Chapter 2: STAMP DUTY A PRODIGY OF CONSTITUTION

‘A king, a prostitute, Lord Yamraja, fire, a thief, a young boy and a bagger cannot understand the suffering of other. The eight of this category is the Tax Collector.’

Kautilya

2.1. Introduction

India’s recent growth story is now much analyzed, and quite well understood. Despite some temporary controversy over the relative impacts of economic reforms in the 1980s and 1990s; hesitant and piecemeal in the first of those decades, deeper and more systematic in the subsequent period; the new consensus is not very different from the old, namely, that an overall shift in economic policy toward greater reliance on the market for resource allocation, including greater openness to the global economy, has been an important factor in increasing India’s average growth rate from its previous low levels. This recognition of the role of market competition does not diminish the Indian government’s past importance in building physical infrastructure and human capital, and in providing stability and safety nets. Nevertheless, the reform of India’s governance is one of two major strands of current policy debates, the

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34 This well known treatise by Kautilya (advisor of the Mauryan Empire) on state crafts, written sometime in 300 B.C., when the Great Mauryan Empire of India was on its glorious upwards move, is truly amazing, for its in-depth study of the civilization of that time and the suggestions given, which should guide a king in running the State in a most efficient and fruitful manner. According to him, tax was not a compulsory contribution to be made by the subject to the State but the relationship was based on Dharma (religion) and it was the King’s sacred duty to protect its citizens in view of the tax collected and if the King failed in his duty, the subject had a right to stop paying taxes, and even to demand refund of the taxes paid. During Mauryan period revenues were collected from all possible sources, however the underlying philosophy was not to exploit or over-tax people but to provide them as well as to the State and the King, immunity from external and internal danger. The revenues collected in this manner were spent on social services such as building of roads, setting up of educational institutions, setting up of new villages and such other activities beneficial to the community. The overall emphasis was on equity and justice in taxation. The affluent had to pay higher taxes as compared to the not so fortunate.
other being areas where further “liberalization” of the economy is needed (e.g., small scale industry reservations, privatization, and matters pertaining to openness to foreign capital).

Underlying all the developments in economic policymaking, and concerns about governance, therefore, is the working of India’s federal system. It is important to understand what this system is, what it does, and how it has been changing in response to the forces put in motion by India’s renewed struggle to fulfill its “tryst with destiny” by substantially improving the well-being of all its citizens in a tangible manner.35

2.2. Central-State Relations

The Constitution in its very first article describes India as a Union of States. When the British power was established in India it was highly centralized and unitary. To hold India under its imperial authority, the British had to control it from the Centre and ensure that power remained centralized in their hands. A strong central authority was for the British both an imperial and an administrative necessity. The country continued to be ruled under the 1919 Act by a central authority until 1947. And, since under the 1919 Act, there was a central government, a central legislature, a system of central laws etc., the use of these terms continued under the colonial hangover.

In the Constituent Assembly, the Drafting Committee decided in favour of describing India as a Union, although its Constitution might be federal in structure. Moving the Draft Constitution for the consideration of the Constituent Assembly on 4 November 1948, Dr. Bhimrao Ambedkar explained the significance of the use of the expression "Union" instead of the expression "Federation". He said "...what is important is that the use of the word 'Union' is deliberate... Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under single imperia derived from a single source." Finally, when the Constitution was adopted on 26 November

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35 Pramod K Rai “The Challenges in Developing Economics (With Special reference to India)”, University of Georgia, School of Law, P.4
1949, it provided for India being a Union of States and its States and territories being as specified in the First Schedule. The Schedule specified four types of units - Parts 'A', 'B' and 'C' States and Part 'D' territories.

During the last half-a-century, many structural changes have been made and the map of the Union of States reshaped. Categorisation of States has disappeared, names of several territorial units called States have vanished, many new States have been formed on linguistic and other criteria, boundaries, areas, names etc. of some States have been altered and many relationships have been transformed. As at present, the Union consists of twenty nine States and seven Union Territories. Some unique solutions of regional councils, development boards, etc., have been attempted with varying degrees of success. The three newest States are Uttarakhand, Jharkhand, Chhatisgarh and Telangana.

2.3. Legislative Relations

The Constitution, based on the principle of federalism with a strong and indestructible Union, has a scheme of distribution of legislative powers designed to blend the imperatives of diversity with the drive of a common national endeavor. In this respect our constitutional theory as well as practice has kept pace with contemporary developments. The current trends are emphasizing cooperation and coordination, rather than demarcation of powers, between different levels of Government. The basic theme is interdependence in orchestrating the balance between autonomy of the States and the inner logic of the Union.

The Constitution adopts a three-fold distribution of legislative powers by placing them in any one of the three lists, namely I (Union List), II (State List) and III (Concurrent List). Articles 245 and 246 demarcate the legislative domain, subject to the controlling principle of the supremacy of the Union which is the basis of the entire system.

36 Durga Das Basu, “Introduction to the Constitution of India” (Prentice, Hall of India, 2000 P 236)
The Concurrent List gives power to two legislatures, Union as well as State, to legislate on the same subject. In case of conflict or inconsistency, the rule of repugnancy, as contained in Article 254, comes into play to uphold the principle of Union power.

