

## Chapter – IV

### CONSTITUTIONAL PROVISIONS ON SEPARATION OF POWERS

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#### 4.1 Introduction

A Constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed. These rules together make up, i.e. constitute, what the entity is. When these principles are written down into a single document or set of legal documents, those documents may be said to embody a written Constitution; if they are written down in a single comprehensive document, it is said to embody a codified Constitution. Constitutions concern different levels of organizations, from sovereign states to companies and incorporated associations. A treaty which establishes an international organization is also its Constitution, in that it would define how that organization is constituted. Within states, whether sovereign or federated, a Constitution defines the principles upon which the state is based, the procedure in which laws are made and by whom. Some Constitutions, especially codified Constitutions, also act as limiters of state powers, by establishing lines which a state's rulers cannot cross, such as fundamental rights. An example is the Constitution of the United States of America.

The Constitution of India is the longest written constitution of any sovereign country in the world, containing 444 articles in 22 parts, 12 schedules and 118 amendments, with 117,369 words in its English language translation<sup>252</sup>, while the United States Constitution is the shortest written Constitution, at 7 Articles and 27 amendments. The constitution of United States with its all amendments up-to-date consists of not more than 7000 words.

Not only are the provisions relating to the Units elaborately relations between the Federation and the Units elaborately dealt and the Units inter se, whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible<sup>253</sup>. The lessons drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions “regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other

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252. *Dr. Durgadas Basu, Introduction to the Constitution of India, 20th Edition, p. 33*

253. *Ibid.*

activities”<sup>254</sup>, and also as regards inter-State relations, co-ordination and/adjudication of disputes amongst the States.

Perhaps of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though normally the system of government is federal, with Unitary Bias, the Constitution enables the federation to transform itself into a unitary State. By the assumption of the powers of States by the Union in emergencies.

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries.

The nature of the federal system introduced by our Constitution has been fully explained in chapter 2<sup>nd</sup> historical background. To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The Union is composed of 28 States (Now 29) and both the Union and the States derive their authority from the Constitution which divides all powers,—legislative, executive and financial, as between them. The result is that the States are not delegates of the Union and that, though there are agencies and devices for Union control over the States in many matters,—subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

Thus, neither the Union Legislature (Parliament) nor a State Legislature can be said to be ‘sovereign’ in the legalistic sense,—each being limited by the provisions of the Constitution effecting the distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers in certain matters, e.g., Art. 276(2) [limiting the powers of a State Legislature to impose a tax on professions]; Art. 303 [limiting the powers of both Parliament and a State Legislature with regard to legislation relating to trade and commerce]. If any of these

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254. *Dr. Rajendra Prasad, C.A.D. Vol. X, p. 891.*

constitutional limitations is violated, the law of the Legislature concerned is liable to be declared invalid by the Courts.<sup>255</sup>

The debate on the 'basic structure' of the Constitution, lying somnolent in the archives of India's constitutional history during the last decade of the 20<sup>th</sup> Century, has reappeared in the public realm. While setting up the National Commission to Review the Working of the Constitution (the Commission), the National Democratic Alliance government stated that the basic structure of the Constitution would not be tampered with. Justice M.N. Venkatachalaiah, Chairman of the Commission, has emphasised on several occasions that an inquiry into the basic structure of the Constitution lay beyond the scope of the Commission's work.

#### 4.2 Constitutional status and practice of Separation of Power in India

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of separation of powers is accepted in India. Under the Indian Constitution, the executive powers are with the President,<sup>256</sup> the legislative powers with the Parliament<sup>257</sup> and the judicial powers with the judiciary.<sup>258</sup> The President holds his office for a fixed period. His functions and powers are enumerated in the Constitution itself. The Parliament is competent to make any law subject to the provisions of the Constitution and there is no other limitation on its legislative powers. Similarly, the judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or by the legislature. At the same time, the Court also cannot arrogate to itself any function, which is left to the domain of the other two branches, namely, the executive and the legislature.<sup>259</sup> The Supreme Court and High Courts are given the powers of judicial review and they can declare any law passed by the Parliament or Legislature as *ultra vires* or

254. Dr. Durgadas Basu, *Introduction to the Constitution of India*, 20th Edition, p. 327

256. Art. 53 (1) ; Art. 154 (1) ; *Delhi Laws Act, 1912 Re*, AIR 1951 SC 332, (387, Mahajan, J.; 395, Mukherjea, J.); *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC1 : AIR 1975 SC 22999; *Bandhua Muktri Morcha v. Union of India*, (1984) 3 SCC 161 (231-32): AIR 1984 SC 802: (1984) 2 SCR 67; *State of H.P. v. Umed Ram Sharma*, (1986) 2 SCC 68 (80-81); AIR 1986 SC 847; *Union of India v. Raghbir Singh*, (1989), 2 SCC 754 (765-66): AIR 1989 SC 1933.

257. *Delhi Laws Act, Re, 1912, i.d.*, pp. 346-47 (Kania, C.J.); p. 388 (Mahajan, J.), *Indira Nehru Gandhi v. Raj Narain*, *id.*, pp. 136, 190 (SCC).

258. Article 50 of the Constitution of India, which reads as under: Separation of Judiciary from Executive—The State shall take steps to separate the judiciary from the executive in the public services of the State.

259. *State of H. P. v. Umed Ram Sharma*, (1986) 2 SCC 68 (76) : AIR 1986 SC 847; *State of H.P. v. A Parent of a Student of Medical College*, (1985) 3 SCC 169 (174-75) AIR 1985 SC 910 (913.14) ; *Asif Hameed v. State of J&K*, 1989 Supp (2) SCC 364; AIR 1989 SC 1899 (1907).

unconstitutional. Taking into account these factors, Kania, C.J. and some jurists are of the opinion that the doctrine of separation of powers has been accepted in the Constitution of India. In *Golak Nath v. State of Punjab*<sup>260</sup>, Subba Rao, C.J. observed:

“The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of powers, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. They should function within the spheres allotted to them.”<sup>261</sup>

In *Bandhua Mukti Morcha v. Union of India*<sup>262</sup>, Pathak, J. observed:

“The Constitution envisages a broad division of the powers of the State between the legislature, the executive and the judiciary. Although the division is not precisely, there is general acknowledgement of its limits. The limits can be gathered from the written text of the Constitution, from conventions and constitutional practice, and from an entire array of judicial decisions. The constitutional lawyer concedes a certain measure of overlapping in functional action among the three organs of the State. But there is no warrant for assuming a geometrical congruence. It is common place that while the Legislature enacts the law, the Executive implements it and the Court interprets it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognised that in a certain sphere the Legislature is possessed of judicial powers, the executive possesses a measure of both legislative and judicial functions and the Court, in its duty of interpreting the law, accomplishes in its perfected action a marginal degree of legislative exercise. Nonetheless a fine and

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260. *AIR 1967 SC 1643: (1967) 2 SCR 762.*

261. *Id.*

262. *(1984) 3 SCC 161, 231: AIR 1984 SC 802.*

delicate balance is envisaged under our Constitution between these primary institutions of the State’.<sup>263</sup>

But if we study the constitutional provisions carefully, it is clear that the doctrine of separation of powers has not been accepted in India in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the government and the exercise thereof. Though, under Articles 53(1) and 154(1), the executive powers of the Union and of the States is vested in the President and the Governors respectively, there is no corresponding provision vesting the legislative and judicial powers in any particular organ. The President has wide legislative powers. He can issue ordinances, make laws’ for a State after the State legislature is dissolved, adopt the laws or make necessary modifications and the exercise of this legislative powers is immune from judicial review.<sup>264</sup> He performs judicial functions also. He decides disputes about the age of a judge of a High Court or the Supreme Court for the purpose of retiring him<sup>265</sup>, and cases of disqualification of members of any house of Parliament.<sup>266</sup>

Though the Parliament exercises legislative functions and is competent to make any law not inconsistent with the provisions of the Constitution, many legislative functions are delegated to the executive. In certain matters, the Parliament exercises judicial functions also. Thus, it can decide the question of breach of its privilege and, if proved, can punish the person concerned.<sup>267</sup> In case of impeachment of the President, one house acts as a prosecutor and the other house investigates the charges and decides whether they were proved or not. The latter is a purely judicial function.<sup>268</sup>

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263. *Id.*, similar observations of Fazal Mi, J.: *The doctrine of separation of powers, so far as our Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and administrative functions. The Constitution has taken the best of both the British and the American Constitution.*’ (S. P. Gupta v. Union of India, 1981 Supp SCC 87 (335): AIR 1982 SC 149.

264. Articles 123, 213 and 356.

265. Articles 124(2-A), 217(3); *Union of India v. Jyod Prakash Mistet*, (1971) 1 5CC 396: MR 1971 SC 1093: (1971) 3 SCR 483 ; S. P. Gupta v. Union of India, 1981 Supp SCC 87 : AIR 1982 SC 149: (1982)2 SCR 365.

266. Article 103 ; See also Article 192 ; *Election Commission v. Saka Venkata Rao*, AIR 1953 SC 210: 1953 SCR 1144; *Brindaban v. Election Commission*, AIR 1965 SC 1892: (1965)3 SCR 53.

267. Article 105; article 194; *Kehar Singh, Re*, AIR 1965 SC 745: (1965) 1 SCR 413 ; M.S. M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 385: 1959 Supp SCR 806.

268. Article 61.

Though judiciary exercises all judicial powers, at the same time, it exercises certain executive or administrative functions also. The High Court has supervisory powers over all subordinate courts and tribunals.<sup>269</sup> The Supreme Court and High Courts have also powers to transfer cases.<sup>270</sup> The High Courts and the Supreme Court have legislative powers also and they frame rules regulating their own procedure for the conduct and disposal of cases.<sup>271</sup>

Thus, the doctrine of separation of powers is not accepted fully in the Constitution of India, and we are with the observations of *Mukherjea, J. in Ram Jawaya v. State of Punjab*<sup>272</sup>: “The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”<sup>273</sup>

In *State of Kerala v. Lakshmikutty*<sup>274</sup> also the Supreme Court observed “Our Constitution does not envisage a rigid separation of powers Even though this is so, the respective powers of the three wings of the State are well defined with the object that each wing must function within the field earmarked for it. The object of such demarcation is to exclude the possibility of encroachment on the field earmarked for one wing by the other or others. As long as each wing of the State functions within the field carved out and shows due deference for the other two branches, there would arise no difficulty in the working of the Constitution. But the trouble arises when one wing of the State tries to encroach on the field reserved for the other.”<sup>275</sup>

It is submitted that the following observations in the pronouncement of the Supreme Court in *Asif Hameed v. State of J & K*<sup>276</sup> lay down the correct law on the point and are, therefore, required to be quoted:

“Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but

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269. Article 227.

270. Article 139-A and 228.

271. Article 145.

272. AIR 1955 SC 549: (1955) 2 SCR 225.

273. *Id.*, at p. 556

274. (1986) 4 SCC 632: AIR 1987 SC 331.

275. *Id.*, at p. 657 SCC)

276. 1989 Supp (2) SCC 364 : AIR 1989 SC 1899.

the constitution makers have meticulously defined the functions of various organs of the state. Legislature, executive and judiciary have to function within their own spheres demarcated under the constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these ‘organs to function and exercise their discretion by strictly following the, procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people’s will, they have all the powers including that of finance. Judiciary has no powers over sword or the purse nonetheless it has powers to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of powers by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of powers is the self imposed discipline of judicial restraint.”<sup>277</sup>

In *Krishena Kunzar v. Union of India*<sup>278</sup> the Constitution Bench of the Supreme Court observed “In the matter of expenditure includible in the annual Financial Statement, this Court has to be loath to pass any order or give any direction, because of the division of functions between the three co-equal organs of the Government under the Constitution.”

No court can direct a Legislature to enact a particular law. Similarly, a court’ cannot direct an executive authority to enact a law which it has been empowered to do under the delegated legislative authority.<sup>279</sup>

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277. *Ram Krishna Dalmia v. Tendolkar*, AIR 1958 SC 538 (546): 1959 SCR 279: 1959 SJC 147; *Jayantilal v. F. N. Rana*, AIR 1964 SC 648 (655-56): (1964) 5 SCR 294; *Chandra Mohan v. Stare of U P.*, AIR 1966 SC 1987 (1992-93)

278. (1990) 4 SCC 207.

279. *Employees Welfare Assn. v. Union of India*, (1989) 4 SCC 187 (219) : AIR 1990 SC 334.

