griffiths' telegram from 16th March, 189).
[29] MICHAEL HEAD & SCOTT MANN, DOMESTIC DEPLOYMENT OF ARMED FORCES 38 (2009).
[30] Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 293 (2015).

obligation on the Federal Government to protect the States from domestic violence and invasion, and as such the duty rested with the Federal Executive, rather than the State Executive to protect, as a situation may also arise, wherein the Governor of a State, when faced with the threat of imminent invasion or violence, may be inclined to not act at all. However, during the constituent assembly debates on the 3rd of August 1949,[31] Dr. Ambedkar moved a series of amendments to the draft constitution, which sought to remove from the Governor the power to declare a two-week emergency.[32] The reason which would explain the exclusion of the Governor's power and the inclusion of the Guarantee Clause in India could be understood from the context of the prevalent political situation in princely state of Hyderabad, which had been labelled as the belly without which India could not breathe. According to scholars, Dr. Ambedkar feared that the "intense uncertainty and unprecedent violence and mobility,"[33] in Hyderabad threatened to replicate the violence of the partition.[34] It was a fear shared by many of the founding fathers.[35] As such, the Governor-General of India at that time, C. Rajagopalchari declared a state of emergency due to 'internal disturbance' on 13th September, 1948,[36] and the Indian military proceeded to suppress the militia of the Nizam

[31] Dr. Ambedkar Speech 3rd August 1949— at volume 9, document number 110, paragraph 17, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/ (last accessed 11 June 2020). Subsequent references to the Constituent Assembly Debates of India will not bear a link, but just the volumne number, document number, date and paragraph.
bear reference to just the volume,

[32] *See* Dr. Ambedkar Speech 3rd August 1949— at volume 9, document number 110, paragraph 21.

[33] Sunil Purushotham, *Internal Violence: The "Police Action" in Hyderabad*, 57(2) COMP. STUD. IN SOC'Y & HIST., 57(2) 435, 438 (2015).

[34] *Id*. at 439

[35] *See* 7 SELECTED WORKS OF JAWAHARLAL NEHRU 185-86 (S. Gopal ed. 1988) (Letter to Lord Mountbatten, July 3, 1948 informing him of Hyderabad's plans to invade Indian Union); *Id* at 206-7 (Letter to V.K. Krishna Menon Aug. 15, 1948 informing him of violence in the State of Hyderabad committed by the Razakars); and lastly, *see id*. at 222-223, Letter to V.K. Krishna Menon (Aug. 29 1948)

> I am myself convinced that it is impossible to arrive at any solution of the Hyderabad problem by settlement or peaceful negotiations. Military action becomes essential; we call it, as you have called it, police action. We certainly do not call it here or elsewhere war, though soldiers will be involved. The question then limits itself to the time and manner of doing it. Any marked delay would have, as it is having, a very bad effect on our people and a feeling of desperation, and utter frustration will seize hold of them.

[36] *See* Emergency Proclamation by C. Rajagopalachari, Gazette of India, Pt. II sec. 1 (Sep. 13, 1948) under the Government of India Act, 1935, 9 & 10 Geo. 5 c. 101, § 102. The said proclamation read—

> In pursuance of section 102 of the Government of India Act, 1935, I, Chkravarti Rajagopalachari, Governor-General of India, being satisfied that there is **imminent danger of the security of India**

in less than a week.[37] While an innocent sounding terminology ("Police Action") was used to describe the federal intervention, it was nothing less than a military action to quell an armed rebellion,[38] and the mobilisation of armed forces was made possible only due to the Governor-General's proclamation of emergency.

Accordingly, is perceivable that this incident was fresh in the minds of the members of the Drafting Committee, when they sought to a new draft provision on 3rd of October, at which time, it seemed to be textually inspired by the guarantee clause in the US Constitution.[39] The timing of the introduction of the Clause and the chronology of events and the references to Dr. Ambedkar's understanding of the US Constitutions seem to allude countless speculations but it is not improbable that he was mindful of the historical context which lead the United States to include this provision in their own constitution, in order to prevent any future occurrences of violent riots and armed rebellions, he placed an obligation on the Union to protect the States.[40]

> **being threatened by internal disturbance**, do by thus Proclamation, declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

[37] *See* Taylor C. Sherman, *The Integration Of The Princely State Of Hyderabad And The Making Of Postcolonial State In India, 1948-56*, 44 INDIAN ECON. & SOC. HIST. REV. 489, 495-96 (2007).

[38] Sunil Purushotham, *Internal Violence: The "Police Action" in Hyderabad*, 57(2) COMP. STUD. IN SOC'Y & HIST., 57(2) 435, 440 (2015).

[39] *See* 4 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 368 (1968). The draft provision read as — "Duty of the Union to protect States against external aggression and domestic violence: It shall be the duty of the Union to protect every State against external aggression and domestic violence." The decision by the Committee was taken on 3rd October 1948.

[40] *See* Sunil Purushotham, *Internal Violence: The "Police Action" in Hyderabad*, 57(2) COMP. STUD. IN SOC'Y & HIST., 57(2) 435, 438-39 (2015).