The Concurrent List expresses and illustrates vividly the underlying process of nation building in the setting of our heterogeneity and diversity. The framers of the Constitution recognized that there was a category of subjects of common interest which could not be allocated exclusively either to the States or the Union. Nonetheless, a broad uniformity of approach in legislative policy was essential to combine specific requirements of different States with the articulation of a common national policy objective. Conceived thus, harmonious operation of the Concurrent List could well be considered to be creative federalism at its best.

The problems that have attracted attention in the field of Union-State relations have less to do with the structure or the rationale of the Concurrent List than with the manner in which the Union has exercised its powers. In a fundamental political sense, the passing of one party dominant that characterized the first four decades of the Republic has also ended the drive towards over centralization. Even the powers that unquestionably belong to the Union, for example the power to temporarily assume the functions of a State Government under Article 356, are heavily circumscribed by the political reality of a multi-party system where the States have acquired significant bargaining power *vis a vis* the Government of India.\(^{37}\)

The evolving political system has thus imparted considerable vitality to the federal impulses of the Constitution. However, what has been gained in the actual practice of legislative relations between the Union and the States, in terms of restoring the balance inherent in the constitutional scheme, has not entered the realm of institutional validation. To this extent, the unilateralism of the Union in regard to the exercise of legislative powers under the Concurrent List remains a potential problem area. The principal critique of concurrency is

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\(^{37}\) Dholakia, Ravindra H; Ram Mohan, T T and Karan, Navendu (2005), Fiscal Sustainability of Debt of States (a study sponsored by the 12\(^{th}\) Finance Commission, New Delhi).
not that it is not required, but that it is used without consultation, that it is not exercised to deepen inter-dependence and co-operation but to stress dominance of the Union point of view.

It has to be conceded that institutional arrangements for facilitating exchange of views between the States and the Union on matters falling within the field of concurrent legislation leave something to be desired. This has happened in spite of the existence of the Inter State Council under Article 263. The Council has yet to develop into a mechanism to be relied on for an ongoing process of dialogue on vital socio-economic and political issues between the Union and the States and among the States. It is not as if such consultation is absent. There are Chief Ministers’ Conferences on specific issues. There are State Ministers’ Conferences on a variety of subjects on which common policy positions have to be formulated, such as Value Added Tax.

There is, however, no formal institutional structure that requires mandatory consultation between the Union and the States in the area of legislation under the Concurrent List which covers several items of crucial importance to national economy and security. Even the National Development Council, whose ambit may occasionally be widened beyond the Five Year and the Annual Plans, is seldom convened to test ideas and evaluate experience in policy formulation and implementation in areas where both the Union and the States are interested for the sake of social and economic development.

The Concurrent List provides a fine balance between the need for uniformity in the national laws and creating a simultaneous jurisdiction for the States to accommodate the diversities and peculiarities of different regions. This also provides a distinguishing feature in the federal scheme envisaged by the framers of the Constitution. This is further reinforced by placing a mode of altering the provisions in lists I,II and III in the seventh schedule among other matters of provisions substantive in nature and basic to the structure of the Constitution that fall within the purview of the proviso to clause (2) of Article 368. A bill for amending the list in the seventh schedule has to be passed by Parliament by a majority of the total membership of that House and by a majority of not less than two third of the members of the House present and
voting and followed by ratification of legislatures of not less than a half of the States. This mechanism provides a statutory tilt in favor of consultation and cooperation with the States in matters pertaining to the Legislative sphere and inherent balance between flexibility and rigidity.

Globalization as a phenomenon has created a great deal of mobility of goods, services, capital, technology; integrating the world trade far more than ever before. There are also related concerns arising out of a need for a better and sustained use of resources of the earth as a planet that call for a much greater coordination in identification and formulation of responses among the nations. This process of cohesive and concurrent action needs to generate, first of all within the national context. The geographical climate, environmental, technological diversities amongst States have to be harmonized in order that these may link with global processes for viable sustained, development and growth. A major field of undertaking new initiatives in these spheres would lie in the legislative domain where a certain concurrences and coherence between the States and their different needs have to be harmonized to evolve national policies. This may also be reflected in issues that pertain to technology, trade, financial services etc. in the global context. 38

2.4. Financial Relations of Union and States

Division of financial powers and functions among different levels of the federal polity are asymmetrical, with a pronounced bias for revenue taxing powers at the Union level while the States carry the responsibility for subjects that affect the day to day life of the people entailing larger expenditure than can be met from their own resources. On an average, the revenue of States from their own resources suffices only for about fifty to sixty percent of States’ current expenditure. Since the insufficiency of the States’ fiscal resources had been foreseen at the time of framing the Constitution, a mechanism in the shape of Finance Commission was provided under Article 280 for financial transfers

38 Durga Das Basu, “Introduction to the Constitution of India” (Prentice, Hall of India, 1982, P.136)
from the Union. Its function is to ensure orderly and judicious devolution that is deemed necessary from the point of view of avoiding vertical or horizontal imbalances.

The Finance Commission is only one stream of transfer of resources from the Union to the States. The Planning Commission advises the Union Government regarding the desirable transfer of resources to the States over and above those recommended by the Finance Commission. Bulk of the transfer of revenue and capital resources from the Union to the States is determined largely on the advice of these two Commissions. By and large, such transfers are formula based. Then there are some discretionary transfers as well to meet the exigencies of specific situations in individual States.

These institutional arrangements served the country well in the first three decades after independence. Testifying to the strength of these institutions neither the Union nor the States suffered from any large imbalance in their budgets, although the size of the public sector in terms of proportion of government expenditure to Gross Domestic Product had nearly doubled during this period.