But the court cannot also tolerate flagrant violation of constitutional provisions by the executive. Thus, if a Governor promulgates ordinances on large scale from time to time, without getting them replaced by Act, the Supreme Court can declare the action *ultra vires* and void being a fraud on the Constitution. The Governor cannot assume the legislative function which does not belong to him and the court can certainly prevent him from usurping it and crossing his limits set out in the Constitution of India.<sup>280</sup>

In *Mallikarjuna Rao v. State of A. P.*,<sup>281</sup> the Andhra Pradesh Administrative Tribunal directed the State Government “to evolve proper and rational method of determination of seniority among the veterinary surgeons in the matter of promotions to the next higher rank of Assistant Director of Veterinary Surgeons”. The said direction was quashed by the Supreme Court observing that the powers under Article 309 of the Constitution of India to frame rules is the legislative powers and has to be exercised by the President or the Governor of a State as the case may be. The High Courts or the Administrative Tribunals cannot issue mandate to the State Government to legislate. “The Court cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making powers in any manner. The Court cannot assume to itself a supervisory role over the rule making powers of the executive under Article 309 of the Constitution of India.”<sup>282</sup>

In India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50, which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.<sup>283</sup> In fact, there are several constitutional provisions, which go on to say that the Indian Constitution does not purport strict separation of powers. There is no provision in the Indian Constitution vesting the legislative and judicial powers in any particular organ. Article 53(1) confers the executive powers on the President of India. Article 246 confers legislative powers on the Parliament exclusively. However, Article 79 speaks that the Parliament shall consist of the President apart from the two Houses, the Council of States and the

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280. *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 : AIR 1987 SC 579.

281. (1990) 2 SCC 707 : AIR 1990 SC 1251.

282. *Id.*

32. *Upendra Baxi, The Constitutional Quicksands of Kesavananda Bharati and the Twenty Fifth Amendment*, (1974) 1 SCC (Jour) 45.

House of the People. On reading Articles 53(1) and 79 together a safe conclusion as to the non-existence of a strict separation of powers in India can be drawn. Same is the scenario in the state level where the executive powers are vested with the Governor (Article 154) who is also a part of the state legislature by virtue of Article 168(1). Moreover, Chapter III of Part V of the Constitution of India reads "Legislative Powers of the President". Article 123(1) confers powers on the President to promulgate ordinances during recess of Parliament. A similar powers is conferred on the Governors of the States by virtue of Article 213. Article 309 confers rule-making powers on the President for service related matters. He also exercises this rule making powers under Articles 240, 318, 146(1), 77(2), 77(3), 148(5), 101(2), 118(3), 98(2). The Governor exercises his rule making powers under Articles 166(2), 166(3), 208(3), 187(3) and under the proviso to Article 229(1). Article 357 grants the exercise of legislative powers to the President under Proclamation issued under Article 356. The important role played by the President as well as the Governor of the States with regard to bills introduced in the legislature cannot be ignored. Thus the executive is bestowed with law making powers.

President also exercises judicial powers by virtue of Article 103 which says that the decision of the President shall be final with regard to the disqualification of members of the House. Similar powers rests with the Governor of States under Article 192(1). Under Article 72 the President and under Article 161 the Governor has the powers to grant pardons, reprieves, respites etc. in certain cases.

The legislature in India performs judicial function by virtue of Articles 61(1),124(4),124(5) with regard to removal of President and Judges. The legislature also performs executive functions when it comes to imposition of surcharge under Article 274, formation of new states, alteration of areas, boundaries, names of existing states under Article 3.

The Judiciary frames rules for the various Courts under Article 227(2) (b) and Article 145. The Supreme Court appoints subordinate staff under Article 146. Similarly, High Courts appoint subordinate staff under Article 229. Thus the judiciary is also involved in legislative and executive functions. These are some of the provisions in the Constitution of India, which reflect the intention of the framers of the Constitution. In the Constitutional Assembly Debates, the proposal made to include specific provisions in the Constitution of India with regard to separation of

powers was rejected by the majority. This again goes on to emphasize the intention of the Constitution makers, which was never in favour of having strict separation of powers in India.

From this it can be concluded that the doctrine of separation of powers in its strict sense is undesirable and impracticable and therefore till now it has not been fully accepted in any of the country. In theory under the constitution of the United States of America the doctrine of Separation of powers has been strictly adopted but their also gradually the supreme court is relaxing the policy. In India also own casual viewing of the constitution it can be said that India has adopted the doctrine of separation of powers but in reality it is not show. The three organs in some or the other way perform the task of other. For example the legislative delegate some powers to executive, thus executive the function of the legislature. In this way the parliament other then making laws also have judicial powers which it can exercise when its contempt take places.

#### **4.3 The scheme of Distribution of Legislative Powers**

There is no fixed mathematical formula of distribution or powers between the Union and the State in world's federal Constitutions. The pattern varies from one federation to another federation. Usually, the subjects of national importance are entrusted to the Centre and subjects demanding local importance are allotted to the component units. This is very general and rough, a sort of an adhoc formula, and does not lead to any uniform pattern of allocation of powers between the national and the regional governments. It is impossible, and far too, to device a uniform formula. There can be no fixed formula by applying which can be decided that why certain matter is of national importance or local importance. But there are certain subjects which due to their peculiar natures have attained the importance of being national. These include defense, foreign affairs and currency.

The nature of distribution varies according to the local and political background in each country, the division, obviously, proceeds on two lines –

- (a) The territory over which the Federation and the Units shall, respectively, have their jurisdiction.
- (b) The subjects to, which their respective jurisdiction shall extend.

The distribution of legislative powers in our Constitution under both heads is as follows:

As regards the territory with respect to which the Legislature may legislate, the State Legislature naturally suffers from a limitation to which Parliament is not subject, namely, that the territory of the Union being divided amongst the States, the jurisdiction of each State must be confined to its own territory. When, therefore, a State Legislature makes a law relating to a subject within its competence, it must be read as referring to persons or objects situated within the territory of the State concerned. A State Legislature can make laws for the whole or any part of the State to which it belongs [Art. 245(1)]. It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament.

Parliament has, on the other hand, the powers to legislate for ‘the whole or any part of the territory of India’, which includes not only the States but also the Union Territories or any other area, for the time being, included in the territory of India [Art. 246(4)]. It also possesses the powers of ‘extra- territorial legislation’ [Art. 245(2)], which no State Legislature possesses. This means that laws made by Parliament will govern not only persons and property within the territory of India but also Indian subjects resident and their property situated anywhere in the world. No such powers to affect persons or property outside the borders of its own State can be claimed by a State Legislature in India.

As regards the subjects of legislation, the Constitution adopts from the Government of India Act, 1935, a threefold of distribution of legislative powers between the Union and the States Article 246. While in the United States and Australia, there is only a single enumeration of powers only the powers of the Federal Legislature being enumerated in Canada there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely, Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Sch. VII of the Constitution.<sup>284</sup>

The subjects which are to be allocated to the State subject at the time of making of the Constitution. If the centripetal forces are stronger than centrifugal forces then states would claim a lion share out of the powers to be distributed. These two contending and conflicting forces largely also determine the schemes of

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284. *Dr. Durga Dass Basu, Introduction to the Constitution of India, 20th Edition, p. 328-329*

distribution of powers. The scheme which finally emerges in a federation is the resultant of a compromise or balance of these conflicting forces at the time of the Constitution making.<sup>285</sup> The Indian Constitution is no exception.

The Indian Constitution follows a scheme similar to the Canadian. But the Indian Constitution contains a very elaborate and detailed system of division of powers between the Centers and the States. The Concurrent List has been taken from Australian Constitution. But Indian Concurrent List is more detailed and elaborate. The scheme is same as it was in the Act of 1935 the residuary powers were vested in the Governor-General. The founding fathers surveyed the entire area of functioning of the modern government and they had the advantage of learning from the experience of other federations, their growth and development, the kind of problems faced by them in their career, the solutions attempted for those problems and the adequacy or otherwise of those solutions.<sup>286</sup>

The framers studied the peculiar circumstance and factors prevailing in India and gave a Constitution which could suit the needs and aspirations of Indian people. The strong centrifugal forces impelled the Constitution makers into one direction to enact a Constitution with a strong Centre. There are three lists in Indian Constitution. These are- Union List, State List and Concurrent List. Article 245(1) confers on Parliament an exclusive powers to make laws with respect to subjects enumerated in Union List. These subjects are of national importance and demand uniform law for the whole country. Art.246(3) confers an exclusive powers on the states to legislate with respect to matters contained in the State List. The State List contains subjects of local importance. Art 246(3) confers an exclusive powers on the states to legislate with respect to matters contained in the State List. The State List contains subjects of local importance. Art. 246(2) confers powers on both the Union and the states to make laws on matters enumerated in Concurrent List. The existence of this list brought flexibility in the Indian Constitution. This list includes matters which could not be given exclusively either to the Centre or to the States. The progressive states are free to legislate on these topics. It was also thought necessary that the Centre should also have powers to make laws on these heads in order to secure uniformity in the main principles of law throughout the country, to guide and courage State effort, and to provide remedies for disputes arising in the State sphere but whose scope is

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285. *M.P. Jain, Introduction to the Constitution of India, 20th Edition, p. 273.*

286. *Ibid.*

liable to be felt beyond the boundaries of a single State.<sup>287</sup> Examples of the first type are Indian Code of Civil and Criminal Laws, the Laws of Marriage, Divorce and Inheritance- subject which are included in the Concurrent List to bring uniformity throughout the country. Instances of second are provided by such matters as of labour legislation , and of third by legislation for the prevention and control of epidemic diseases. Thus the concurrent list avoids traditional rigidity of federal Constitution.

Although, the three lists are very much comprehensive and it can be thought that there is left nothing in the form of residue. But inspite of marvellous draftsmanship in carefully enumerating the classes of subject for legislation, it is well-high possible to encompass the whole jurisdiction of all possible legislative activity and to exhaust the legislative field.<sup>288</sup> It is true that three list are very much detailed and there is a little scope for residuary powers but this can not be a good reason for excluding the provision for residuary powers from Indian Constitution. Entry 97 in the Union list runs : "Any other matter not enumerated in the list II or List III including any tax not mentioned in either of those lists." Further, Article 248 confides residuary powers exclusively to the Union Parliament.

“Distribution of legislative powers between the Centre and the States is an essential prerequisite of a cooperative federalism. In India, the Constitution empowers Parliament to legislate for the whole or part of the country and the States Legislatures to legislate for the whole or part of the individual States.<sup>289</sup> The scheme of distribution of legislative powers is more elaborate as compared to the schemes in the U.S.A., Canada and Australia.

*Zameer Ahmed Latifur Rehrnan Sheik v. State of Maharashtra & Ors.*<sup>290</sup> The Court held that it is common ground that the State Legislature does not have powers to legislate upon any of the matters enumerated in the union list. However, if it could not shown that core area and the subject matter of the legislation is covered by an entry in the State List, then any incidental encroachment upon an entry in the Union List would not be enough so as to render the State law is valid, and such an incidental encroachment will not make the Legislation ultra vires the constitution. The appeal is dismissed by the court.

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287. *Anal Ray, Inter-Governmental Relaxations in India, p. 89 (1966).*

288. *M.P. Jain, India Constitutional Law, p. 275.*

289. *Article 245 (1) and (2)*

290. *AIR 2010 SC 2633*

*State of West Bengal and Ors. v. Committee for Protection of Democratic Rights. West Bengal and Ors.*<sup>291</sup> In this case the court held that the Article deals with the distribution of legislative powers between the union and the State legislatures. List I or 'the Union list' enumerates the subjects over which the union shall have exclusive powers of legislation in respect of 99 items or subjects, which include Defence etc, List II or 'The State List' Comprises of subjects, which the State Legislature shall have exclusive powers of legislation and List III gives concurrent powers to the union and the State Legislature to legislate in respect of items mentioned therein.

There is clear demarcation of legislative powers in Indian Constitution. In the case *State of West Bengal and others v. Committee for Protection of Democratic Rights and others*<sup>292</sup> the court held though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Art. 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field. But the issue we are called upon to determine is that when the scheme of Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature, like public order, police etc., can the third organ of the State viz, the Judiciary, direct the CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the concerned State Government?

The legislative powers of Parliament and State Legislatures have been divided into three lists in the Seventh Schedule of the Constitution.

#### **4.3.1 The Union List**

List I called the Union List contains 99 entries<sup>293</sup> (in 2008 entries 100) with respect to which the Centre has exclusive powers to make laws. The Centre has been

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291. AIR 2010 SC 1476.

292. 2010 (3) SCJ 569.