3. MADISON, GRIFFITH AND AMBEDKAR. THE FATHERS OF THE GUARANTEE CLAUSE?

3.1. United States

Having understood that a difficulty persisted in calling the armed forces in time of exigencies which made it difficult to have troops at dispersal expeditiously, the members sought to redress this flaw by including a new provision which would cure these defects. [41] In order to do so, the members of the Convention proposed to include a new provision which would impose an obligation on the Federal Government to "*prevent establishment of governments which are not republican; protect each state against internal commotion and; against external invasion"* with the final point noting that the guarantee "*shall not operate in the last case without an application from the legislature of a state.*"[42] It was pointed out by the members of the convention that it would be antithetical to the purpose of preserving the Federation if no collateral obligation to protect the states against "…dangerous commotions, insurrections and rebellions"[43] existed. As such it would not only be dangerous to prevent the President from acting in times of necessity, it would also be antithetical if the Federal Government was to remain a spectator due to perceived lack of authority to suppress rebellions *against* States, and internal subversions consequently triggered violence in between States.[44]

However, those cynical of the Guarantee Clause highlighted that the propensity to enable deployment of armed forces even in aid of civil authorities could likely result in the same sort

[41] *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 521-22 (1888). For a brief summary on the same issue, *see* Ryan C. Williams, *The "Guarantee" Clause* 132 HARV. L. REV. 602, 645-52 (2018).

[42] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 173-74 (1907).

[43] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 47 (1907) (18th July).

[44] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 47 (1907) (18th July). *See also* THE FEDERALIST NO. 21 (Alexander Hamilton), who put forward a similar line of reasoning by claiming that it was sheer good fortune for the Americans that the "despotism of Massachusetts" had not been headed by a Caesar, as then it would have been difficult to predict the collateral damage it would have had on the liberties of people living in the nearby States.

of despotism that the framers were trying to avoid.[45] The members of the Convention were also divided in their opinions as to when the President would be empowered to deploy the Armed Forces.[46] While a general agreement was there that it was necessary to prevent an "*insurrection*" akin to the Shays' Rebellion,[47] the members of the committee were divided in their opinions when it came to lowering this threshold for preventive federal intervention in form of "domestic violence", and the amendment which mandated this lower threshold was agreed to by a margin of just 1 vote.[48] It is interesting to note that while the term "insurrection" was used to describe the Shays Rebellion by some members of the convention,[49] the expression domestic violence remained ambiguous. By some scholarly accounts, it connoted a lower threshold for seeking federal assistance, in that, the phrase envisaged situations of "riots or disturbances within a state (as opposed to foreign attack)"[50] as opposed to situations of higher threshold implicated by term 'insurrection'.

Since there were apprehensions that federal military interventions might interfere with the autonomy of the States, Madison clarified that the proper threshold justifying an intervention would be when the States comprising the Federation, and in effect the society comprising it, are threatened by an—

[45] *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 417-28(1888) (June 14, 1788).
[46] *Id*. at 417-420 (John Marshall) (June 14, 1788).
[47] *See* Jonathan K. Waldrop, *Rousing the Sleeping Giant - Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 272 (1999).
[48] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 466 (1907) (James Madison, 30th August).
[49] Kevin M. Wagner, *Rewriting the Guarantee Clause: Justifying Direct Democracy in the Constitution*, 47 WILLAMETTE L. REV. 67, 77-78 (2010).
[50] *See* JACK M. BALKIN, LIVING ORIGINALISM 37 (2011). Some commentators have put forward the notion that the phrase domestic violence was "*interpreted to be a restricted violence of a sufficient magnitude to constitute an insurrection*". *See also* Report of the Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 7 (2018) which relies on the definition put forward by Bennet Milton Rich in his book PRESIDENTS AND CIVIL DISORDER (1941).

> "[A]*rmed hostility from another political entity not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbours.*"[51]

For Madison, a guaranty of republican form of government consequently acts as one of the three layers of obligatory protections which the Union has towards the States, which explains his argument that the inclusion of a powerful executive in certain situations was necessary so as to prevent the risk of insurrection, rebellion, invasion or domestic violence, which he felt would subvert the constitutional order, and therefore take away with it the order of constitutional rights.[52] In effect, according to him, protection from invasion alluded to two considerations, namely, from neighbouring foreign states, which could be referred to the neighbouring colonies, and from the States of the of the Federation themselves, which was perhaps a vague reference to what Hamilton had previously warned about, i.e., had the rebellion of 1787 been led by a Caesar, the liberties of the people of neighbouring states would have been trampled upon.[53] As for the threshold of intervention in times of domestic violence, Madison was of the view federal intervention would be justified only in such situations which are likely to produce a "bloody and obstinate contest".[54]Hamilton however envisaged a narrower view. According to him, the duty of the federation to repel "domestic dangers" connoted violence which threaten the existence of State government and render them powerless spectators of the violence besieging the States.[55] It is clear that the purpose which Madison envisaged this Clause would be serving as a constitutional embodiment of Montesquieu's dictum—

[51] THE FEDERALIST NO. 43 (James Madison).
[52] *Id.* "It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest." *See also id*. at "…and that it is a sufficient recommendation of the federal Constitution that it diminishes the risk of a calamity for which no possible constitution can provide a cure."
[53] THE FEDERALIST NO. 21 (Alexander Hamilton).
[54] THE FEDERALIST NO. 43 (James Madison).
[55] THE FEDERALIST NO. 21 (Alexander Hamilton).