Imbalances have become endemic during the last two decades and have assumed alarming proportions recently. For this state of affairs, the constitutional provisions can hardly be blamed. Broadly, the causes have to be sought in the working of the political institutions. There are shortcomings in the transfer system. For example, the ‘gap-filling’ approach adopted by the Finance Commission and the soft budget constraints have provided perverse incentives. The point, however, is that these deficiencies are capable of being corrected without any change in the Constitution.39

On the whole the framework of legislative relations between the Union and the States, contained in Articles 245 to 254, has stood the test of time. In particular, the Concurrent List, List III in the Seventh Schedule under Article 246 (2), has to be regarded as a valuable instrument for consolidating and

furthering the principle of cooperative and creative federalism that has made a major contribution to nation building. One can say that it is essential to institutionalize the process of consultation between the Union and the States on legislation under the Concurrent List.

### 2.5. Distribution of Revenues

There have been many conflicts with regard that whether India is a federal state or not. But, when we see about the characteristics of federal state then we find that one of the characteristics specifically mentions about the distribution of taxes. Thus, a federal state always has a distribution of powers. Indian Constitution specifies about the distribution of revenues where exclusive powers are given to the State, to collect taxes and exclusive powers rest with Union in relation with taxes. There are three lists namely, central, state and concurrent lists, where distribution of taxes is there in various entries. So, framers of the Constitution have definitely made the distribution appropriately.

The importance of such a distribution is very clear, as with the distribution only, Government will come to conclusion as how has been distributed to each states and how much it should be kept in consolidated fund of India to meet future needs. So, it’s very important to see that equal distribution is made of revenues with respect to their contribution.

Distribution of revenues thus, leads to clarity and leaves no scope for any confusion. With the help of distribution, we meet justice. Also, the relationship between center and state grows and the Government doesn’t go only unitary but equal participation of State is also there in collecting taxes. So, distribution of revenue leads to a better form of Government as the provisions with regard to distribution can be changed according to needs and circumstances if any conflicts between the distributions arise. The distribution of revenues is from Article 278 till Article 281 in the Indian Constitution.⁴⁰

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⁴⁰[www.legalserviceinindia.com](http://www.legalserviceinindia.com) (as on September 2, 2011)
### 2.5.1. Distribution of Revenues between Union and States

There are few Articles in the Indian Constitution which specifically focuses on distribution of revenues. They are

**Article 268:** Duties levied by the Union but collected and appropriated by the States:

This Article was amended by the Constitution (Seventh Amendment) Act, 1956 with effect from 1st November 1956. Article 268 (1) provides that stamp duties and excise on medicinal and toilet preparation which are mentioned in Union List, the collection of duties shall be made by the State which shall be levied by the Union Government. The proceeds of any such duty levy able within any State in any financial year shall not form part of the consolidated Fund of India but shall be assigned to that State.

**Article 268A:** Service tax levied by Union and collected an appropriated by the Union and States:

This Article was inserted by Ninety Fifth Amendment Bill, 2003 which was passed by both the Houses of Parliament; Lok Sabha on 6/5/2003 and Rajya Sabha on 8/5/2003. Article speaks that taxes on services shall be levied by the Government of India which shall be collected by the States. Such tax shall be appropriated by the Government of India and the States.

**Article 269:** Taxes levied and collected by the Union but assign to the States:

This Article was lastly amended by the Eightieth Amendment with effect from 1st April, 1996. Taxes which shall be levied and collected by the Government of India which are included in this Article: (a) the consignment of goods which takes place in the course of inter-state trade or commerce, (b) sale or purchase of goods which takes in the course of inter-state trade or commerce.

In this case, the question was in relation with two sales tax act which speaks on consignment of goods. Section 9(1) (b) of the Haryana General Sales Tax Act, 1973 and Section 13AA of the Bombay Sales Tax Act, 1959 is the tax on consignment goods and these provisions are beyond the respective State Legislatures as the power vests with the Parliament. And so, it was held to be
invalid. Clause 3 of this Article provides that Parliament may formulate principles for determining that when such sales and purchase or consignment takes place in the course of interstate trade or commerce.\textsuperscript{41}

The Supreme Court considered section 3 and 6 of Central Sales Tax Act, 1956. Supreme Court held that a movement of goods after completion of the transaction of sale within the state does not constitute interstate sale. Bench has also laid down few principles for considering interstate trade or commerce:

- Existence of a contract of sale incorporating a stipulation, express or implied regarding inter-State movement of goods;
- Goods must actually move from one State to another pursuant to such contract;
- Such movement of goods must be from one State to another, where the sales conclude.

Article 270: Taxes levied and distributed between Union and States:

This Article was lastly amended in eightieth amendment which was in effect from 1st April, 1996. This Article specifically provides that taxes on income other than agricultural income and corporation tax shall be levied and collected by the Union and is distributed by the Union and States. The revenue which shall be transferred to the States is unconditional and the States shall be free to use their income as and when they like. In spite of the large transfer, the fact remains that States are not happy and the main reason being that due to political reasons, the States do not make adequate efforts to impose more tax. The tax proceeds shall not form a part of consolidated fund of India but shall be distributed among States.