293. In 2008 Union list contain 100 entries but last number till 97.

given extensive and exclusive powers of legislation over such matters on defence, foreign affairs, currency, direct taxation, foreign and inter State trade and commerce, incorporation of trading companies, banking and insurance, industries and some other aspects of education and health. In *Union of India v. Azadi Bacho Andolan*<sup>294</sup>. Power of entering into a treaty is an inherent part of the severing powers of the State. Moreover, the Constitution makes no provision making legislation a condition for entry into a treaty in times either of war or peace.

Entries 1 to 81, 93 to 95 and 97 deal with the general legislative powers of the Union, and entries 82 to 92, 96 and 97 deal with powers to levy taxes and fees. The general entries may be broadly arranged under the following heads.

(a) *Defence : Entries 1 to 7 may be placed under defence powers of the Union. These entries are given below :*

1. Defence of Indian and every part thereof including preparation for defence and all such notes and may be conducive in time of war to its prosecution and after its termination to effective demobilization.
2. Naval, military not air forces any other armed forces other armed forces of the Union.
- 2a. Development of any armed force of the Union or any other forces subject to the control of the union or any contingent all unit thereof in any state in aid of the civil powers; Powers, Jurisdiction, Privileges and liabilities of the members of such forces while on such development.
3. Delimitation of contentment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas:- The words 'isolating the control rents' in the entry has been interpreted to include with in its ambit the control of rent and eviction of tenants relating to private properties within the cantonments.
4. Naval, Military and Air Force works.
5. Arms, Firearms, Convention and Explosives.
6. Atomic Energy and Mineral Resources necessary for its production.
7. Industries declares by Parliament by law to be secretary for the purpose of defense or for the prosecution of war.

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294. AIR 2004 SC 1107

The above entries enable centre to prepare for and to organise, the defense of India.

- (b) *Preventive detention:- Entry 9 enables Parliament to enact law with respect to Preventive Detention for reasons connected with Defense, Foreign Affairs, or the security of India; persons subjected to such detention."*
- (c) *Foreign Affairs :- The comprehensive and wide powers to regulate foreign affairs, to enter into treaties with foreign countries has been given by entries running from 10 to 21.*
- (10) Foreign Affairs; all matters which bring the Union into relation with any foreign country: The entry confers a very wide powers upon Centre in respect to foreign affairs.
  - (11) Diplomatic, Consular and Trade Representation.
  - (12) United Nations Organization.
  - (13) Participation in International Conferences, Associations and other bodies and implementing of decisions made thereat.
  - (14) Entering into treaties and agreements with foreign countries, and implementing of treaties, agreements and conventions with foreign countries:- The entry confers plenary powers on the Centre to enter into treaties with foreign countries, which may override even the normal federal-State jurisdictional lines. A treaty regarding settlement of boundary disputes can be implemented by the Centre without any legislation being passed by Parliament.
  - (15) War and Peace
  - (16) Foreign Jurisdiction
  - (17) Citizenship, Neutralisation and Aliens.
  - (18) Extradition- This entry is related to surrender of fugitive persons by one State to another State.
  - (19) Admission into, and emigration and expulsion from India; passports and visas.
  - (20) Pilgrimages to places outside India.
  - (21) Piracies and crimes committed on the high seas or in the air; offences against Law of Nations committed on land or the high seas or in the air.

(d) *Communications:- Centre has been given extensive powers over means of communications vis. railways, national highways, airways etc. by entries 22to31. These entries are:-*

(22) Railways

(23) Highways declared by or under law made by Parliament to be national highways.

(24) Shipping and navigations on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of road on such waterways.

(25) Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by states and other agencies.

(26) Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

(27) Ports declared by or under law made by Parliament or existing law to be major parts, including their delimitation and the Constitution and powers of port authorities therein.

(28) Ports quarantine, including hospitals therewith; seamen's and marine hospital : - also see entry 81 in this list.

(29) Airways : aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by states and other agencies.

(30) Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

(31) Posts and telegraph; telephones, wireless, broadcasting and other like force of communications:- Amplifiers' are regarded as instruments of broadcasting and communication so fall under this entry.

(e) *Property of the UNION*

*Parliament is competent to legislate in respect of any land if it belongs to the Union. The relevant entry 32 runs as follows : -*

(32) Property of the Union and the revenue therefore, but as regards property situated in a state, subject to legislation by the state, save in so far as parliament by law otherwise provides.

(33) Omitted.<sup>295</sup>

(f) *Financial Powers*

*Centre is entrusted with financial powers by the entries 35 to 40 and 76. Those entries run as follows :*

(35) Public debt of Union.

(36) Currency, coinage and legal tender; foreign exchange :- This is most important powers of Centre to control foreign exchange.

(37) Foreign Loans.

(38) Reserve Bank of India.

(39) Post office Savings Bank.

(40) Lotteries organised by the Government of India or the Government of a State.

(76) Audit of Accounts of the Union and the States.

(g) *Economic Powers*

*The Centre has been given powers to control and regulate economic affairs of the country. These powers are derived from Entries 41 to 59 and 61. These entries run as follows : -*

(41) Trade and Commerce with foreign countries, import and export across customs frontiers; definition of customs frontiers:- this entry the Centre regulation foreign trade through imports and export (Control).

(42) Interstate trade and commerce.

(43) Incorporation, regulation and winding up of training corporations, including banking, insurance and financial corporation but not including co-operative societies: In *Charanjit v. Union of India*<sup>296</sup> the law regulating and controlling a mismanaged company was declared valid. The life Insurance corporation Act 1957 has been enacted under this entry.

(44) Incorporation, Regulation and Winding up of Corporations, whether trading or not, with objects of not confined to one state, but no including universalistion:- Under entries 43 and 44, parliament is competent to cannot a law providing for

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295. *Omitted by the Constitution (7<sup>th</sup> Amendment) Act, 1956*

296. *AIR 1951 SC 41*

allegations of companies but this would not apply to societies registered under the Societies Registration Act.

- (45) Banking : The Banking Companies Act 1949 is valid and within the powers of the parliament. Nationalization of fourteen bank by Indira Government was done under this entry.
- (46) Bills of Exchange, Cheques, Promissory Notes and other like instruments.
- (47) Insurance
- (48) Stock exchanges and future markets.
- (49) Patents, inventions and designs; copy-right; trade-marks and merchandise marks.
- (50) Establishment of Standards of weight and measurement – It is interacting to note that while weights and measures are a state subject (entry 29, list II), but the laying down of their standards is a central subject.
- (51) Establishment of standards of quality for goods to be exported out of India or transported from one state to another.
- (52) Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest- This entry confers a wide powers on centre to take control of industries and the state powers of industrial regulations (entry 24, list II) is subservient to Centre's powers.
- (53) Regulation and development of oil fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable: - Under this entry centre has taken control of oil fields through oilfields (Regulations and development) Act.
- (54) Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
- (55) Regulation of labour and safety in mines and oilfields.
- (56) Regulation and development of inter-state rivers and river valley to the extent to which such regulation and development under the control of the Union is declared by parliament by law to be expedient is public interest.
- (57) Fishing and Fisheries beyond territorial waters.
- (58) Manufacturer, supply and distribution of salt by union agencies; regulation and control of manufactures, supply and distribution of salt by other agencies.

- (59) Cultivation, manufacture, and sale for export, of opium :- Possession and sales of opium are governed by entry 19 List III.
- (60) Industrial disputes concerning Union employees : But see entry 22 List III which deals with labour disputes in general.
- (h) *Cultural and Educational Functions :*  
*Entries 60, 62 to 69 relate to this category. These run as follows : -*
- (60) Sanctioning of cinematograph films for exhibitions.
- (62) The institutions known at the commencement of this Constitution as the National Liberty, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the India War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by parliament by law to be an institution of national importance.
- (63) The institutions known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University, and the Delhi University; *the University established in pursuance of Article 371E;*<sup>297</sup> any other institution declared by parliament by law to be an institution of national importance.
- (64) Institutions of scientific or technical education financed by the government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
- (65) Union agencies and institutions for (a) Professional, vocational or technical training, the training of police officers : or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime.
- (66) Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions:- see state list, entries 11 and 12.
- (67) Ancient and historical monuments and records, and archaeological sites and remains, declared by or under : The historical monuments of a national importance fall under entry 12, list II and entry 40, List III.
- (68) The Survey of India, the Geological, Zoological and Anthropological surveys of India; Meteorological Organisations.

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297. *Words in italics inserted by the constitution (32<sup>nd</sup> Amendment) Act, 1973.*

- (69) Census
- (i) *Union Services :*  
*The relevant entries are : -*
- (70) Union Public services; all-India services ; Union Public Service Commission.
- (71) Union Pensions, that is to say, pensions payable by the government of India out of the Consolidated Fund of India: The entry is exhaustive enough even to cover the people who are not government servants.
- (j) *Elections, Parliamentary Affairs etc:*  
*Entries 72 to 75 confer powers on parliament to regulate the election and parliamentary affairs.*
- (72) Elections to Parliament, State Legislature and offices of President and Vice-President ; the Election Commission : - Parliament has passed the Representation of People Act 1950 & 1951 under this entry.
- (73) Salaries and allowances of members of Parliament, the chairman and Deputy Chairman of Rajya Sabha and the speaker and Deputy Speaker of the Lok Sabha.
- (74) Powers, privileges and immunities of each house of Parliament and of the member and the committees of each house; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.
- (75) Emoluments, allowances, privileges and rights in respect of leave of absence, of the President and Governors. Salaries and allowances of the ministers for the Union ; the salaries, allowances and rights in respect of leave of absence and other condition of service of the controller and Auditor-General.
- (k) *Judicial Powers : Entries 77 to 79 and 95 are related to judicial powers of Union to legislate in respect of affairs of Supreme Court and High Courts.*  
*These entries run as follows : -*
- (77) Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

- (78) Constitution and Organization *including vacations*<sup>298</sup> of the high Courts except provisions as to the officers and servants of High Courts; Person entitled before the High Court.
- (79) Extension of the jurisdiction of a high court to, and exclusion of the jurisdiction of a high court from, any *Union Territory*<sup>299</sup>.
- (95) Jurisdiction and Powers of all courts, except the supreme court, with respect to any of the matters in this list ; admiralty jurisdiction.
- (1) *Miscellaneous :*  
*Some of the entries can not be kept in any of the above categories, therefore, these are dealt here. These entries are:*
- (8) Central Bureau of Intelligence and Investigation. This is very important entry under which the bureau formed can help governments to preserve their stability and to detect crimes easily.
- (34) Court of wards for the estates of Ruler of Indian States.
- (80) Extension of the powers and jurisdiction of members of a police force belonging to any state to any areas outside that state, but not so as to enable the police of one state to exercise powers and jurisdiction in any area outside that state without the consent of the state government in which such area is situated ; extension of the powers and jurisdiction of members of police force belonging to any state to railway areas that state.
- (81) Inter state migration; inter state quarantine.
- (93) Offences against law with respect to any of this matters in this list.
- (94) Inquiries, surveys and statistics for the purpose of any of the matters in this list.

In the case *Union of India and others v. M/S Martin Lottery Agency Ltd.*<sup>300</sup> court held that :

In the year 2003, while amending the provisions of 1994 Act, the Constitution was also amended and Article 268A and Entry 92C in List I were inserted. The courts are in future required to determine whether a service tax within the meaning of Entry 92C would cover sale of lottery or it would come within the purview of residuary entry containing Entry 97 List I. If it is held to be a taxing provision within the

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298. *Inserted by the constitution (15<sup>th</sup> Amendment) Act, 1935*

299. *Substituted by the constitution (7<sup>th</sup> Amendment) Act, 1956*

300. *2010 (1) SCJ 42*

purview of Entry 97, the same will have a bearing on the States. The Explanation so read appears to be a charging provision. It states about taxing need. It can be termed to be a *sui generis* tax. If it is a different kind of tax, the same may be held to be running contrary to the ordinary concept of service tax. It may, thus, be held to be a stand alone clause. A constitutional question may have to be raised and answered as to whether the taxing powers can be segregated. If by reason of the said explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.

No doubt, the explanation begins with the words 'for removal of doubts'. Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous. There is also nothing to show that it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of clause (ii) had never been in contemplation of the taxing authorities. In fact, rendition of service for the purpose of imposition of service tax is imperative in character. It must be a part of economic activity. Whereas the economic activity has three characteristics - tax on production; tax on sales and tax on service. The concept of the Value Added Tax comes from the generic expression so as to include not only taxes on sales but also taxes on service as service has become segment of the economic activity.

The speech of the Honble the Finance Minister would have been relevant for the purpose of opining as to whether the court independently would have arrived at a conclusion that organizing lottery would amount to rendition of service but not otherwise. As it is not possible for us to arrive at the said conclusion, we have no other option but to hold that by inserting the explanation appended to clause (19) of Section 65 of the Act, a new concept of imposition of tax has been brought in. The Parliament may be entitled to do so. It would be entitled to raise a legal fiction, but when a new type of tax is introduced or a new concept of tax is introduced so as to widen the net, it, in our opinion, should not be construed to have a retrospective operation on the premise that it is clarificatory or declaratory in nature.