> "[T]*hat should popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep in one part, they are reformed by those that remain sound.*"[56]

Concerns and fears were raised by some members, highlighting that the powers of the Guarantee Clause and the way it seeks to operate bears an inherent propensity to be abused.[57] Concerns were also raised as to the necessity to have an armed force at all, chief among them by Governor Randolph who questioned the necessity of having an armed force rather than a defensive armed force. Madison in his speech at the Virginia Ratifying Convention, sought to dispel the fears of other members, by highlighting that the necessity of the having an armed force will be protected from abuse by their military discipline.[58] According to him, a disciplined militia under the control of the Congress could function *only* in times of "obvious necessity", and as such, their domestic role would be required only in times of necessity, to provide for the "*execution of laws, suppressing insurrections and repelling invasions…without [which]…liberties might be destroyed by domestic factions…and domestic tyranny be established*."[59] In effect, these powers granted the federal government the power, to call forth

[56] THE FEDERALIST NO. 43 (James Madison).

[57] *See, e.g.*, THE ANTIFEDERALIST NO. 18 (The Federal Farmer) ("*it may be proper to add, that the militia of any state shall not remain in the service of the union, beyond a given period, without the express consent of the state legislature*."); 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 378-98(1888) (Speech of Mr. Mason) who noted that—

> unless there be some restrictions on the power of calling forth the militia…we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations…This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army…If gentlemen say that the militia of a neighbouring state is not sufficient, the government ought to have power to call forth those of other states, the most convenient and contiguous…But in this case, the consent of the state legislatures ought to be had. On real emergencies, this consent will never be denied, each state being concerned in the safety of the rest.

[58] 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 84-85(1888)

[59] 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 90 (1888)

the *aid of the militia* to quell rebellions on the application of the legislature of any State, which was subsequently codified by the Congress.

3.2.Australia

In the Australian context, Sir Samuel Griffiths presumably introduced the Clause into the draft Constitution in 1891.[60] In its original version, the clause read as —

> "*The Commonwealth shall protect every state against invasion and, on the application of the Legislature of a State, or when the Legislature cannot be convened, on the Executive Government of a State, against domestic violence*."[61]

Doubts were raised as to what the proper scope of the word "invasion" connoted, and whether it was inclusive of the word "attack".[62] As such, an attempt was made by a member to lower the threshold of the Guarantee Clause so as to cover attacks. It was asserted by the members that the scope of the word "invasion" covered the word "attack" and given the geographical location that Australia enjoyed, they deemed it improbable that they will ever be attacked.[63] Members of the Convention were also quick to distinguish the fact that an invasion is preceded by an attack, and the meaning of the Clause incorporated attack as well.[64] One reason for this line of thought could be to understand whether any failure of the Federation to protect member states would give rise to claims against the Commonwealth for their failure to discharge their obligations.[65] An understanding between the members was ultimately arrived at, when it was

[60] Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 293 (2015).
[61] *Id.*
[62] *See* Mr. Gordon's proposed amendment on Clause 112 of the draft Constitution, dated February 8, 1898, at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=%22domestic%20violence%22%20Dataset%3Aconventions;rec=1;resCount=Default>
[63] *Id.*
[64] *Id*. Mr. Barton's.
[65] *Id.* Mr. Gordon's replyobjection on debates on Clause 112 of the draft Constitution, dated February 8, 1898, at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=%22domestic%20violence%22%20Dataset%3Aconventions;rec=1;resCount=Default>

pointed out to Mr. Gordon, that in times of necessity (or when the guns are booming), the categorial differentiations of attacks and invasion would be trivial. Apart from this, another issue which was discussed was the question of who would be the competent authority to invoke the powers of the clause, i.e., whether it shall be the Governor-General or whether the power should lie with the States or legislative.[66] A move was also made to include a clause which sought to empower the Governor-General to take recourse to these powers, if he was of the opinion that necessity to preserve public peace existed, which was also negatived.[67]

In effect, instead of replicating the American provision, the members instead adapted the Clause with a slight variation, which made it possible for the State Executive to request the federal intervention at the first instance, rather than the State legislature, as it may not be possible for the legislature to convene during times of violence.

3.3.India

Dr. Ambedkar moved two key amendments on the 3rd of August 1949. The first one was to repeal the power of the Governor of a State to declare a state of emergency for a period of two weeks. The second one was proposed to include draft Article 277-A (later Art. 355)[68] which according to Ambedkar, bore some resemblance to the American and Australian Guarantee Clause.[69] This provision, according to him, would be nothing more than a "pious declaration", would be *not be* used to provide the Federal Government to make any law for the "peace, order and good government of States", the power for which would still reside within the powers allocated to the State.[70] From his understanding, any justification for interfering with

[66] *See id.* Mr. Gordon's objection noting that the Governor-General is not a resident of the State.
[67] *See id.*
[68] As Members will see, Article 277-A says that it shall be the duty of the Union to protect every unit, and also to maintain the Constitution. So far as such obligation is concerned, it will be found that it is not our Constitution alone which is going to create this duty and this obligation. Similar clauses appear in the American Constitution.
[69] *See* speech of Dr. Ambedkar on 3rd of August 1949: — volume 9, document 110 paragraph 31.
[70] INDIA CONST. Sch. 7, List II Entry 1, 2.