Supreme Court gave a judgment with regard to income tax and said that “the income tax attributable to Union territories forms a part of the Consolidated Fund of India. It is not necessary to make any distribution of income tax with

\textsuperscript{41} Goodyear India Ltd. v. State of Haryana, AIR 1999 SC781
respect to Union territories as those territories are centrally administered through the President."\(^{42}\)

Article 271: Surcharge on certain duties and taxes for purposes of the Union:

This Article corresponds to Sections 137 and 138(1) of the Government of India Act, 1935. Article basically speaks that Parliament is empowered to levy a surcharge from time to time as it’s the parliament who has imposed a surcharge and so it won’t be precluded to surcharge in another form. All proceeds from such surcharges are to form part of the Consolidated Fund of India and are not liable to be distributed among the states. No one can prevent Parliament to impose a surcharge.\(^{43}\)

Article: 272: Taxes which are levied and collected by the Union and may be distributed between the Union and the States. This Article has been omitted by the Constitution Act, in eightieth amendment.

**2.5.2. Grant in Aid**

Article 273: Grants in lieu of export duty on jute and jute products:

Under the Government of India Act, the Central Government shared the net proceeds of the jute export duty with the jute growing provinces. Under this Constitution, the States are not entitled to any such share.

The Provision specifies that for a period of ten years from the commencement of the Constitution, the jute growing states of West Bengal, Bihar, Orissa and Assam will receive grants-in-aid from the Union in lieu of the above share of the jute export duty to the extent of sums specified by the President with the consultation of Finance Commission.

Article 275: Grants from the Union to certain States

This Article was amended in twenty-second Amendment which came in effect in 1969. Parliament is empowered to make such grants, as and when it is necessary to the States which are in need of financial assistance. Special

\(^{42}\) State of Andhra Pradesh v. National Thermal Corporation Ltd, 1990 STC 132 AP.

\(^{43}\) T.M. Kanniyan v. I.T.O., (1968) 68 ITR 224 (SC)
grants may also be made to promote welfare schemes for Scheduled Castes and Scheduled Tribes.

Article 282: Expenditure defrayable by the Union or a State out of its revenues:

This Article corresponds to (i) Section 150 of the Government of India Act, 1935; (ii) Article 1, Section 8(1) of the Constitution of the United States, and (iii) Section 81 of the Commonwealth of Australia Constitution Act, 1900. This Article provides that the spending power of the Union or State Legislature is not limited to the legislative powers. Thus, they can spend more money but the purpose should be “public”.

One can observe that This Article has very wide wings, How this money is to be utilized, is not mentioned in this article. So, any political party can misuse the money in name of “public purpose”.

Supreme Court has decided that the exercise of religion is a private purpose. But, if the States themselves take the management of such religious endowment in the interest of public order, mortality, or health, then it is for public purpose.\(^{44}\)

\section*{2.5.3. Restrictions and Limitations of State to Levy Tax}

Article 276: State’s power to Levy taxes on Professions and Trades:

Article authorizes a state or other local authority to levy taxes on professions etc. where List 2, Entry 60 speaks of. Clause 2 of this Article specifies the fixed limit of Rs. 250 per annum for taxes on professions, calling etc. Later, Constitution raised the limit to Rs. 2500.

Here, Kerela Profession Tax, 1958 was held to be \textit{ultra vires} because it violated Article 276 and also encroaching upon the Union field of income tax inasmuch as it exceeded the permissible limit which was there Rs. 250 at that time.

\(^{44}\) Narayanan Nambudripad, Kidangazhi Manakkal v State of Madras, 2008 AIR (SC).
Here 2 questions were raised: (a) whether a suit for refund of tax, which was *ultra vires* the municipality, paid to the municipality was maintainable, and (b) if the suit is maintainable, whether the levy of tax by the municipality was valid in law. Thus, Supreme Court held that the suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. And, for second question, there was a bar against the levy in excess of the amount specified in the Constitution and not a mere question of levy of taxes under an inapplicable entry.\(^{45}\)

It is also observe that, (a) this Article comes in overlapping situation with Union list but still Constitution permits such kind of overlapping, (b) even if the matter may not fall in the law made by the State relating to taxes, for the benefit of States of a municipality, district board, local authority etc. shall not be invalid on the grounds that it relates to a tax of income.\(^{46}\)

### 2.5.4. State’s Power to Levy Tax

Article 286 gives the power to levy taxes on “sale or purchase of goods other than newspapers” belonging to States. But, there are few Union laws like “imports and exports” and “taxes on sale or purchase of goods, other than newspapers in the course of inter-State trade or commerce.” So, to avoid such overlapping, Article 286 subjects the States power to levy sales tax to the following restrictions:-

Article 286 (1) (a): No State can tax a sale or purchase taking place outside the State:

This Article specifically prohibits a State to impose a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. But, clause 2 of this Article clearly lays down the principles for determining when a sale or purchase takes place outside the State.

Article 286 (1) (b): No State can tax a sale or purchase taking place in the course of import and export:

\(^{45}\) *Quilon Municipality v. H&C. Ltd.*, (1967) 69 BOM LR 723.

This Article prohibits a State to impose a tax on the sale or purchase of goods when such sale or purchase takes place in the course of import of the goods into or export of the goods out of the territory of India. Parliament may by law formulate principles for determining when a sale or purchase takes place in the course of import and export of goods.