It is, therefore evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect.

### 4.3.2 The State List

List II enumerates 61 entries for exclusive legislation by State Legislatures. In *Bhavesh Jayanti Lakhani v. State of Maharashtra*.<sup>301</sup> In this case the Court held that the police powers of the State (Police including railway and village police) in respect of any offence committed in a State comes within the legislative competence of the State. The State may exercise some extraterritorial jurisdiction only if a part of the offence is committed in the State and the other part in another State or some other States. In such an event the State; before an investigation to that part of the offence which has been committed in any (sic other) State, may have to proceed with the consent of the State concerned or must work with the police of the other State. Its jurisdiction over the investigation into a matter is limited. Keeping in view the various entries contained in List I of the Seventh Schedule, there cannot be any doubt whatsoever that in the matter of investigation of the matter (sic offence) committed in a State, the jurisdiction of the Central Government is excluded.<sup>302</sup>

*M/S Siet Ltd. v. State of Punjab & Ors.*<sup>303</sup> It is thus evident that the exclusive powers of the State legislature to frame law on consumption or sale of electricity under entry 53 of the List of Seventh Schedule is judicially well recognized and conceded therefore, no fault could be found with the provision of Punjab electricity (Duty) Act, 2002 nor it could be held that Punjab legislative Assembly lacked competence to frame law for the reasons aforementioned this petition fails and the same is dismissed.

The items of this list may be grouped as follows<sup>304</sup>:-

(a) Law and Order and Justice :

The relevant entries are 1 to 40 and 64-65. These entries run as follows :

(i) Public order (but not including the use of naval, military or air force or any other armed forces of the Union in aid of the civil powers) : Public order is a very wide term enough to cover all disturbances. Public order means state of tranquility in the state.<sup>305</sup>

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301. AIR (2009) 9 SCC 551.

302. M.P. Jain, *Indian Constitutional Law*, 2011, Sixth Edition, p. 549

303. AIR 2010 Punjab & Haryana 121.

304. M.P. Jain, *Indian Constitutional Law*, p. 284

305. *Thapper v. State of Andhra Pradesh*, AIR 1950, SC 214.

- (2) Police, (including railway and village police) subject to the provision of entry 2A of list I : - The word 'police' includes provisional armed constabulary. Article 257 (3) empowers centre to given directions for protection of railways:
- (3) Officers and servants of the High court; procedure in rent and revenue counts; fees taken in all courts except the Supreme Court.
- (4) Prisons, reformatories, Borstal Institutions and other institutions of a like nature, and persons detained therein; arrangements with other states for the one of prisons and other institutions.
- (64) Offences against laws with respect to any of the matters in list II.
- (65) Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list.
- (a) *Health, Legal Government, Relief of disabled etc. : The entries related to social welfare of the state run as follows :*
- (5) Local Government, that is to say, the Constitution and powers of Municipal Corporations, Improvement Trusts, District Boards, sinning settlement authorities and other local authorities for the purpose of local self government or village administration:- The Village Panchayat Acts which set up criminal courts are valid under this entry.
- (6) Public Health and Sanitations; hospitals and dispensaries: This entry gives very wide powers to state to regulates various aspects of life on he basis of public health and sanitation.
- (9) Relief of the disabled and unemployed.
- (10) Buriala and burial grounds; and cremation grounds.
- (b) *Education :*
- Education is the responsibility of the state. The entries grouped under this head relate to education. (Subject to what has been enumerated is List I). These entries run as follows: -*
- (11) Omitted by section 57 of constitutions. (42<sup>nd</sup> Amendment) Act, 1976.
- (12) Libraries, museum and other similar institutions controlled or financed by the state; ancient and historical monuments and records other than those declared by or under law made by parliament to be of national importance.
- (c) *Communication:*
- The area of communication has been divided between the centre and the states. The entry 13 runs as follows:*

- (13) Communication, that is to say, roads, bridges, ferries, and other means of communication not specified in list I; municipal tramways; ropeways; Leland waterways and traffic thereon subject to the provisions of list I and List III with regard to such waterways; other than mechanically propelled.

(d) *Land and Agricultures*

*The relevant entries 14 to 18, 21 runs as follows :*

- (14) Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
- (15) Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.
- (16) Founds and prevention of cattle treaspane.
- (17) Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water powers subject to the provisions of entry 56 of list I.
- (18) Land, that is to any, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents ; transfer and alienation of agricultural land, land improvement and agricultural land, land improvement and agricultural loans; colonization:- The word 'Land' is used in very wide tense and includes not only agricultural lands but any type of land.
- (19) Omitted by Constitution (42<sup>nd</sup> Amendment) Act, 1976, Section 57.
- (20) Omitted by Constitution (42<sup>nd</sup> Amendment) Act 1976, Section 57.

(e) *Trade, Commerce, Industry :*

*The affairs relating to trade, commerce and industry taking place within the state are dealt under this land. The relevant entries are : -*

- (23) Regulation of mines and mineral development subject to the provisions of list I with respect to regulation and development under the control of the Union: This entry is subject to entries 54 and 55 of List I.
- (24) Industries subject to the provisions of entries 7 and 52 of List I.
- (25) Gas and Gas-works.
- (26) Trade and commerce within the state subject to the provisions of entry 33 of list III :- This entry confers a wide powers to the state to regulate interstate trade and commerce.
- (27) Production, supply and distribution of goods subject to the provision of entry 33 of list III.

- (28) Forests and fairs.
- (29) Omitted by the Constitution (42<sup>nd</sup> Amendment) Act, 1976, Section 57.
- (30) Money lending and money lenders; relief of agricultural indebtedness.
- (31) Inn and Inn-keepers.
- (32) Incorporation, regulation and winding up of corporation other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associating; cooperative societies.

(G) *State Property :*

*The relevant entry is 35.*

- (35) Works, lands, and building vested in or in the possession of the state.

(f) Entertainments and Intoxicants

The state has powers to regulate, control or prohibit the use of intoxicants. The relevant entry 8 runs as follows:-

- (8) Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of liquor : - This entry has served as the basis of the present Janta Government's programme of liquor prohibition.

The entries pertaining to entertainment affairs are : -

- (33) Theatres and dramatic performance : cinema subject to the provisions of entry 60 of list I; sports.
- (34) Betting and gambling.
- (g) Elections and Legislative Privileges :  
Entries relating to this category are : -
- (37) Elections to the legislative of the state subject to the provisions of any law made by parliament.
- (38) Salaries and allowances of members of the legislature of the state, of the speaker and Deputy Speaker of the legislative assembly and, if there is a legislative council, of chairman and Deputy Chairman thereof.
- (39) Powers, Privileges and Immunities of the legislative assembly and of the members of committees thereof, and, if there is a legislative council, of the council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committee of the legislature of the state.
- (40) Salaries and allowances of ministers of the state.

*(h) State Public Services*

*The relevant entries pertaining to this head are :-*

- (41) State Public Services ; State Public Services Commission.
- (42) State pensions, that is to any, pensions payable by the state or out of consolidated fund of the state.
- (i) Finance and Taxation*

*(43) Public debt of the state.*

Several entries 43 to 63 and 66 deal with the taxing powers of state government.

*(j) Miscellaneous :*

*Some of the entries which cannot be grouped under aforesaid heads are kept under this ominous head. These entries are as follows:*

- (7) Pilgrimages, other than pilgrimages to places outside India.
- (22) Courts of wards subject to the provisions of entry 34 of list I; encountered and attached estates.
- (44) Treasury.

In the case *State of Kerala & Others v. People Union for Civil Liberties, Kerala State Unit and Others*<sup>306</sup> court held that State has no Legislative competence to enact a legislation in terms of Entry No.49, List II of the Seventh Schedule of the Constitution in relation to non-agricultural land — It exists only in terms of Entry 6, List III of the Seventh Schedule of the Constitution.

**4.3.3 The Concurrent List**

List III gives concurrent powers to union and states legislation over 52 items such as criminal law and procedure, civil procedure, marriage, contracts, torts, welfare of labour, economic and social planning and education.

List III known as concurrent List, is discussed in the next part of this chapter contains 52 entries for concurrent law making by both the Centre and the States. (The State are competent to legislate with respect to matters in this List, subject to the rule of repugnancy contained in Art. 254<sup>307</sup>. The rationale underlying the Concurrent List is that there may be certain matters which are neither of exclusively national interest, nor of purely State or local concern. These matters are such that both the Centre and

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306. 2009 (6) SCJ 267.

307. For discussion on Art. 254. See Entry 8 of II list of the 7 schedule.

the States may have common interest therein. In *Srinivas Enterprises v. Union of India*.<sup>308</sup> In this case the Court held that the Prize chits have an element of chance of the draw of lot to choose the successful bidder. There is an element of draw of luck in such chits. Nevertheless, a law banning prize chits has been held to fall under this head as dealing with a special species of contracts with sinister features and it does not fall under entry 34 List II.

An Act to regulate the administration of public religious and charitable trust would fall within entry 28 read with entry 10.<sup>309</sup> In case the trust is incorporated, it would fall under entries 43 and 44 of List I (if extending to more than one States), or entry 32 of List II if extending to one State only.<sup>310</sup> As a matter of abundant caution, certain matters are included in the Union List with a view to avoid tensions and disputes among the States. Such areas include inter-State rivers and river valleys, interstate migration and quarantine. Similarly, as a matter of great caution, Union List 7 entries (i.e. 1 to 7 entries) relating to defence and 12 entries (i.e. 10 to 21 entries) to foreign affairs. In other federations, only one entry is found about each of these matters but in India it has been ensured beyond doubt that the Centre has complete jurisdiction over all aspects of these matter including to make any law to implement any treaty. This has been done to avoid any difficulty of the type as has arisen for the Central Government in Canada in this area.

Under entry 2 Naval, Military and air forces; any other armed forces of the Union. The last word in the entry refer to armed forces other than the regular army, like the Assam rifles or the Central Reserve Police Force, the Border Security Force, the Central Industrial Security Force etc.<sup>311</sup> The Army Act has been enacted under this entry.<sup>312</sup> Under entries 9 and 10, Parliament can enact a law providing for preventive detention of a foreigner with a view to making arrangements for his expulsion from India, as this matter falls under foreign affairs.<sup>313</sup>

There are also certain heads of legislation which at the first instance belong exclusively to the States may become the subject of exclusive concern of the Centre if an appropriate declaration is made by the Parliament Industries are primarily assigned

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308. *AIR 1981 SC 504 : (1980) 4 SCC 507.*

309. *Servants of India Society v. Charity Commr, AIR 1962 Bom. 12*

310. *The Tibba College Case, AIR 1962 SC 458*

311. *Akhilesh Prashad v. Union Territory of Mizoram, AIR 1981 SC 806 (1981) 2 SCC 150.*

312. *Prithipal Singh v. Union of India, AIR 1982 SC 1413 (1982) 3 SCC 140.*

313. *Hans Muller v. Supdt. Presidency Jail, Calcutta, AIR 1955 SC 367 (1955) 1 SCR 1284.*

to the States<sup>314</sup> but entry 52 of List I States that the industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest are to be dealt with by Parliamentary legislation.<sup>315</sup> Thus the Centre can take under its control any industry as entry 52 is very flexible. It has exercised this powers by bringing under its regulation a number of industries through the Industries (Development and Regulation) Act, 1951. A noted authority on the Constitution of India N.A. Palkhivala, has argued<sup>316</sup> that while the Industries (Development and Regulation) Act was legitimate and reasonable exercise of legislative powers by Parliament, its actual use had effect of subverting the Constitution.

The States legislative powers, on the other hand, though not so broad as those of the Centre are, nevertheless, significant and touch the people perhaps more intimately. They have to maintain law and order. Thus, the so-called 'sovereignty' of the States is the sovereignty of the enumerated powers which find articulation in the State List entries and their judicial interpretation and construction. The wide range of powers in the Union List has made the Centre considerably strong over the States and that has proved a controversy ever since the Constitution was inaugurated. The Seventh Schedule was one of the principal targets of attack in the Report of Centre-State Relations Inquiry Committee appointed by the Government of Tamil Nadu. The Committee, representing a State point of view, recommended to the State List.<sup>317</sup>

According to the Chief Justice, Mr. Chandra Chud<sup>318</sup>, history holds a lesson that a weak and strife-torn Centre makes non sense of the federal concept. He said, the world's federal history taught the lesson that federalism and the high ideas that went with it became an empty dream if the Centre was weak. The casualty was the common man's welfare.