the State's autonomy must flow from the authority placed by the Constitution on the Federal Government, and an interference by the Federal Government with the State's autonomy cannot be *"an invasion which is wanton, arbitrary and unauthorised by law…*".[71] This proposed amendment came under severe criticism from some members of the Assembly, who felt that the proposed amendment not only stripped away the autonomy of the States, but also the vagueness of the phrase "internal disturbance" and the normative the threshold which could justify a federal intervention.[72] Kamath in particular highlighted the Delphic nature of the proposed amendment, noting that Ambedkar on the one hand proposed to protect the States from undefined situations of internal disturbances which justified federal intervention, and at the same time, provided the States the explicit power to preserve public order. Another criticism levelled against the text of the proposed amendment was the lack of clarity in the phrase "union" which lacked the clarity as to which branch of the Union Government could intervene,[73] and the presence of the conjoiner "and" between the situations of external aggression & internal disturbance, which was textually envisaged a situation of both external aggression and internal disturbance to be present before a federal intervention action could be justified. Other criticism that was levelled against the article related to overlapping powers conferred by concurrent emergency provisions, i.e., Art. 352 (draft articles 275) and 356 (draft article 278); the likelihood of emergency powers resulting in excessive federal intervention in State's domestic affairs, like in the times of colonial rule, and the withering effect it had on democracy.[74]

[71] *See* Dr. Ambedkar's Speech during the Constituent Assembly Debates on 3rd August, 1949— volume 9, document 110 paragraph 31.("Therefore, in order to make it quite clear that Articles 278 and 278-A are not to be deemed as a wanton invasion by the Centre upon the authority of the province, we, propose to introduce Article 277-A.")

[72] *See* H.V. Kamath's speech on 3rd of August 1949: — volume 9, document 110 paragraph 31.

[73] *See* speech of Hriday Nath Kunzuru— 3rd of August 1949: — volume 9, document 110 paragraph 113.

[74] Naziruddin Ahmed—3rd of August 1949: — volume 9, document 110 paragraph 127.

In his reply, Ambedkar explained that federal intervention would be on two grounds. Firstly, it can be at the request of the State, i.e., should the police be incapable or unequipped to do so, the first step would not be invoke the powers under this provision, but take recourse of the armed police (not the armed force); should this measure not succeed in quelling violence, then recourse may be taken to the armed forces. Secondly, it can be the Federal Government taking *suo moto* cognizance of the violence in the State and deploying the armed forces. In this situation, it is understood that the Federal Government cannot be a bystander as the violence erupts in a state. However, before taking recourse to the powers under this clause, the procedure as envisaged in the debates, stipulates that first a notice be issued to the erring state, *then* a plebiscite so as to let the people elect their own leader, and only then can the powers under Art. 355 be exercised.[75] In spite of the criticism levelled, Ambedkar's persuasive arguments held more weight in the assembly, and none of the criticisms against the proposed amendment to the article of the draft constitution were admitted, and the draft article passed as per the wording it was tabled on, one week later.

3.4. Who Saw The Future?

It is essential to remember that the situations of necessity as envisaged by Madison relied heavily on the corrective remedies and obligations of the States on the State affected, "*in all for one, one for all*" manner, and the primacy of the onus is not necessarily falling solely on the President to ensure this, but only when the gravity of violent situations so demand, that he may resort to the domestic deployment of the armed forces to prevent further bloodshed.[76] A review of the drafting history of s 119 of the Australian Constitution illuminates other things that *suo moto* federal intervention at the behest of the Governor-General is not possible, as a

[75] *See* speech of Dr. Ambedkar, 3rd of August 1949: — volume 9, document 111 paragraph 49.
[76] THE FEDERALIST NO. 43 (James Madison).

state executive has to make a request for federal assistance. A review of the drafting history of Article 355, and documents which highlight the procedure of how this provision takes shape normatively illuminates that the provision was primarily meant to counter extreme violence which the police have been incapable of handling. While the draft article in the United States went through a lot of deliberations and a lot of criticisms and was revised a number of times to bear the text it bore ultimately, the clause was scarcely debated in Australia and India. and the provisions were railroaded

4. Statutory Embodiments

4.1. United States

The Guarantee Clause, as envisaged, did not have any scope for unilateral federal intervention, as such, the Legislature of the State had to make a request for Federal assistance, and, when the Legislature of the State was unable to convene, on the State Executive. Unilateral intervention while hotly debated, has only been impliedly made possible on the grounds of extreme necessity at which point it would amount to a dereliction of duty owed by the Union to States to not intervene. The earliest statutory embodiment of the Constitutional obligation to protect States from domestic violence and insurrection came in the form of the Calling Forth Act, 1792, which enabled the President of the United States to mobilize the militia for a maximum period of 30 days "*whenever the laws of United States…in any State…by combinations too powerful to be suppressed by ordinary course of judicial proceedings…or…the marshals….the same being notified to the President of the United States, by an associate justice or the district judge*."[77]

It is interesting to note that this statutory provision enacted following on the heels of the US Constitution, and perhaps capturing the spirit of Art. IV §4 the best too, provided for sanctions, in terms of temporary deployment of militia, when the Federal laws faced an opposition of such nature that judicial remedies and penalties for breach of law became difficult to implement, or in other words, it became impossible to hold the violators of the law accountable to justice, and, in such situations, a judge, a notification had to be issued by a judge to the US President. Subsequent versions of this act and their numerous amendments have completely obliterated these minimal safeguards and enlarged the grounds for deploying armed forces considerably. The current version of the Statute empowers the President, to *firstly*, at the behest of the State legislature or executive, deploy the armed forces to suppress

[77] *See* Calling Forth Act of 1792 §2. *See also* Report of the Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (2018).

insurrections;[78] *secondly,* to deploy the armed forces *suo moto* if the implementation of laws and recourse to judicial remedies become "impracticable";[79] *thirdly,* (and most stunningly) to use the armed forces, to suppress insurrections, domestic violence, "*unlawful combination, or conspiracy*" which "hinders the execution of laws of that State…" which tramples upon the constitutional rights, privileges, immunities, which the authorities of that State are either "*unable, fail or refuse to protect…"*;[80] and, *fourthly,* prior to the deployment of the armed forces, the President has to, by a proclamation, order the "insurgents to disperse…to their abodes…*within a limited time*."[81]