There were cashew nuts, which were purchased and imported by the C.C.I from African suppliers, which were sold by C.C.I to local users. Supreme Court held that the sale by the C.C.I were not in the course of import and was not covered by the exemption of Central Sales Tax Act, 1956. There being no direct or inverse able link between transactions of sale and import of goods on account of nature of understanding between the C.C.I. and purchasers as also be the reason of canalizing scheme for import by C.C.I. the sales do not go in exemption.47

Entry 92A Union List: No state can tax a sale or purchase taking place in the course of Inter-State trade and commerce:

The power to impose tax on sale or purchase is exclusively vested with the Parliament. Section 3 of Central Sales Tax Act, 1956 provides that a sale or purchase of goods shall be deemed to take place in the course of Inter-State trade or commerce if the sale or purchase; (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Article 286(3): Taxes on sale or purchase of goods of special importance:

Section 14 of the Central Sales Tax Act, 1956 declares a number of goods to be of special importance in Inter-State trade or commerce. Section 15 thus, imposes restrictions on taxation of sales of such goods.

Article 286 (3) (b): Taxes on the sale or purchase of goods in the course of interstate trade or commerce specified in sub clauses (b), (c) or (d) of Clause (29-A) of Article 366:

Clause (29-A) of Article 366 provides for tax on sale or purchase of goods on transfer of property in goods involved in execution of a works contract, on delivery of goods on hire-purchase or any system of payment by installments, transfer of right to use any goods for any purpose for cash, deferred payment or any other valuable consideration. Thus, State law is restricted to impose any tax on above things.

Article 277: Savings:

This article speaks about any taxes, duties, cesses or fees which immediately before the commencement of the Constitution, were being lawfully levied by the Government shall be continued for the same purposes notwithstanding that above things are mentioned in Union List, unless the contrary law has been provided.

The object of this article is to prevent dislocation of the finances of local government and authorities by reason of the coming into force of new constitutional enactments disturbing heads of taxation on lines different from those which existed before the commencement of such constitutional changes.48

It is presumed that the taxation is meant for the benefit of the public which results from expenditure incurred or from schemes undertaken by State or local Government authorities. The scope of the Article is limited and it has no application where there has been no shifting in the allocation of power as between the Union and the State under the Constitution.

The municipality of Amravati, under a law passed before the Constitution came into operation, imposed terminal tax on goods, except gold and silver, imported in or exported outside municipal limits by rail or road. The power to impose this kind of tax after the commencement of the Constitution was given to the Parliament under Entry 89 of List I. after the commencement of the Constitution, an amending notification of the municipality of 1959 made gold and silver also subject to the terminal tax. The Court held that, the action of

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48 Durga Das Basu, "Introduction to the Constitution of India" (Prentice, Hall of India, 2000 P 342)
the municipality is unconstitutional on the ground that Article 277 could neither permit increase in the rate nor could its incidence be altered.\(^{49}\)

It must be noted that Article 372 is a general provision and Article 277 is a special provision. Article 372 saves all pre-constitutional valid laws and Article 277 is confined to only taxes, duties cesses or fees. Article 372 must be read subject to Article 277.

The appellant were manufacturing medicines in which they had to use alcohol. They were working under licenses granted under the Hyderabad Abkari Act and the rules made thereunder. They were required to pay certain fees to the State Govt. for the supervision. Thereafter, the Parliament passed the Medicinal and Toilet Preparations Act, 1955 under which they were not required to pay the fee. The petitioner challenged the levy of fees by the State Govt. after the passing of the Central Act, 1955. By virtue of entry 84 of List 1 and Seventh Schedule and Article 277, no charge could be levied by the State. It was held that after the passing of the law by the Parliament, the Hyderabad Act must be deemed to have been repealed.\(^{50}\)

There is also a difference between tax and fee. A tax is an imposition made for public purpose, without reference to any services rendered by the State or any specific benefit. Whereas, fee is a payment levied by the State in respect of services performed, for the benefit of the individual. It is levied on a principle just opposite to tax. Tax is paid for common benefit conferred by the Government on all tax-payers, whereas a fee is payment made for some special benefits.

Article 279: Calculation of net proceeds, etc.:

This article defines the “net proceeds” of a tax. It means all the proceeds of tax reduced by the cost of collection. The certificate of the Comptroller and the Auditor General of India of net proceeds of a tax in a State shall be final.

\(^{49}\) Amravati Municipality v. Ramchandra, 1964, AIR SC 1172

\(^{50}\) Hyderabad Chemical and Pharmaceutical Works Ltd. v. State of Andhra Pradesh, 1964, AIR SC 1870
### 2.5.5. Finance Commission

Article 280 of the Indian Constitution speaks about finance commission. The idea of Finance Commission has been adopted from the model of the Common-wealth Commission of Australia. The expert committee on the Financial Provisions of the Constitution recommended the setting up of a Finance Commission. The Finance Commission in India is an innovation of far reaching importance as it attempts to make the Indian fiscal system federal in character. It is worth noting that in assessing the needs of the States and determining the proportions in which the States, individually, should share the central assistance, the Finance Commission has been guided inter-alia, by the principle that “the scheme of distribution should attempt to lessen the inequalities between the states” The framers of the Constitution ensured that the transfer of funds from the Centre to the States should be made neither in such a manner as nor to impair the autonomy of the States. Article 280 required the President to appoint a Finance Commission within two years from the commencement of the Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President might consider necessary.