This list brings flexibility in the legislative relations between the centre and the states. For convenient study, the list can be broadly arranged in following groups:-

- (a) *Basic Laws : The first fourteen entries are related to basic laws of the land. These include both procedural and substantive laws. It is interesting to note*

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314. List II, entry 24.

315. The Industries (Development and Regulation) Act, was enacted by the Parliament after such a declaration.

316. Symposium on should we change our constitution? The illustrated weekly of India, March 17, 1974, p.25

317. Union list entries suggested to be transferred to the State list are : 40, 48, 53, 54, 55, 67, 76, 84.

318. See Press Report, Times of India, Dec. 18, 1978, p. 2.

*that India has achieved uniformity in certain basic laws maintaining its federal character. These entries run as follows :*

- (1) Criminal law including all matters included in Indian Penal Code at the commencement of the constitution but excluding offences against laws with respect to any of the matters in list I or list II and including the naval, military or air forces or any other armed forces of the Union in aid of the Civil powers.
- (2) Criminal procedure, including all matters included in the code of Criminal Procedure at the commencement of the Constitution.
- (3) Preventive detention for reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community; subjected to such detention.
- (4) Removal from one state to another state of prisoners, accused persons and persons subjected to protective detention for reasons specified in entry 3 of this list.
- (5) Marriage and Divorce; infants and adoption; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal laws: under this entry the states are competent to modify the personal laws of Hindu and Muslim.
- (6) Transfer of property other than agricultural land; registration of deeds and documents.
- (7) Contracts, including partnership, agency, contracts of marriage and other special forms of contracts, but not including contracts relating to agricultural land.
- (8) Actionable wrongs : - This entry may be regarded as referring to torts.
- (9) Bankruptcy and insolvency.
- (10) Trust and Trustees.
- (11) Administrator – general and official trustees.
- (11)A. Administration of justice; constitution and organisation of all courts except Supreme Court and High Courts.<sup>319</sup>
- (12) Evidence and others : recognition of laws, public acts and records, and judicial proceedings.

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319. *Introduced by constitution (42nd Amendment) Act, 1976, section 57.*

(13) Civil procedure, including all matters included in the code of civil procedure at the commencement of this constitution, limitation and arbitration:-  
Legislation regulating landlord- tenant relationship in houses and buildings does not fall under entry 18 of list II. <sup>320</sup>

(14) Contempt of Court, but not including contempt of the Supreme Court.

*Public Welfare : Few entries relating to public welfare fall under this head. These entries run as follows: -*

(15) Vagrancy: Nomadic and migratory tribes.

(16) Lunacy and Mental deficiency including places for reception or treatment of lunatics and mental deficiencies.

(17) Prevention of cruelty to animals.

(17a) Forests. <sup>321</sup>

(17b) Protection of wild animals and birds. <sup>322</sup>

(16) and mental deficiency including places for treatment for lunatics and mental deficiencies.

(17) Prevention of cruelty to animals.

(17a) Forests<sup>323</sup>

(17b) Protection of wild animals and birds<sup>324</sup>.

(18) Adulteration of foodstuffs and other foods.

(19) Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.

(23) Social security and social insurance; employment and unemployment.

(27) Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominion of India and Pakistan.

(29) Prevention of extension from one State to another of infections and contagious diseases or pests affecting men, animals or plants.

(30) Vital statistics including registration of births and deaths.

*(b) Labour :- This List contains certain aspects of labour, like trade unions, training of labour and labour welfare. The relevant entries are : -*

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320. AIR 1954, Pat. 97.

323. Inserted by Constitution(42nd Amendment) 1976, Section 57

324. Ibid.

- (22) Trade unions; industrial and labour disputes.
- (24) Welfare of labour including conditions of work, provident fund, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits :- The Minimum Wages not falls under this entry. The Industrial Disputes Act is justified under both entries 22 and 24.<sup>325</sup>
- (25) Education, including technical education, medical education and universities, subject to the provisions of the entries 63,64 and 66 of List I ; vocational and technical training of labour: - Instituted by Constitution(42<sup>nd</sup> Amendment) Act 1976, Section 57.
- (c) *Economic Power and Planning* : -  
*The relevant entries are:-*
- (20) Economic and social Planning : This entry is very vague and controversial. It would be wise for the Courts to interpret this entry neither broadly nor narrowly but to attempt to strike a balance.
- (20 a) Population control and family planning.<sup>326</sup>
- (21) Commercial and Industrial monopolies, combines and trusts: - Both the State and Central government are , under this entry, to create monopoly in respect of any commercial or industrial venture.
- (33) Trade and Commerce in, and the production, supply and distribution of, - (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to expedient in the public interest, and imported goods of the same kinds and such products ; (b) foodstuffs, including edible oil needs (c) cattle fodder, including and other concentrates; (d) raw cotton, whether ,cotton seeds (e) raw jute :- The Centre has passed, under this entry, the Essential Commodities Act, 1955. The scope of this entry is very wide. Wheat, wheat products, sugar and sugarcane are included in the food stuffs.<sup>327</sup>
- (33a) Weights and measures except establishment of standards.<sup>328</sup>
- (34) Price Control.
- (36) Factories
- (37) Boilers.

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325. *Nirmala Textiles v. The Second Punjab Tr.* AIR 1957 SC 329.

326. *Inserted by Constitution(42nd Amendment) Act 1976, Section 57.*

327. *Nathuni v. State of West Bengal* AIR 1964 Cal. 279.

328. *Inserted by Constitution (42nd Amendment) Act 1976, Section 57.*

(38) Electricity.

(d) *Communications* : - *Certain kinds of means of communication like ports, shipping etc. falls within this list. The relevant entries run as follows:-*

(31) Ports other than declared by or under law made by Parliament or existing law to be major ports:- The major ports which are dealt in entry 27 List I do not fall under this entry.

(32) Shipping and navigation on inland waterways mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

(35) Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be divide

(e) MISCELLANEOUS :- Few entries which defines above classification are given below :-

(26) Legal, medical and other professions

(28) Charities and charitable institutions, charitable and religious endowments and religious institutions.

(39) News papers, books and printing presses.

(40) Archaeological sites and other than those declared by Parliament by law to be of national importance.

(41) Custody, management and disposal of property(including agricultural land) declared by law to be evacuee property.

(42) Acquisition and requisitioning of property: -

This entry is vague. As acquisition implies even “deprivation”

(43) Recovery in a state of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that state.

(45) Enquiries and statistics for the purposes of any of the matters specified in List 2 or List 3 :-

Parliament is empowered to make a law to inquire into the matters of State List, although it legislate on the topics given in the State List.

(46) Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list.

(47) Fees in respect of any of the matters in this list, but not including fees taken in any court.

The number of items included in concurrent list was small in earlier Constitutions<sup>329</sup> but in the Constitution of India there are 52<sup>330</sup> such items. These matters have been placed in the Concurrent List so that a uniform texture and framework of laws may be maintained throughout the country. The Centre being given powers to enact normative legislation and lay down general standards while the units are left with powers to apply such standard in the light of varying local conditions and circumstances.

It was felt that a large list of concurrent heads of legislation was calculated to promote harmony between the Centre and the States and to avoid possibility of the conflicts which would have arisen if there had been only a two—fold division of the subject- matters of legislation.<sup>331</sup>

The fifty two entries of the Concurrent List fall into two groups. The first group is made of the general law and procedure, civil procedure, evidence, marriage, divorce, property law, contracts, etc. The other group includes subjects related to economic and social planning. It includes, *inter alia*, social welfare, trade Unions, social security, vocational and technical training of labour, legal, medical and other profession, price control, acquisition and requisition of property.<sup>332</sup>

The Legislature, under this entry, can modify the personal laws, such as, Hindu Law or Muslim LaJ<sup>333</sup>. Parliament can enact a law, under this entry, to deal with matters of will, intestacy and succession of agricultural property in spite of its tendering upon entry 18, List II, eg., S. 14 of the Hindu Succession Act.<sup>334</sup> A different opinion has been expressed by the Rajasthan High Court which has ruled that S. 22 of the Hindu Succession Act does not apply to agricultural land as entry 6 takes (reading entries 5 and 6 together) such land out of the purview of entry.<sup>335</sup> The

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329. *Concurrent Powers in Canada.*

330. *See Seventh Schedule – List III of Indian Constitution.*

331. *C.A.D. XI, 838; Sir Alladi Krishnaswami Ayyer.*

332. *Chandar Pal, Centre State Relation and Cooperative federalism, p. 71*

333. *Ameerunissa v. Mehboob, AIR 1953 SC 91: 1953 SCR 404.*

334. *Shakuntala v. Beni Mahhav, AIR 1964 All. 165.*

335. *Jeewanram v. Lichmadevi, AIR 1981 Raj. 16.*

word 'transfer of property' are wider than the meaning given to them in the transfer of Property act.<sup>336</sup>

As both the Parliament and the State Legislatures are competent to legislate on any matter enumerated in the concurrent List, and no question of legislative competence would arise. But in case of any inconsistency between any provision of the Union law and that of a State law, the later shall be void to the extent of repugnancy.<sup>337</sup> The other view is that Article 254 (1) is not to be restricted to repugnancy in the concurrent field alone. It applies equally also to cases of repugnancy between the Union law and State law in different Lists.<sup>338</sup> Some other writer<sup>339</sup> is of the view that the First view limiting repugnancy to matters of Concurrent List. alone is correct because it is more in consonance with the scheme of division of legislative powers between the Union and States as laid down in Article 246.

When can a State legislation be said to be repugnant to Union legislation? In *Deep Chand v. State of U.P.*,<sup>340</sup> the Supreme Court set forth three classic situations in which repugnancy may arise.

First, where there is direct conflict between two provisions. There may be express inconsistency in the actual terms of the State legislation so that one cannot be obeyed without disobeying the other.<sup>341</sup> It may also arise where both legislations operate in the same field and the two cannot possibly exist together, e.g., where both prescribe punishment for the same offence but the punishment differs in kind. In such situations, the Central law prevails over the State law.

Second, though there may be no direct conflict, a State law may be repugnant to a Central law which is intended to be a complete and exhaustive code. If a Parliamentary law expressly or impliedly intends to cover the whole field, any State action in that field is necessarily inconsistent with the Parliamentary law. The intention to cover the whole field could be seen from the terms, nature and the subject matter of a Parliamentary law.

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336. *M.P. Jain Indian Constitutional Law, 2011, Sixth Edition.*

337. *Article 251 (1)*

338. *M.P. Jain, Indian Constitutional Law, 1962, pp. 254-55*

339. *Alice Jacob, 'Centre State Governmental Relation in India Federal System', S.N. Jain and others (ed.).*

340. *AIR 1959 SC 648*

341. *Sarathy v. State of Madras, A.I.R. 1951 Mad. 191.*

*Subhash Basu v. State of A.P. & Ans.*<sup>342</sup> The Court held that where a law made by the legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provisions of an earlier law made with respect to that matter then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, Prevail in that Statl. Prvided that nothing in this clause shall prevent Parliament from enacting a law adding to, amending, verying or repealin the law made by the Legislature of the State.

Third, repuancy can arise when the law made by Parliament and the law made by State Legislature involve conflicting policies in the same general area. *Deep Chand v. State of U.P.*<sup>343</sup> provides an illustration of this principle. The U.P. Legislature had enacted the U.P. Transport Services (Development) Act, 1955, which authorized the State Government control of Motor transport.

Subsequently, the Parliament amended the motor vehicles Act, 1939 to introduce a uniform law on State control of motor transport. The amendment enabled the State governments to frame and execute schemes of State controls of motor transport. The issue was whether the State law was repugnant to the Parliamentary amendment. The Supreme Court on comparing the provisions of both the Acts found that they were intended to operate in respect of the same subject-matter in the same field. Hence, it was held that the State law was repugnant to Central law, and therefore, void to the extent of repugnancy.<sup>344</sup>

However, the general rule ensuring supremacy of Union laws in case of repugnancy between Union and State laws is subject to an exception in clause (2) of Article 254. If the president assents to a State law which has been reserved for his consideration, it will prevail in spite of its repugnancy of an earlier law of the Union. However, the supremacy of the State law which received assent will be only temporary.<sup>345</sup>

*K. T. Plantation Pvt. Ltd., & Anr. v. State of Karnataka.*<sup>346</sup> The court held that when the repugnancy between the Centre and State legislation is pleaded we have to first examine whether the two legislations cover or relate to the same subject matters.

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342. AIR 2011 SC 3031

343. AIR 1959 SC 648.

344. *Tika Ramji v. State of U.P.*, A.I.R. 1956 S.C. 676.