In order to understand how these provisions work in practice, a reference must be made to the recently declassified Field Manual of 1945 which notes that the military can be called out, *inter alia*, for the purposes of "*aiding the civil authorities at the request of the State,… [or an] emergency unexpected invasion, insurrection, or riot endangering the public property of the United States…so imminent as to render it dangerous to await instructions from the War Department*"[82] firstly at the behest of the State, in which case, the provisions of the guarantee clause will operate, i.e., the request should originate at the behest of the State Legislature or with the State Executive if situations require make it impossible for the legislature to convene,[83] and if an intervention is made at the behest of the President, the provisions of the

[78] *See* Federal Aid for State Governments 10 USCA §251 (2016) which reads as— Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

[79] *See* Use of Militia and Armed Forces to Enforce Federal Authority 10 USCA §252 which reads as— Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

[80] *See* Interference with State and Federal Law 10 USCA §253 (2016).

[81] *See* Proclamation to Disperse 10 USCA §254 (2016)— Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

[82] WAR DEPARTMENT, THE FIELD MANUAL OF 1945, 4 (1945).

[83] *Id.* at 5.

Insurrection Act will be applicable, as such, intervention requested for any purposes apart from emergency measures and measures to protect public property, a proclamation demanding the 'insurgents' to disperse has to be published before any action can be taken.[84]

4.2.Australia

In Australia, the Guarantee Clause provisions have been codified in the Defence Act of 1903. Since the Sydney Olympics, and the attack on the Twin Towers in New York, the penal provisions and justifications for mandating the deployment of armed forces have been steadily and surreptitiously increased without little public debate.[85] The scope of powers to deploy military domestically has been enlarged considerably after these two pieces of legislation.[86] The concept of domestic violence is mentioned in prospective terms, i.e., "domestic violence that is occurring or is likely to…"[87] occur or affect, and it is quite alarming to witness that the Act provides for deployment of armed forces even if there is no visible indication as to the existence or imminence of a threat. The armed forces may be deployed for a number of reasons, such as to protect the property of the Commonwealth, [88] or critical infrastructure.[89] The most recent amendment, coming out in 2018, and purportedly in response to the recommendations of the State Coroner's Report,[90] further enhanced the ability of the Authorising Ministers to advise the Governor-General to deploy the defence forces domestically for a number of broadly defined prospective or pre-existing threats, such as the threat of domestic violence or threat to public safety, both defined in broad vernacular encompassing both preventive action, and,

[84] *Id.* at 5-6.
[85] Michael Head, *Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions*, 5 UNSW L.J. FORUM 1, 1 (2019).
[86] Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 301 (2015).
[87] *The Defence Act 1903* (Cth.) s 34 (Austl).
[88] *Id*. at s 33(1)(a)(i). *See also* Michael Head, *Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions*, 5 UNSW L.J. FORUM 1, 4 (2019).
[89] *The Defence Act 1903* (Cth.) ss §51H, §51J, §51L (Austl).
[90] Michael Head, *Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions*, 5 UNSW L.J. FORUM 1, 4 (2019).

reaction to a threat or perceived threat. Under this Act, an order to deploy armed forces can be issued by the Governor-General on advice of the Authorising Minister, if it is necessary to protect Commonwealth interests or the interests of the State and Territories. Such a deployment can be either a deployment to meet either a contingency or a real situation or instance, not limited to those of domestic violence.[91] Any such deployment of armed forces domestically occurs for a period of 20 days,[92] but the Governor-General has the power to prolong the order beyond this period if the Authorising Ministers recommend it.[93] Under this Act, the armed forces have the power to search private properties without a warrant,[94] use force against to the extent of causing a person's death. Apart from the safeguard of duration, the other safeguard that this act has is in form of review by the Independent National Security Legislation Monitor Act, every five years.[95]

4.3. India

One key area where the Guarantee Clause provision in India differs from its counterparts in United States and Australia rests in the fact that it does not provide the State to request federal aid explicitly, highlighting that the Federal Government can intervene *suo moto*. To recall, the debates at the assembly highlights that Dr. Ambedkar was of the view that should it ever be imperative that recourse needs to be taken to Art. 355 by the Government, the Government has to first issue a warning, then, dissolve the State Government, presumably by taking recourse to Art. 356, and should these measure fail, then only can recourse be taken to these provision. The Government has interpreted this provision as a source of power to enable the domestic deployment of armed forces in some regions for perpetuity.