According to the Finance Commission Act, it has all the powers of a civil court for summoning the witnesses, requiring production of any document, requiring any person to furnish information on any point which the Commission regards as useful or relevant to any matter under its consideration.

### 2.5.5.1. Constitution of Finance Commission

According to the Finance Commission Act, 1952, the Commission is to consist of a Chairman and four other members appointed by the President. The Act further says that, the Chairman of the Finance Commission shall be selected from amongst persons who had experience in public affairs and the members shall be selected from the following categories:

- who are qualified to be appointed as judge of a High Court; or
- who have special knowledge of the finance; or
• who have wide experience of financial matters and in administration; or
• who have special knowledge of economics.

2.5.5.2. Functions of Finance Commission

The Finance Commission is capable of settling many complicated financial problems which affect the relationship between the Union and the States. The recommendations of the last twelve Finance Commissions have proved that the Commission has settled many complicated problems and the present system of allocation of finance between the Union and the States is almost the result of these recommendations. While making recommendations, Finance Commission will take all relevant matters into account including the state of finances of Centre.

The Commissions first function would be of the nature of arbitration, and therefore the Commissions decisions will be final. There are few duties described by Art. 280(3):

• The distribution between the Union and the States of the net proceeds of the taxes which are to be, or may be, divided between them, and the allocation of the respective shares of such proceeds;
• The principles to govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;
• The measures needed to augment the State Consolidated Fund to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the State Finance Commission;
• The measures needed to augment the State Consolidated Fund to supplement the resources of the municipalities in the State on the basis of the recommendations made by the State Finance Commission;
• Any other matter referred to it by the President in the interest of the sound finance.
2.5.5.3. Various Finance Commissions

Originally, the Finance Commission was intended to cover all the financial transfers from the Centre to the States under Articles 269, 272, 275, and 282. In fact the First and Second Finance Commission recommended financial assistance to cover both the revenue and the capital requirements of the States, but the establishment to the Planning Commission led to the bifurcation of this function and the Finance Commission’s role became limited to the non plan expenditure. There have been thirteen finance commissions till now. The last Finance Commission is established in 2010 where the Chairman of that Commission is Vijay Kelkar. It is only expected that the Finance Commissions shall apply only two yardsticks: one of the tax effort of the State, and another is the efficiency and economy in formulating its recommendations. But, Chairman of the third Finance Commission, A.K. Chanda, in late seventies in his book mentioned that: it feels that neither of the yardsticks have been applied, as the tax potential varies from State to State and it is beyond the resources of, and the time allocated for, a Finance Commission to undertake the assessment, also it is unable to evaluate the relative administrative efficiency of the States, as neither the statistical material nor the time needed is available for making such in depth study. While S. R. Bhansali, who said that Finance Commission has been a backbone to many problems. In fact Finance Commission has come up to a great help in solving the distribution of revenues, and will be of great help in future also.\(^{51}\)

The idea of Finance Commission is very unique. It is very important to have a separate body recommending in issues related financing. The framers of the Constitution have correctly put note of the finance commission. The distribution of revenues have been properly dealt as neither the rules are rigid nor it’s confusing. The idea of dividing the taxes has been properly dealt. Though, the collection of main revenues is dealt by Union Government, but still, there are quite number of taxes which are dealt only by State. The distribution in few revenues is though overlapping but the ends of justice do

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meet. I can clearly note that Parliament’s rights are not tied up. Every law is subject to Parliament’s new contrary law. Thus, Indian Constitution gives wide powers to parliament and it is not rigid neither same. So, according to future needs one can also change the said rules of law. The procedural aspects of this distribution might be confusing or rather difficult but the theoretical aspects are very clearly laid down by the Indian Constitution.52

2.5.6. Stamp Duty and Legislative Power

The Oxford Dictionary of Law defines “stamp duty” to mean a tax payable on certain legal documents specified by statute; the duty may be fixed or ad valorem. The Constitution of India provides three lists, viz. the Union List, State List and Concurrent List. The Parliament has exclusive powers to make laws with respect to any of the matters enumerated in the Union List, the Legislature of any State has the power to make laws with respect to any of the matters enumerated in the State List and both the Parliament and the Legislature of the State have the power to make laws with respect to any of the matters enumerated in the Concurrent List.53

The Constitution of India lays down the provisions for levying taxes. This includes tax in the form of stamps on instruments recording certain transactions. The Stamp Act is a fiscal statute dealing with tax on transactions.

Under the Constitution of India, the power to levy stamp duty is divided between the Union and the State. The Parliament (Central Government) has the power to levy stamp duty on the instruments specified in Article 246 read with Schedule VII, List I, Entry 91 and the State Government has the power to levy stamp duty on instruments falling under Article 246 read with Schedule VII, List II, Entry 63. Law relate to stamps and stamp duties regarding documents other than those specified in Entry 91 of List I of Schedule VII of the Constitution, Specified documents are bills of exchange promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares,

52 [www.fincomindia.nic.in](http://www.fincomindia.nic.in) (as on December 13, 2011)
53 Durga Das Basu, “Introduction to the Constitution of India” (Prentice, Hall of India, 1982, P.232)
debentures, proxies and receipts and the field related to rates of stamp duties. List II empowers state to enact laws for rates of stamp duty in respect of documents other than specified in List I.