345. *Chandrpal, Centre State Relation and Cooperative Federalism*, p. 81.

346. AIR 2011 SC 3430

The test for determining the same is to find out the dominant intention of the two legislations is different, they cover different subject- matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover legislation to give effect to its dominant purpose may does not bring about the repugnancy which is intended to be covered by Art. 252(2). In other words, both the legislations must be substantially on the same subject to attract Art. 254.

According to the Sarkaria Commission the need for Central legislation may arise for the following reasons.<sup>347</sup>

1. Need to secure uniformity in regard to main principles of law throughout the country in the interests of the nation.
2. The subject matter of legislation may have interstate, national and even international, aspects and the 'mischief emanating 'in a State may have impact it beyond its territorial limits.
3. It may be important to safeguard a Fundamental Right, or secure implementation of a constitutional directive.
4. Co-ordination may be necessary between the Union and the States, and among the States, as may be necessary for certain regulatory, preventive or developmental purposes, or to secure certain national objective.

When Parliament makes a law on a matter in a concurrent list, there is a corresponding attenuation in the legislative powers of the States because a State law repugnant to a Central law is invalid. However, subject to any law made by Parliament with respect to any matter in List III, the State Legislature can also make a law in relation to the matter. India is a federal country but, unlike other federations, a great amount of uniformity in the basic laws has been achieved over a period of time.

<sup>348</sup> The first fourteen entries relate to the basic procedural and substantive law and administration of justice.<sup>349</sup>

#### **4.4 Supremacy of Parliament in Certain Spheres**

Usually, the distribution of powers in a federation between the Centre and the State is rigid, as the balance drawn between them cannot be changed unilaterally by any one of them. The process of constitutional amendment is also rigid and is not capable of being effectuated easily. Gradual adjustments in the balance of powers is

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347. *Report of the Sarkaria Commission, 65.*

348. *Jain, Outlines of Indian Legal History, Ch S. XXII – XXV (1990).*

349. *M.P. Jain, Indian Constitutional law, Sixth Edition, p. 559-560.*

effected by the process of judicial interpretation, but there are certain exceptional times when it fails to make the needed adjustment to meet the situations at hand. In *Ram Manohar Lohia v. State of Bihar*<sup>350</sup>, a case on preventive detention, the Supreme Court distinguished between ‘public order’ and ‘law and order’, and held the latter to be broader than the former. The scheme of Centre — State distribution of powers which introduce an element of flexibility in an inherently rigid federal structure.

Federalism suffered from the defect of rigidity. There is a rigid distribution of powers fixed by the Constitution. Sometimes, the cooperation between the two governments is essential, but no government is competent to disturb the scheme of distribution of powers. Either judicial interpretation or Constitutional amendment are possible ways for solving the problem. A rigid scheme of distribution of powers may be appropriate in the context of the times when the Constitution is adopted, but as circumstances and needs of the country are always changing, the scheme may require adjustment in powers and problems which are a law of any part of ‘territory of India’. In *Re Berubari Union case*<sup>351</sup>, the Supreme Court accepted in principle that for the award of ascertainment of disputed boundaries, there is no need of any legislation for it is an executive act. But of any part of any territory of India, the amendment of the Constitution is essential, what to talk of only ordinary legislation.

But *Ram Jawaya v. State of Punjab*<sup>352</sup> goes further in asserting the necessity of passing of a law even if there is no ‘cessation matter’ involved. The case followed the position of England in this regard. In England, private rights are not to be affected via treaty or executive action by way of its implementation unless there is an Act of Parliament to that effect.<sup>353</sup>

In the U.S.A. Article 6 of the Constitution lays down, “..... All treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. The Income Tax Act, 1961 were upheld within the competence of Parliament by virtue of entry 97 of List I. However, Hidayatullah, J. maintained that before taxing recourse to entry 97 of List I it must be seen that whether impugned provisions would be

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350. *AIR 1966 SC 740 : (1966) 1 SCR 709.*

351. *1960, 3 S.C.R. 250*

352. *1955, 2 S.C.R. 225*

353. *Walker v. Baird (1892) A.C. 491, quoted in Basu's commentary on Constitution of India, 5th ed. Vol. 4, p. 194.*

sustained under any entry of 3 lists. He meant by the three lists which excludes entry 97 of list 1. but the most important and complicated problem is – whether the scope and extent of Article 48 should be identified with that of entry 97 of list 1. This problem was discussed in *Union of India vs. B.S.Dhillon*<sup>354</sup>, which involved the vires of the definition of act wealth in the Wealth Tax Act of 1952 as amended by the Finance Act of 1969. The residuary powers are conferred exclusively on Parliament by virtue of Article 248. The ambit and scope of Article 248 is distinct and separate from that of Article 246(1) read with List I. Otherwise 248 would have become more superfluous appendage because entry 97 of List I could have covered the area of residuary powers. “It is submitted that the fallacy lies in reading entry 97 of List I with Article 248 and not with Article 246(1) as is the case with other entries, that is entries 1-96 of the same list. In other words, entry 97 is just one entry amongst 97 enumerates in List I<sup>355</sup>. Therefore, Article 248 should include those matters which are not mentioned in any of the three lists. Thus entry 97 of List I indicates only the subject matter, whereas Article 248 is an enabling provision.

#### 4.4.1 Superiority of Union List

As it is already discussed that article 246 divides the legislative powers which is based on subject matters enlisted in three list of the seventh schedule of the constitution. It has also been mentioned that Parliament has exclusive powers to make laws with respect to any matters enumerated in list (i.e. union list) in the seventh schedule.<sup>356</sup>

But as far as importance of these three lists (i.e. Union list, state list, and concurrent list) are concerned the union list dominate among the three; This domination is not only due the number of entries (97 entries in the union list) but also due to the nature of subjects which has been included in the union list. These subjects fare very vital for the governance of the country. The subjects which are of the national are very vital for the governance of the country. The subject which are of the national importance, like difence, finance and communication etc. have enlisted in the union list. On the question that which subject should be kept under the union list or under any other list, M.P. Jain has observed as follows:

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354. (1971) 2 S.C.C. 779.

355. V.N. Shukla, *the Constitution of India*,(1975), p.426.

356. *Article 246 Constitution of India*.

Usually certain powers are allotted exclusively to the centre; certain powers are exclusively allotted to the units, and there may be a common or concurrent area for both to operate simultaneously. A basic test applied to decide what subjects should be allowed to the one or other level of government is that the function of national importance should go to the centre, and those of local interest should go to the units. This test is very general a sort of adhoc formula, and doesn't lead to any uniform pattern to the allocation of powers and functions between the two tiers of government in all federal countries.<sup>357</sup>

The scheme of division of powers depend Upon the polity of every country and it always varies that what subjects are of the national importance and what issues are of local or regional importance. In India framers of the constitution wanted that there should be a strong central government, which can maintain the unity and integrity of nascent democracy. Their wishes reflect in the various provisions of the constitution and seventh schedule is not an exception to the rule. There seems every effort to include more subject in the list 1. More subjects in the union list means more powers to the centre.

Architects of the constitution made every attempt to draw such an exhaustive list so that there should be no overlapping among the three lists. They also took care to avoid any conflict of jurisdiction but there is always a chance of human error of unforeseen situation. Here arises the problem of inter-relationship between the three lists. To, avoid any conflict, article 246 provides for the predominance of the union list over the other the other two lists. In case of overlapping between and entry in union list and an entry in the state list, law made by the union government shall stand to the extent o overlapping, if the subject matter falls exclusively within the union jurisdiction and then state can not legislate on it. In case of any overlapping between an entry in the concurrent list and the union list the latter prevails over the former and the subject matter is treated as exclusively for the centre. It appears that in Indian constitution, the union government has been given wider powers vis-a-vis and to the state government as compared to any government as compared to any government in the world as justice E.S. Venkataramiah and M.P. Singh observed as follows:

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357. *M.P. Jain, Indian Constitution Law, at 242 (1999).*

Through the wide powers of the parliament have not always been free from the adverse criticism no serious effort has ever been made to curtail them. On the contrary, through subsequent amendment the powers of the parliament have been further enlarged by transference of some of the subjects from the state list to the concurrent list.<sup>358</sup>

In the era of globalisations some Centre protagonists demand that more subject matter be included in union list to fare the challenge posed by the new phenomenon of globalization and liberal economic policy. It is well established that union lists is sulêrior among three list but it doesn't mean that it will overtake the other list, whenever even a slight conflict or overlapping appears. Superiority of union list does not give blank cheques to hit at the heart of federal principle, that is the principle of sharing of powers and independence from mutual control. The non-obstante clause is the ultimate rule which is to be invoked only as a last resort, in case of inevitable or irreconcilable conflict between the lists.<sup>359</sup> Court always tries to reconcile the conflict and avoid overlapping by applying; all the reasonable facts.

It was held in case of *K.S.E. Board v. Indian Aluminum Co.*<sup>360</sup> that if indeed, a reconciliation between the conflicting entries should prove impossible, then, and only then the non-obstante clause it invoked to give primacy to the federal powers over the state concurrent powers.

It was further observed that the non-obstante clause ought to be regarded as, the last recourse, a witness to the imperfections of the human expression and the fallibility of the legal draftsmanship.<sup>361</sup>

Although a strict and rigid interpretation of article 246 may lead to somewhere else that reconciliation between the two conflicting entries of any two different list is not possible. Because article 246 provides that there is clear cut demarcation of jurisdiction that union list is exclusively for the union, and state is exclusively for the state. If one go by this definition an overlapping is not possible consequently there is no question of reconciliation. But rejecting such contentions, federal court in C.P.

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358. *Justice E.S. Venkataramiah and Prof. M.P. Singh in "Distribution of Legislative powers between centre and States" in Hidayatullah (Ed.) Constitution Law of India, 222-305 at 233.*

359. *M.P. Jain, Indian Constitution Law, at 266 (1999).*

360. *AIR 1976 SC 1031*

361. *M.P. Jain, Indian Constitution Law at 266 (1999).*

Berar Case<sup>362</sup> under sec 100 of the government of India Act. 1935, uphold the validity of the C.P. Berar Act 1938. Section 100 of the government of India Act is the predecessor of article 246 of the constitution of India. In the above case question was whether tax on sale of motor sprit was a sale within Entry 48 of provincial list or duty of excise within entry 45 of the federal list. The court held that duty of excise could be interpreted to include sales tax and thus exclude the jurisdiction of the provincial legislature to impose sale tax later on supreme court in case of *State of Bombay. v. Balsora*<sup>363</sup> following the Berar Act case resolved a coefficient between entry 31 of the list II of the government of India Act, 1935, Possession- and sales of intoxicating liquors” with entry 19 of list I - Important by giving liberal construction to the former that included the powers to prohibit possession and sale of liquors absolutely while the latter was confined to import minus possession and sale after such import.

Similarly in *Ishwari Khetan Mills v. Uttar Pradesh*<sup>364</sup> the apex court held that although sugar being centrally controlled industry under entry 52 list I the state of Uttar Pradesh can pass legislation acquiring some sugar mills and merging them in the state sugar corporation. The court observed that when a declaration is made in respect of an industry under entry 52, lists Industry as a whole is not taken out of the purview of entry 24, list II, but only to the extent of the declaration. To demarcate the powers of the state legislature, the scope of the declaration of the centre ought to be assessed, as that will indicate the extent of control assumed by the Centre. The extent of central control over sugar is contained in the Industries Development and Regulation Act. To the extent the union government has taken control over sugar industry under the said Act, the state legislature is deprived of its right to frame law under entry 24, but not beyond that commenting upon the interrelation between the entry 52, list I and entry 24 list II, the supreme court clarified that legislative powers of the states under entry 24, list II, is eroded only to the extent of control is assumed by the union pursuant to a declaration made by parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion.

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362. AIR 1939 PC 1

363. AIR 1951 SC 662

364. AIR 1980 SC 1955

Upholding the supremacy of the union list the supreme court in case of *Hoechst v. State of Bihar*<sup>365</sup> held that if any matter could be brought under an entry in list I as well as in list II or III, the powers of the parliament shall be exclusive and that of the state legislature shall be excluded, in so far as matter is covered by the Entry in list 1.

In a recent case of *State v. Urilli Chosal*<sup>366</sup>. The honourable high court of Calcutta gave a decision upholding the supremacy of union law. In this case police authorities took the action against the petitioner in this case under rule 258 of the West Bengal motor vehicle rules, 1989. Rule 258 lays down the emission standard for Motor vehicles. It may be mentioned at the very outset that the rule 258. Appears to be beyond the powers of the state of west Bengal because section 110 of the Act. As quoted above, it only empowers the, centre government to frame rule with regard to air and sound pollution under section 110 (g) and (h) of the Act. Therefore, apparently it appears that rules 258 framed by the State of West Bengal is beyond its competence.