91 *Id*. at 1.
92 *The Defence Act 1903* (Cth.) s 37 (Austl).
93 *Id.*
94 *Id.* at s 51A.
95 *Id.* at s 51 ZB

The powers mentioned in the Indian version of the Guarantee Clause find their statutory embodiment in the Armed Forces Special Powers Act (1958).[96] When it was passed in the parliament, it was only deliberated upon for two hours,[97] and there were assurances that the legislation will only be a temporary measure[98] and shall be allowed to lapse after a year.[99] The Act conferred concurrent powers to the federally nominated State Governor and to the Federal Government to declare any or all part of a State where the Act extends as being a "disturbed area",[100] which is meant to serve as a justification for the domestic deployment of armed forces in that particular region. Once deployed in a "disturbed area" the armed forces have the special power, i.e., powers which are not prescribed or governed by the regular law provisions, but extraordinary powers outside the regular framework, such as using force "necessary…for the maintenance of public order"[101]… "even to the causing the death"[102] of any person who is acting in contravention of "any law and order for the time being in force in a disturbed area,"[103] and, the arresting a person without any warrant; and entering private premises without a search warrant.[104]

The absence of any textual limitations, or indications of constitutional limitations, or statutory limitations on the Executive, or the Legislature as to *how long* armed forces can be deployed

[96] The Act was first passed as an ordinance in 1942, allowed to lapse shortly after independence, then promulgated as an an ordinance from 1948 to 1957, and codified as a Statute in 1958. As such, the relevant portion of the "Objects and Reasons" clause to the Act reads as— "…*Keeping in view the duty of the Union under Article 355 of the Constitution…to protect every State against internal disturbance, it is considered desirable that the Central Government should also have the power to declare areas as 'disturbed', to enable its armed forces to exercise the special powers*." *See* generally, Naga People's Movement for Human Rights v. Union of India (1998) 2 SCC 109.

[97] *See* Gautam Navlakha, *Internal Militarisation: Blood on the Tracks*, 32(6) ECON. & POL. WKLY. 299, 306 (1997).

[98] *Id.* at 302.

[99] *Id.* (Quoting from the debates from 1958 to highlight among other things that the nature of the powers they conferred were visible to all the members of the legislature, as the Home Minister GB Pant mentioned that "a regulation more or less on the lines of this bill was applicable to that area. It's a simple measure. It does not create any new offences. It only provides for the protection of the army when it has to deal with hostile Nagas.")

[100] Armed Forces Special Powers Act, 1958, § 3.

[101] *Id*. at §3(a)

[102] *Id.*

[103] *Id*.

[104] *Id*. at §3(a), §3(b).

in aid of civil authorities ensured a departure from the ethos of constitutionalism, as recourse was taken to these statutory provisions, when the appropriate action, according to some scholars, laid under the provisions of Art. 356,[105] which would have provided a time bound restrictions as well as the oversight of the Legislature in terms of periodic parliamentary review of the de facto emergency proclamations, which only the semantics classified as 'internal disturbance'. Some aspects of how these provisions work in practice has been clarified by the Reddy Commission, which, while being rejected by the Central Government in 2005, is nonetheless illuminating. The President, the report notes, is also empowered to act unilaterally, rather than wait for a request be made by the State executive. In their opinion, the Committee Report notes that the Federal Government has flexibility in terms of manner they choose to discharge their obligation towards the States, and as such, have the discretion to provide suggestions, assistance, initiate measures to prevent recurrence or may deploy the armed forces in aid of state police and magistracy. The Committee also suggested that when the armed forces are deployed, it is **implicative** that the State authorities have to cooperate and coordinate the forces, and should they lack such cooperation, the Federal Government can take further actions under Arts. 257 & 355. However, the most interesting point that the report highlights is the issue pertaining to how a disturbed area notification may be revoked. According to the representation of the Home Minister, the armed forces would be "progressively withdrawn" from the regions once the capacity and standards of the police have reached the requisite levels.[106]

[105] Surabhi Chopra, *National Security Laws in India*: *The Unravelling of Constitutional Constraints* 17 OR. REV. INT'L L. 1, 15 (2015-2016).

[106] It is a discussion for another day that the funding levels for the police modernization in the North-East have fallen by more than 50% over the past five years. *See* Parliament of India's Standing Committee Report on Security Situation in the North-Eastern States at page 30 (2018).

5. Problems with Defining Internal Disturbance

To a very limited extent has this vagueness of the provision, i.e., what typifies as 'internal disturbance', has been clarified, as has been the modalities of how recourse to these powers may be taken, and what measures may be taken, and when, has been clarified. The primary justification for the deployment of armed forces domestically in all the three countries under review is that of controlling "domestic violence" and "internal disturbance". The elements of what the phrases "disturbed area" or for that matter "internal disturbances" demand has not been objectively described by either the Statue or the judicial opinions but has been left to the subjective prudence of the Government. The terminology itself is a child borne out of the politics of national security legislations, and as such, the definitions are as illuminative to understanding the situations of necessity as a as a rhetorical palindrome would be. The Defence Act, 1903 for instance, defines 'domestic violence' as "domestic violence has the same meaning as in s 119"[107], while the Armed Forces Special Powers Act defines a disturbed area as "disturbed area means an area which is for the time being declared by notification to be a disturbed area."[108] The definitions provided by Australia and India in their respective legislations are indicative of this problem.

The problems with lack of clarifications on the definitions here gives rise to plenitude of circumstance under which armed forces can be deployed without any safeguards to prevent their abuse. The fluidity of the definitions has been mitigated to some extent been circumscribed by the secondary sources, which illuminate the practices. In Australia for example, the Government recently rejected the demands made in by the Parliamentary Inquiry Committee which asked them to define the scope of 'domestic violence'.[109] Scholars have

[107] *The Defence Act 1903* (Cth.) s 31 (Austl).
[108] Armed Forces Special Powers Act, 1958, § 2(b).
[109] Michael Head, *Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions* 5 UNSW L.J. FORUM 1, 4 (2019).

drawn on the history of exercise of this power, to note that the term 'domestic violence' encompasses "industrial disputes, protests, demonstrations, riots and many traditions forms of political opposition, which may threaten the existence or institution of the states."[110] In the United States, a declassified Field Manual issued by the War Department on controlling domestic disturbances, defines domestic disturbances as—