Rates for stamp duties for specified documents in List I. Entry 91 can by prescribed by Parliament and rates for stamp duties for other documents can be prescribed by State laws. Entry 44 List II empowers concurrently Parliament and State legislatures to make laws for stamp duties. Thus levy and charge of stamp duties can be imposed by both the Parliament and State legislatures subject to repugnancy and occupied field. Rates however have to be prescribed exclusively by Parliament for specified documents and by State legislatures in respect of other documents.

Power of parliament in respect of Stamp duty; Parliament has exclusive powers to make laws with respect to any of the matters enumerated in Union List which includes, prescribing rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bills of exchange, cheques, promissory notes, bills of landing, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, will prevail all over India. In case of States, the rates prescribed by individual States will prevail in those States.

Powers of State Government in respect of Stamp Duty; State Government has powers to fix stamp duties on all documents, except bills of exchange, cheques, promissory notes, bills of landing, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, The rates prescribed by State Government will prevail in that State.

The payment of proper stamp duty on instruments bestows legality on them. Such instruments get evidentiary value and are admitted as evidence in Courts; Section 35 of the Indian Stamp Act, 1899 and Section 34 of the Bombay Stamp Act, 1958. A stamped document is considered more authentic and reliable than an unstamped document.
2.5.7. Levy of Stamp Duty in India

The Indian Stamp Act, 1899 was enacted to consolidate and amend the law relating to stamps. It extends to the whole of India, except the State of Jammu and Kashmir. It includes all transactions between parties.

Section 2(14) of Indian Stamp Act, 1899 defines the instrument as every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded.

The Indian Stamp Act, 1899 defines the term “duly stamped” as applied to an instrument. The phrase means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with law for the time being in force.

The Finance (No. 2) Act, 2004 inserted the definition of “stamp” as any mark, seal or endorsement by any agency or person duly authorized by the State Government, and includes an adhesive or impressed stamp, for the purposes of duty chargeable under Indian Stamp Act, 1899.

The Indian Stamp Act, 1899 is a Central enactment and States have powers to adopt the Indian Stamp Act, 1899 with amendments to the same to suit the transactions peculiar to each State. Section 3 of the Indian Stamp Act, 1899 is the charging section and stipulates that stamp duty has to be paid on the instruments provided in Schedule I to the Indian Stamp Act, 1899. Certain States have introduced Schedule IA to the Indian Stamp Act, 1899 being the stamp duty payable in that State.

States such as Gujarat, Maharashtra, Karnataka, Kerala and Rajasthan have their separate State Stamp Acts, while many States follow the 1899 legislation. However, where stamp duty payable on certain transactions is not covered in the respective State Stamp Act, the States refer to the stamp duty rates provided in the Indian Stamp Act, 1899 for such transactions.

The stamp papers impressed with the desired amount of stamp duty are used both for judicial and non-judicial purposes as described herein below:
• Judicial Stamp (court fee stamp): Stamps used in courts i.e. for applications, petitions etc., are judicial stamp papers and in normal parlance are called court fee stamps.

• Non-Judicial Stamp: Non-judicial stamp is the most common form of stamp used throughout the country to register deeds, contracts and other instruments. This kind of stamp is printed (impressed) on the paper in various denominations, such as Rs. 50, Rs. 100, Rs. 1,000, Rs. 5,000.

The revenue from such duties forms a considerable part of the revenues of the State. For the sake of ensuring uniformity of rates of duty with regard to certain instruments of a commercial nature such as bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, the power to prescribe the rates of duties on such commercial documents is vested with the Union Legislature (Schedule VII Entry 91 of the Union List) and the power to reduce, remit or compound such duties on the commercial documents is also vested with the Central Government (Section 9 of the Indian Stamp Act).

On the other hand, the power to prescribe the rates of duties on non-commercial instruments is vested with the State Legislature (Schedule VII Entry 63 of the State List) and the power to reduce or remit such duties on non-commercial documents is with the State Government (Section 9 of the Indian Stamp Act).

The legislation has added separate Schedules to the Indian Stamp Act, 1899 applicable to the concerned States, except in Tamil Nadu, Assam and the North Eastern States where the changes are made in the Articles of Schedule I. The Indian Stamp Act, 1899 is also in force in the whole country as regards matters in the Concurrent List, but the Legislature has amended various sections and added new sections as applicable to each State. In the five States referred to above, the Act is in force in such matters only as regards instruments specified in entry 91 of the Union List. Thus, the Indian Stamp Act, 1899 is now a composite Act amended by the Union Legislature and State Legislature in their respective spheres of legislation.
The disparity of stamp duty in respect of the (non commercial) documents has become greater on account of State legislations since different States levy different stamp duty on the similar instruments.

With regard to conveyance there is another important aspect which seems to have received no attention at all till now, except in a few States where market value of the property is made the criterion for duty. A transfer may be for a consideration which is far less than the real value of the property because of the transferor’s natural love and affection towards the transferee or of a sense of gratitude for some past act of service or of hope of future reward in some kind; but still duty would be chargeable only on the actual amount of consideration i.e. real value (market value) of the property.\textsuperscript{54}

2.5.7.1. Power of Parliament in Respect of Stamp Duty

Parliament can make law in respect of Stamp Duty. It can prescribe rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bill of exchange, cheques, transfer of shares etc. will prevail all over India. However, other stamp duty rates prescribed by Parliament in Indian Stamp Act, 1899 (e.g. stamp duty on agreements, affidavit, articles of association of a company, partnership deed, lease deed, mortgage, power of attorney, security bond etc.) are valid only for Union territories. In case of States, the rates prescribed by individual States will prevail in those States.