Similarly in case of *I.T.C.V. Agricultural produce committees*.<sup>367</sup> Supreme court observed that the legislative powers of the parliament in certain area is paramount under the constitution is not in dispute what is in dispute is the limits of those area as judicially defined. Broadly speaking parliamentary paramount is provided for under article 246 and 254 of the constitution. The first three clauses of Article 246 of the constitution relates to the demarcation of legislative powers between the parliament and the state legislatures. The three lists while enumerating in detail the legislative subjects carefully distribute the areas of legislative authority between the parliament (list-I) and the state (list III). The supremacy of the parliament has been provided by, 'the non-obstante clause in article clams in art 246 (1) and the words subject to in article 246 (2) and (3). Therefore under article 246 (1), if any of the entries in the three lists overlap. The entry in list I will prevail<sup>368</sup> Additionally some of the entries in the state list have been made expressly subject to the powers of

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365. *AIR 1983 SC 1019*

366. *AIR 2002 Calcutta 192.*

367. *AIR 2002 SC 920*

368. *M.P. v. Sundaramier & Co. v. State of Andhra Pradesh, AIR 1958 SC 468.*

Parliament to legislate either under list I or under list III. Some of the example of such entries are as given below<sup>369</sup>:

Entry 17 of list II, subject to Entry 56 of List I

Entry 23 of list II, subject to entry 54 of list I

Entry 24 of list II, subject to entry 7 and 52 of list I

Entry 33 of list II, subject to entry 60 of list I

Entry 37 of list II, subject to entry 72 of list I.

All the fore going paras establish it beyond doubt again and again that union list is superior among all the three list and list I of the VII schedule plays a significant role in establishing centre at dominant position in Indian federal polity.

#### **4.4.2 Residuary Power with Parliament**

Deviation from the other traditional federal countries, where residuary powers are conferred on the states, Indian constitution allocates residuary powers in favour of Centre. According to the provision of the constitution.

Parliament had exclusive powers to make any law with respect to any matter not enumerated in the concurrent list or state list.<sup>370</sup>

It is further provided that such powers shall include the powers of making any law imposing a tax not mentioned in either of those lists.<sup>371</sup>

There are some analogous provisions to Article 248 of the Indian Constitution, which deals with the allocation of residuary powers. They are<sup>372</sup>:

- (i) Section 107 of the commonwealth of Australia Constitution Act, (1900)
- (ii) Section 91 of British North America Act, 1867 (Constitution of Canada).
- (iii) The Xth amendment to the constitution of the United states of America.
- (iv) The section 104 of the Government of India Act 1935.

The residuary powers which has been attributed to the centre by the article 248 finds support under entry 97 list I, it reads as any other matter not enumerated in list II, or List III including any tax not mentioned in either of those lists. As Indian constitution is the bulkiest constitution in the world and the architects of this constitution tried their best to enumerate all the possible subject matters into the three exhaustive list.

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369. *D.D. Basu; 'Shorter Constitution of India' at 799 (1996).*

370. *Article 248 (1) of Constitution of India.*

371. *Article 248 (2) of Constitution of India*

372. *Dr. H.K. Sharaey : 'Cases and materials on constitution of India' 375 (1987).*

They put their all effort to provide the best structure (Constitution), just like a mason who at the time of building a house take care of all the requirements of the user and built the house in that manner only, so that even if in future any modification can be carried out easily according to the need. But there is always a chance of human error.

Similarly despite all the efforts no one can visualize all the future exigencies of the government particularly in the age of development and technology. Something, which is unforeseen may happen. In such situation which government will deal with those circumstances, with whom the powers lies to legislate, and other many question may arise. There should be no vacuum in this regard otherwise it may lead to anarchy. A good constitution must respond to such questions, our far sighted fathers of the question smelt it and made a provision related with residuary powers. They allocate this powers to the Centre. Although in the government of India Act 1935, which is the pre decor of the Indian constitution, residuary powers was neither allocated to union nor to the provinces. The Act, provided that, the Governor General may by public notification empowers either the federal legislature or a provincial legislature to enact a law with respect to any matter not enumerated in any of the lists in the seventh schedule to this Act, including a law imposing a tax not mentioned in any such list, mid the executive authority of the federation or of the province, as the case may be, shall extend to the administration of any law so made, unless the Governor- General otherwise directs.<sup>373</sup>

It was further provided that in discharge of his function under this section the Governor General shall act in his discretion.<sup>374</sup>

Above paras indicates that Governor-General was given the full discretion with regard to allocation of residuary powers. He could allocate powers to any of the government from time to time. But after the independence, office of Governor-General was abolished and framers of the constitution realized that the strong central government is the need of the hour. That is why they allocate the residuary powers to the centre. But, while they were allocating this powers in favour of centre, they were very clear in their mind that residuary powers should not be used in a manner so that it may prove a heavy blow to the very concept of federalism in case of *Jaora Sugar*

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373. Section – 104 (1) Government of India Act 1935

374. Section – 104 (2) Government of India Act 1935

*Mills v. Madhya Pradesh*<sup>375</sup> Supreme Court held that Parliament's residuary powers is not to be interpreted so expansively as to whittle down the powers of the state legislature residuary should not be interpreted as to destroy or belittle state To do so would be to affect the federal principal adversely. If there is a competition between an entry in list II and the residuary the former may be given a broad and plentiful interpretation.

Residuary powers should be exercise only when it does not fall in any of the entries in the three lists. It was held in the case of Second Gift-Tax officer *Magalore v. D.H Hazareth*<sup>376</sup> it was held that since the entries are likely to overlap occasionally, it is unusual to examine the pith and substance of the legislation with a view to determine to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding if, however, no entry in any of the three list covers, then it must be regarded as a matter not enumerated in any of the three list. Then it belongs exclusively to the parliament, under entry 97 of the union list as topic of legislation, read with Art 248. However a slightly different view had been taken by the supreme court in case of *Union of India v. Harbhajan Singh Dhillon*<sup>377</sup> with regard to the question of consideration of list with respect to the residuary powers; it was observed by the supreme court that the residuary powers is as, much a powers a powers conferred under Article 246 in respect of a specified item.

The function of article 245(1) read with entries 1-96, list I is to give positive powers to parliament to legislate in respect of these entries object is not to debar parliament from legislating on a matter, even if other provisions of the constitution enable it to do so. Accordingly the word "any other matter" occurring in entry 97 list I entry it can't be interpreted to mean a topic mentioned by way of the exclusion. These words really refer to the matters contained in each of the entries 1 to 96. At any rate, what ever doubts there may be on the interpretation of the entry 97 list I, is removed by the wide terms of Art 248. It is framed in the widest possible terms. On this term the only question to be asked is: is the matter sought to be legislated included in list II or in list III, or is the tax sought to be levied mentioned in list II or .list III? No question has to be asked about list 1. If the answer is in negative then it follows that parliament has powers to make the laws with respect to that matter of tax.

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375. AIR 1966 SC 416, 421

376. AIR 1970 SC 999

377. AIR 1972 SC 1061

If a central Act is challenged that it is beyond the legislative competence of the parliament, it is enough to enquire if it is all law with respect to matters or taxes enumerated in list II, if it is not, no further question arises.

By exercising its residuary powers parliament validated an Act passed by the legislative Assembly of Himachal Pradesh. It was held by supreme court in case of *Jadab Singh v. Himachal Pradesh*<sup>378</sup> Administration 47 that by article 248 parliament has the residuary powers to make laws with respect to any matter not enumerated in the concurrent list or the state list and the legislation seeking to remove the disability of the members of a legislative Assembly of part state arising because of the failure to issue a notification under section 74 of the Representation of the people Act.

From all the forgoing para it is clear that although constitution gives residuary powers to the centre, but centre can use it only for unseen circumstance and not according to its sweet will.

#### **4.5 Union Legislation in the State field**

Federalism means sharing of powers and independence from mutual interference. A clear cut division of powers is the pre-requisite of federal contract, it is understood that union and regional government shall not interfere in to the affairs of each other. As it was observed by M.P. Jain as follows:

Proverbially, federalism has been characterized as a rigid form of government. Constituted as it is of a dual polity, there is a rigid distribution of functions between the centre and the states supported by no less a sanction than that of the constitution. The balance thus drawn between the country and state cant be disturbed by one of them unilaterally. Neither the Centre nor the state can trench upon the jurisdiction assigned to others.<sup>379</sup>

But the framers of the Indian Constitution realized from the experiences of other working federal constitution that a blind following of the traditional, rigid principles of federalism will not, solve the purpose of a country like India. No Doubt there are merits in having federal constitution in a multicultural, multiethnic country like India, but there are disadvantages too. Federalism is like a two edge sword, it can work for you as well as it can work against you. If it grants more powers and autonomy to the units for smooth governance, it also contains seeds of disintegration

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378. *AIR 1960 SC 1008*

379. *M.P. Jain, Indian Constitution Law, at 281 (1999).*

in it. Some times excess of federalism can prove fatal to the federation itself. Rigid constitution is not suitable especially at the time of emergency and urgency.

To deal with these situation some flexibility was required under the provision of constitution itself.

Keeping in view the above reasons the architects of the constitution provided comparatively more flexible constitution. They made sure that in general centre should have more powers and especially at the time of emergency and urgency. When Indian were framing their constitution some few experiment has already been done and some concepts were evolving in the process. One of them was concept of co-operative federalism, which evolved during early 20th century which changed the face of rigid federalism. As it was observed by the M.P. Jain in following words: -

"The constitution of India, however breaks new ground in this respect. It contains several provision to create a mechanism for effecting temporary adjustment in the frame of the distribution of powers and thus introduce an element of flexibility in and otherwise, inherently rigid federal structure, and some of these are not to be found elsewhere. Learning by the difficulties forced in other federation by a too rigid distribution of powers, which often the denied powers to the centre to take effective measures to meet a given situation, the framers of Indian constitution took adequate care to create a federal structure which could be easily moulded to respond to the needs of the situation, without resorting to the tedious and elaborate procedure of amending the constitution."<sup>380</sup>

In other federal constitution any unit of the federation cant alter the provisions of constitution unilaterally. Any change or alteration in the jurisdiction or powers of the union and regional government can be carried out only through the amendments. But in India Central Government can even change the nature of the constitution by altering the provision of the constitution unilaterally. Central Government can legislate on even matters exclusive to the states. Constitutional arrangement for the division of powers under article 246 is subject to other provisions of the constitution. These provisions enable central government to enact central laws in the state field.

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380. *Ibid.*

These laws may be temporary as well as permanent in nature. There may be following circumstances where Centre can legislate for the state.

- (i) Where if it is necessary in national interest (Art. 259).
- (ii) Legislation in case of Emergency (Art. 250).
- (iii) Where there is delegation of powers by two or more states (Art. 250).

#### **I) National Interest**

According to Art. 249, if Rajya Sabha declares, by a resolution supported by two third of the members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws with respect to a matter in the State List specified in the resolution, it becomes lawful for Parliament to make law for the whole or any part of India with respect to that matter so long as the resolution stands. Such a resolution may remain in force for such period as is mentioned therein but not exceeding one year; it can be renewed as many times as may be necessary but not exceeding a year at a time.

The proposal for this Article to incorporated in the Draft Constitution was opposed in the Constitution Assembly as a provision which, in substance, struck at the federal nature of the Constitution. It was apprehended that it would lead gradually to the State powers of legislation being encroached upon by the Union.<sup>381</sup>

It may underlined that there are four in built safeguards against misuse of powers conferred by Art. 249, viz.

1. Parliament can assume jurisdiction to legislate only if two—thirds of the members of the Rajya Sabha present and voting pass the necessary resolution.
2. The resolution must specify the matter enumerated in the State List with respect to which Parliament is being authorized to legislate in the national interest;
3. The resolution passed by the Rajya Sabha remains in force for one year; and
4. The law enacted by Parliament in pursuance of this resolution remains in force only for six months after the resolution ceases to remain in force.