> manifestations of civil unrest or tension which take the form of demonstrations or rioting…[of] such proportions that civil authorities cannot maintain law and order by usual methods. Such disturbances may be caused by agitators, racial strife, controversies between employees and employers concerning wages or working conditions, unemployment, lack of housing or food, or other economic or social conditions. Looting of areas ravaged by storms, fires, floods, or other catastrophes may become so pronounced as to constitute a domestic disturbance. Public revulsion to serious crimes and feeling against suspected criminals may prompt groups of persons to attempt to take the law into their own hands, thereby creating a civil disturbance.[111]

Similarly, the Sarkaria Committee Report attempted to demystify what the term "internal disturbance" connotes. According to the Report, the phrase "internal disturbance", was differentiated in terms of heightened degree of public disorder, which is widespread in nature, and also 'endangering the security of state.'[112] In such situations of widespread public disorder which threaten the security of India, the President is empowered to take action under Art. 355, which is to say, deploy federal armed forces *in aid of civil power*.[113] Similar observations were made by the Reddy Committee, which defined "internal

[110] Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 298 (2015)(relying on the definition laid out by Michael Head).
[111] WAR DEPARTMENT, THE FIELD MANUAL OF 1945, 14 (1945).
[112] *See* REPORT OF THE SARKARIA COMMISSION ¶ 7.03.04 (1988).
[113] *Id* at ¶ 7.03.06.

disturbance" as representing a "very serious, large scale and sustained chaotic conditions over a large area of the State.[114] It is imperative to say that the classifications of violence here envisage a far lower threshold than the kind of violence and disorder which compelled Madison, Griffith and Ambedkar to include the guarantee clause within their constitutions. What is notable about all these definitions is that some of these can very well be law and order infractions rather than national security concerns.

[114] REPORT OF THE COMMITTEE TO REVIEW THE ARMED FORCES SPECIAL POWERS ACT 68 (2005).

6. Guarantee Clause as an Emergency Power

The drafting history of the three countries indicates that the rationale for adopting these provisions was to protect the states from riots, rebellions and insurrections, and from attacks and invasions from neighbouring states. The provisions themselves did not presume an attack of the scale of war but an armed rebellion from within the State itself. The framers of this clause did not impose any constitutional limits, nor did they stipulate any time limit when the intervention period has to be allowed to lapse. The history of the political situations of these countries at the time these constitutions were being drafted, and the debates themselves highlight that the mechanism through which the Federation was supposed to fulfil this obligation was that of domestic deployment of armed forces in *aid* of civil authorities. The deployment armed forces domestically, even if it is in aid of civil of civil authorities is an indication that situations are of such gravity that situations of necessity exist which warrant recourse to these drastic measures, without a proclaiming a state of emergency.

The contemporary utility of the Guarantee Clause highlights that the scope of the clause has been predominantly confined to deploying armed forces, in order to purportedly suppress situations of domestic violence, internal disturbances.[115] The use of the armed forces under the cover of the guarantee clause in USA, Australia and India bear testament of this fact.[116] In the context of using the Guarantee clause as a source for domestic deployment of armed forces, all the three countries have one or more form of such legislation, which arguably ousts

[115] *See e.g.,* William M. Wiecek, The Guarantee Clause in the U.S. Constitution 85 (1972); Michael Head and Scott Mann, Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights 50-51(2009); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. Colo. L. Rev. 887, 902 (1994); Jarret A. Zafran, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. Rev. 1418, 1435 (2016). It is pertinent to note that this measure is different from a formally declared state of emergency.

[116] *Instances of recent import include the deployment of air force pilots to fly commercial airplanes to break a strike by the Union. See* Peta Stephenson, *Fertile Ground for Federalism - Internal Security, the States and Section 119 of the Constitution*, 43 FED. L. REV. 289, 291 (2015); the deployment of armed forces in India in perpetuity without declaring a state of emergency in India. *See* Gautam Navlakha, *Internal Militarisation: Blood on the Tracks*, 32(6) ECON. & POL. WKLY. 299 (1997); and invoking the Insurrection Act to dismiss peaceful protests. *See* Christine Hauser, *What Is the Insurrection Act of 1807, the Law Behind Trump's Threat to States?* N.Y. TIMES, Jun. 2, 2020 https://www.nytimes.com/article/insurrection-act.html.

parliamentary review in some manner.[117] It is therefore unsurprising that the Guarantee Clause provisions in their present-day incarnation have been reduced for the mere purpose of the domestic deployment of armed forces. It is not necessary for the domestic deployment of armed forces to be accompanied or preceded by declaration of a state of emergency. While the invocation of a state of emergency confers on the executive with discretionary powers that would otherwise have been unavailable to him, such as the power to suspend access to fundamental rights, the domestic deployment of armed forces is confers upon the military the power to restrict liberties and work outside the normal procedural rules.