2.5.7.2. Powers of State Government of Stamp Duty

State Government has powers to fix stamp duties on all documents except bill of exchange, cheques etc. Rates prescribed by State Government will prevail in that State. State Government can make law for other aspects of stamp duty also (i.e. matters other than quantum of duty). However, if there is conflict between State law and Union law, the Union law prevails [Article 254 of Constitution].

\textsuperscript{54} A Study of Report, P.S.A. Sundaram, “Economic Reform and Stamp Act” (May 1995)
2.5.7.3. Circumventing Central Law

Under Entry 44 of List III, power to levy stamp duty on all documents is concurrent, but the power to prescribe the rate of duty is excluded from Entry 44 of List III and is divided between Parliament and the State Legislatures. If the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate of duty would belong to Parliament, and for all other instruments or documents, the power to prescribe the rate of stamp duty would belong to state legislature under Entry 63 of List II. Therefore, the meaning of Entry 44 of List III is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty could be made both by the Union and the State Legislature, subject to Art.254 of the Constitution in case of repugnancy. Therefore, Entry 91 of List I of the Seventh Schedule would be applicable to rate of insurance stamps to be affixed on Insurance policies and the State does not have the power to circumvent a central law.\(^{55}\)

The legislature by Uttar Pradesh Amendment of Section 33(4) and (5) modified the meaning of the words “is produced or comes in the performance of his functions” in cases under sub-section (4) where collector calls for original instrument after noticing deficiency of stamp duty in copy of instruments consequently produced. Thus, sub-sections (4) and (5) of section 33 of the Act are not charging provisions, but are part of the machinery provisions and are not repugnant to the concept of stamp duty under Entry 44 List II of seventh schedule of the constitution.\(^{56}\)

2.5.7.4. Computation of Stamp Duty

Entry 91 of List I of Schedule VII of the Constitution of India relates to rates of duty in respect of bills of exchange, bills of lading, promissory notes, cheques, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, Entry 63 of List II relates to stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of

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stamp duty.\textsuperscript{57} The power to levy stamp duty is concurrent under Entry 63 of List II, but that entry does not include the power to prescribe the rates of stamp duty. The power to prescribe the rate of stamp duty between the exclusive jurisdiction of the Union and the State: (a) as regards the instruments specified in Entry 91 of List I, the power exclusively belongs to Parliament, and (b) regarding other instruments, the power belongs to the State under Entry 63 of List II. Entry 44 of List III relates to stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty. The charging provisions levying stamp duty could be enacted by both the Parliament and the State Legislature subject to provisions of Art.254 of the Constitution. The scheme of the entries in the various lists is that taxation is not intended to be comprised the main subject in which it might on an extended construction be regarded as included but would be treated as a distinct matter for the purpose of Legislative competence. Even under the residuary power of legislation conferred by Art.248, the Parliament could only impose that tax which was not mentioned in either List II or List III. The stamp duty pertains to the domain of taxation and is covered by Entry 63 in List II read with Entry 44 in List III.\textsuperscript{58} It is open to the State Legislature not only to make an amendment in the Act in regard to the rates of stamp duty but also in regard to the mode of computation of stamp duty.\textsuperscript{59} It is; therefore, open to the State Legislature to fix the rates of stamp duty.\textsuperscript{60}

Kerala High Court has held that provisions of section 45-B of the Kerala Stamp Act and section 61(2) of the Registration Act are inconsistent. The only manner in which the situation of the \textit{pro tanto} invalidity of section 45-B can be avoided, is by reading the words ‘refer the same’ to mean reference of the dispute or doubt with regard to the time value of the property or consideration set forth in the instrument and not reading section 45-B as empowering the Registering Officer to retain the registered document.\textsuperscript{61}

\textsuperscript{57} Litaka Pharmaceuticals Ltd. v. State of Maharashtra, AIR 1997 Bom 7.
\textsuperscript{59} Himalaya House Co. Ltd. v. Chief Controlling Revenue Authority, AIR 1972 SC 899.
\textsuperscript{60} Litika Pharmaceuticals Ltd. v. State of Maharashtra, AIR 1997 Bom 7 (19).
When a law is impugned as *ultra vires*, the true character of the Legislation has to be ascertained and if, on such examination, it is found that the Legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it might incidentally trench beyond its competence.\(^{62}\)

Under the aforesaid provisions, the State Legislature would have jurisdiction to levy stamp duty on order of the court sanctioning the scheme of amalgamation.\(^{63}\)

The amendment in the Stamp Act by interesting Article 38A in Schedule 1B to the U.P. Stamp Act, regarding licence relating to arms or ammunitions was made after exercising power under Entry 44 of List III and Entry 63 of List II, is *intra vires* of the Constitution, and within the competence of state.\(^{64}\)

Once the state Legislature is competent to enact on the subject enlisted under Entry 44 of List III, its power cannot be restricted or circumscribed and provisions relating to appeals and other related matters cannot be said to be outside the purview of the main subject.\(^{65}\) The Legislature can pick and choose regions, objects, persons, methods in fixing rates of stamp duty for augmenting the state revenue.\(^{66}\)

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\(^{64}\) *Naveen Gun House v. Union of India*, AllR 2003, All 187, p. 194.