The goal posts of riot, insurrection and rebellion have been shifted dramatically, in that the threshold for invocation of a situation as such has been lowered to the extent that peaceful protests, or protests with sporadic non-life-threatening violence has been met with a deployment of armed forces. Similarly, the test for whether an emergency exists or not is no longer a bright line test to be determined under 'laboratory conditions' and by looking into the official gazettes and other sources of informational media for proclamations of emergency. Teubner offers some evidence for this assertion, highlighting how the culture of justifications for invoking a state of emergency has gone out of vogue. Instead, according to him, constitutional prolegomenon bear indication that the thresholds of state of emergency have

[117] In the USA, there is the Insurrection Act, the Posse Comitatus Act, and until recently, there was the US PATRIOT Act. For a brief account, *see* Christopher Metzler, *Providing Material Support to Violate the Constitution: The USA Patriot Act and Its Assault on the 4th Amendment* 29 N.C. Cent. L.J. 35 (2006); Kent Roach, *The ordinary law of emergencies and democratic derogation from rights* in Emergency and The Limits of Legality 236 (Victor Ramraj ed., 2008); William E. Scheuerman, *Presidentialism and Emergency Government* in Emergency and The Limits of Legality 267 (Victor Ramraj ed., 2008); Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergency* 25 Minnesota J. Int'l L. 29, 54-56 (2016); Adrian Vermeule, *Holmes on Emergencies*, 61 Stan. L. Rev. 163, 188-89 (2008). For a brief account from the Australian Defense Act 1903, §51A- §51Y *see* Michael Head and Scott Mann, Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights 130-31 (2009). Michael Head, *Calling Out the Troops: Disturbing Trends and Unanswered Questions* 28 U. New South Wales L. Rev. 481, 490-93 (2005). For a brief account of how the Defense Act might potentially impinge on the separation of powers, *see* Tom Campbell, *Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory* in Emergency and The Limits of Legality 211 (Victor Ramraj ed., 2008). In India, there is the Armed Forces Special Powers Act which allows the domestic deployment of armed forces. For an account of the same, *see generally* Khagesh Gautam, *Martial Law In India: The Deployment Of Military Under The Armed Forces Special Powers Act, 1958,* 24 S.W. J. INT. L. 177 (2018).

transgressed, as such states of emergency have gone from being instances of foreign armed aggressions, wars, and insurrection, to being declared to suppress instances of civil unrest, riot and terrorist attacks,[118] which in essence seems to have "devoured the rules and benchmarks of normality." [119]

The drafting history of these clause do not specifically stipulate or express any limits as to for how long the armed forces can be deployed domestically. It is asserted that the while the constitutions of United States and Australia do not contain any express emergency provision like the constitution of India, the deployments are nonetheless bound by the same principles of temporality and the deployments are subject to periodic review by the Legislature. The reason for assertion lies in the fact that the Guarantee Clause, which as noted above, is a constitutional embodiment of Montesquieu's dictum, and the conferment of powers of dictatorship in times emergencies, also places limits on their exercise, as a consequence of which, by necessary implication the exercise of these powers had to be temporary.[120] It is testament to influence that Montesquieu's work had on the drafters of the American constitution that when the powers envisaged by the Guarantee Clause first embodied by the Legislature, the provided the deployment of armed forces domestically can be for a period of 30 days.[121] Such an interpretation of the guarantee clause would stand in conformity with the principles of constitutionalism as by a corollary extension of the interpretation also envisages a ratification by the Legislature of every declaration of a state of emergency and periodic parliamentary review of subsequent renewals, which serves as check on the inherent power of

[118] GUNTHER TEUBNER BETWEEN MAGIC AND DECEIT 264-67 (2017).
[119] *Id*. at 290.
[120] He observed that greatness of the absolute power being bestowed must be balanced by ensuring a brevity in its duration. Notably, while all the three of them had different notions about the specificity of duration, they were in agreement that such measures need to be temporary. *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU THE SPIRIT OF LAWS 12 (Thomas Nugent trans., 2003) (1752).
[121] 1 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, 158-60 (1896) (Washington's order calling up the Militia).

the Executive to override these structural safeguards, that can only be permitted in times of necessity.

7. Challenges

We began this inquiry with a simple question, namely, to understand how the background of Guarantee Clause has defined its contemporary purpose. In order to address this question, we looked at the historical and normative values of the Guarantee Clause. We looked at the exigencies of the situation as they then were and found out that the moments which necessitate the inclusion of the Guarantee Clause have been periods of violence within the borders of the countries under review, which consequently necessitated the deployment of armed forces. In order to ensure protections future recurrences, the drafters of the respective constitutions included this provision in their respective constitutions.

If the historical value of the Guarantee Clause lay in ensuring a perpetuity of the Federation, its normative value lay in exposing the faults of the systems and mitigating the faults within the constitution to ensure that the provision falls into desuetude. The normative values of this provision reveal the vernacular categorization of domestic violence has been eroded significantly by changes after changes, as such, there is no one understanding of when the Federal Executive may abuse this power. The hierarchical categorisation of the vernacular of insurrection, invasion and armed rebellion, had been significantly lowered at the time of the framing of the constitutions, suggesting that intent of the framers was to prevent the escalation of situations which had the propensity to tear the federation apart. In the absence of any constitutional safeguards against the use of these powers, the erosion of liberties has all the Guarantee Clause has yielded.

The vernacular of 'military-acting in aid of civil authorities' is just another lazily described justification for intruding on the fundamental rights of the people, and semantics notwithstanding, it is a proclaiming a state of emergency and should be subject necessarily provide for the same constitutional limitations as a declared state of emergency would. I briefly highlighted how these are inherent protections that can be used to prevent further abuse

of this provision. It is only a limited imagination that has constrained the scope of powers for the purpose of domestic deployment. Abolitionists saw it as a source of power to emancipate the people, and progressives see it as a source of power to provide for education reforms. Whether these goals can confer a new meaning to the guarantee, would be a moment more remarkable to be memorialised and immortalised than history of violence its current incarnation has given.

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