Article 249 provide a simple and quick method to cope with extraordinary situation which temporarily assume national importance. The Article may also be availed of when speed is of the essence of the matter, and it is not considered

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381. *Draft Constitution, pp. 213.2014.*

necessary or expedient to invoke the emergency provisions contained in Arts. 252 and 356. Article 249 has been used so far very sparingly.<sup>382</sup>

(i) Where if it necessary or' expedient in the national interest. Article 249 of constitution provides as follows:

'Notwithstanding anything in the forgoing provisions of this chapter, if the council of the states has declared by resolution supported by not less than two third of the members present and voting that it is necessary or expedient in the national interest that parliament should make law with respect to any matter enumerated in state list specified in the resolution, it shall be lawful for parliament to make laws for the whole or any part of India to that matter while the resolution remains in force.'<sup>383</sup>

Above article suggests that central government can enact a law on the subject enlisted in state list, if the Rajya Sabha pass a resolution supported but not less than 2/3rd of member present and voting, declaring that such a laws required in the 'national interest'. Same was held in case of *State of Karnataka v. Union of India*.<sup>384</sup> It was held the present Article of our constitution empowers the Union parliament to take for legislation by itself any matter enumerated in list II. Same have been observed by D.D. Basu as follows:

Whenever any such resolution is passed, article 246(3) will cease to be a fetter on the powers of the union parliament; to the extent that the resolution goes. This powers is to be distinguished from that conferred by article 250, for under the present article no emergency is necessary for the assumption of the state powers by the parliament. 'National interest' is wide enough to cover any matter which has incidence over the country as a whole distinguished from any particular locality or section of the people.<sup>385</sup>

The idea of central legislation in - state field on the ground of national interest was Originally suggested by the Dr. B.N. Rau who was a eminent member of the constituent Assembly.

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382. *Ibid.*

383. *Article 249 (1) of Constitution of India.*

384. *AIR 1978 SC 68*

385. *D.D. Basu, Shorter Constitution of India, at 802 (1996).*

As. Shiva Rao noted:

B.N. Raus suggestion for a provision to empowers parliament to legislate with respect to any matter in the state list when it assumed national importance was accepted by the drafting Committee in article 226.<sup>386</sup>

The present article 249 of the constitution of India is just a reproduce of B.N. Raus suggestion (Art. 226 of Draft constitution) in constituent Assembly, but the drafting committee omitted the further provision contained in B.N. Raus letter that a resolution passed for this purpose by the council of states could be revoked by a subsequent resolution, also requiring two-third majority.<sup>387</sup> But it must be noted that the clause (2) and '3) of Art 249 of constitution as it exists today, was not present in draft constitution as suggested by Rau. It was included after a vigorous criticism by the protagonist of states right. Dr. Ambedkar moved resolutions for the amendments and the following provisions were added:

- (i) A resolution passed under clause (I) shall remain in force for such period not exceeding one year as may be specified therein: Provided that, if and so often as a resolution approving the continuance in force of any such resolutions is passed in the manner provided in clause (I) such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.<sup>388</sup>
- (ii) A law made by the parliament which parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the in competency, ceases to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.<sup>389</sup>

After reading the article 249 as a whole it is clear that parliament can enact law for the' states or for whole nation only for the short or period, that is only for a year at one time. If parliament wants to extend the life of such legislation, it has to repeat the same procedure as provided under clause (1) of Art. 249. Each time it can extend the life of such legislation only for a year Theoretically it seem possible, but in

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386. B. Shiva Rao (Ed.): *The framing of India's Constitution : A study'* 618 (1968)

387. *Id.*

388. *Id.*

389. *Article 249 (3) of 'Constitution of India'.*

reality any government would hardly adopt, such a tactics for enacting central law for the state by invoking the clause (1) again and again. Thereof, legislation under Art 249 does not mean in any way that it takes away any subject from the state list. States can also legislate on such subject provided state laws shall be null and void to the extent it is in conflict with the central laws.

Although constitution makers tried to strike a balance between the state's right and strong Centre by providing clauses (2) and (3) in the article. 249, so that centre may not use these provisions according to its sweet wills. But there are every chances that centre can use it for suppressing the state or encroaching in to their fields. Especially the term "national interest" is such a wide term that each and every thing can be dragged under it. It contain the seeds of centre- state conflict, which has every potential to take a shape of Banyan tree especially when it is a case involving different parties ruling at the centre and state. As far as the argument that the resolution is to be passed by the Rajya Sabha (Council of states), which is the representative of the state, does not hold good in Indian context. In India the composition of council of state is different than those of the other federal countries. Here states are not equally represented in the council of states. Asok chanda has also criticised this provision and observed that the federal principle however receives a jolt by the prevision made in article 249 of the constitution.<sup>390</sup> He further observed as follows:

Two arguments can be readily adduced against this line of thought first, in a federal constitution no adjustment in the distribution of powers .can be effected even by mutual consent; it has to be only be a constitutional amendment. Secondly the states have unequal representation taken in the council and valuation is considerable. The state of Uttar Pradesh<sup>391</sup> for instance, sends a contingent of 34 against one of the 7 by Assam. A minority of states with large representation, it may well be able to muster the majority necked for the transfer of the subject from the state to union Jurisdiction.<sup>392</sup>

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390. Ashok Chanda, *Federalism in India* at 89.

391. After the creation of state of Uttranchal from state of Uttarpradesh, the number of representative from Uttar Pradesh in Rajaya Sabha are 31, since 3 seats has been allocated to the State of Uttranchal.

392. Ashok Chanda, *Federalism in India* at 90.

In contrast to the Indian constitution, where parliament has the authority to decide what are the National Interests, in Canada where the residuary powers relating more particularly relating to the peace, order, and good governance of Canada, the dominion parliament may legislate on provincials subjects whenever they assume national importance' But the basic difference between the Indian system and Canadian system is that it for the judiciary and not dominion parliament (like in India) to determine finally whether a matter has assumed national importance or not.

However the fact of the matter is that by the provision of article 249 of the constitution central government can enact law on the subject enlisted in state list, when ever it is required in the national interest.

#### **4.5.2 Legislation during the Proclamation of Emergency**

There are provision in the Indian constitution which can cover Indian constitution in to an unitary constitution.

Justice E.S. Venkataramaih and M.P Singh observed that division of powers is antithetical to centralized powers. While in normal, situations division of powers may be good for the better administration of the different regions of a big country like India. In emergency centralized powers is needed to defend and protect the order.<sup>393</sup>

Article 250 (1) provides as under

Not withstanding anything. In this chapter, shall, while a proclamation of emergency is in operation,<sup>394</sup> have powers to make laws for whole or any port of the territory of India with respect to any of the matter enumerated in the state list.

While there is proclamation of emergency in the country, parliament has the full authority to make law on the subject enlisted in the state list, although a proclamation of emergency doesn't suspend the distribution of powers, even at the time of emergency states are entitled to make laws on the state list and concurrent list. The only change in article 250 is that is has capacity to change the state list in the concurrent list. Therefore if any state law which is in conflict with parliamentary law, it shall be null and void up to the extent of repugnancy namely.<sup>395</sup>

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393. *Justice E.S. Venkataramiah and Prof. M.P. Singh in "Distribution of Legislative powers between centre and States" in Hidayatullah (Ed.) Constitution Law of India, 222-305 at 273.*

394. *President of India can issue proclamation of emergency under article 352, if he is satisfied that grave emergency exist where by the security of India or any part of the territory there of is threatened whether by war or external aggression or armed rebellion.*

395. *Article 251 Constitution of India.*

But article 250 is a short term arrangement it changes the nature of the constitution only for a short period as evident from article 250 (2) which provides.

A law made by parliament would not but for the issue of the proclamation of emergency have been competent to make shall, to the extent of its competency, cease to have effect on the expiration of period of six months after the proclamation has ceased to operation, except as respects thing done or omitted to be done before the expiration of the said period.<sup>396</sup>

According to Article 250 while a Proclamation of Emergency is in operation the Parliament shall have powers to make laws for the whole or any part of the territory of India with respect to all matters in the State List such a law, however, shall cease to have effect on the expiration of Six months after the proclamation of emergency has ceased to operate.<sup>397</sup> The Constitution of India envisages three types of emergency.

- (a) First, under Article 352, when the President is satisfied that a grave emergency exists, whereby securing of India or any part of its territory is threatened by external aggression or “armed rebellion”.<sup>398</sup> A declaration to that effect is known as a “Proclamation of Emergency.”<sup>399</sup>
- (b) Secondly, an emergency in the States under Article 356, arises due to the failure of the constitutional machinery in the State or States.
- (c) Thirdly, the financial emergency is contemplated by Article 360. The Constitution also makes a provision for what is called financial emergency.<sup>400</sup> Dr. Ambedkar, while introducing Article 360, justified it on the ground of the then prevalent alarming financial situation in the country, and found its parallel in the National Industrial Recovery Act of the United States in the thirties.<sup>401</sup>

#### **4.5.3 Delegation of Power by two or more State or with the consent of States**

Article 252(1) of the constitution provides that if it appears to the legislature if two or more states to be desirable that any of the matters with respect of which parliament has no powers to make laws for the state except as provided in article 249

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396. Article 250 (2) of Constitution of India.

397. Dr. J.N. Pandey, *Constitutional Law of India, 44th Edition, 2007*

398. Substituted by the Constitution (Forty-Fourth Amendment) Act, 1978.

399. Article 366.

400. Article 360.

401. C.A.D., Vol. IX, p. 361.

and 250 should be regulated in such states by parliament by law, and if resolution to that effect are passed by the house of States, legislature of those states, it shall be lawful for the parliament to pass and for regulating that matter accordingly any Act so passed shall apply to such states and to any other state by which it is adopted afterwards by resolution passed in that behalf by the house or, where there are two houses by each of the House of the legislature of that states.<sup>402</sup>

By a simple reading of the above provision of the constitution it is clear that two or more state can delegate the powers of legislation to the Centre. They can request the Central Government that legislation on a particular subject in these states should be regulated by a parliamentary law.

It was held in a case of *Court of wards v. Commissioner of Wealth Tax*<sup>403</sup> full bench of the Andra Pradesh High court observed that parliament under entry 86 of list I of schedule VII to the constitution of India has no legislative competence in respect of agricultural land unless of course under Art 252 (1) two or more states by a resolution confer that powers.

This article also suggests, that a single state can't delegate its legislative powers to the parliament. It may be debatable issue that why a single state can't delegate its powers in the above manner. One of the reasons for this might be that this article may be mainly aiming at the issues where two or more states are involved, in that situation Centre is expected to play a role of non-partisan arbitrator, Or it was hoped that a central law would be more 'effective in dealing with such an issue. This article has been used few times. For example the state of Bengal and Bihar have authorised parliament to legislate for the setting up of the Damodar valley corporation to control the Damodar river which was cause of constant annual flood. Similarly the prize competition Act 1955 was enacted by the centre to control and regulate the prize competition. Several states passed the resolution to enact the above Act.

It must be noted that for enacting any such central law, there must be a resolution passed by two or more states, it is a precondition under Art 252 (I). But it was held in case of *Union of India v. Basavaih*<sup>404</sup> that the term legislature in Art 252 (1) doesn't include Governor, he needn't to participate in passing resolution in terms of article 252. It should also be noted that any act so passed by the parliament may be

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402. Article 252 (1) of the constitution of India

403. AIR 1969 A.P. 345

404. AIR 1979 SC 1415

amended or repealed by an Act of the parliament passed or adopted in like manner but, shall not as respects any state to which it applies, be amended or repealed by an Act of the legislature of the state.<sup>405</sup>

State legislature can pass resolution with a respect to any particular entry in the state list to the parliament or they may transfer only a distinct and separate part of the state entry. In the former condition, parliament under article 252 (1) would be competent to make a law relating to any subject within that powers, irrespective, of any subject having been mentioned ‘in that resolution’<sup>406</sup> on the other hand, when only a distinct and separate part of a state entry is transferred by the resolution the state legislature, do not, lose their powers to legislate with respect to the rest of that entry.<sup>407</sup>

Although Art 252 has roots in section 103 of the government of India Art. 1935 but there is no such provision in traditional federal constitution like America and Canada, Except in Australia. Article 252 seems to be very close to the Australian model. Section 51 (XXXVII) (of Australian Constitution) authorizes the central parliament to enact laws with respect to matter referred to it by the parliament or parliaments of states. The visible difference is that in Australia Even a single state can refer that particular subject to the dominion( government otherwise Art 252 (1) of the constitution of India is very close to section 51 (XXXVII) of the constitution of Australia in the matter of adoption by the other states (units) of the federation and in its application.

#### **4.5.4 Legislation for Giving Effect to International Agreements**

Article 253 empowers the Parliament to make law for the whole or any of the part of the territory of India for implementing treaties and international agreements. In other words, the normal distribution of powers will not stand in the way of Parliament to pass a law for giving effect to an international obligation even though such law relates to any of the subjects in the State List.

Thus, whatever be the distribution of legislative powers<sup>408</sup> inter se the parallel governments in the country, so far as the outside world is concerned, the whole nation should speak with one voice and without being hampered by any local considerations.

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405. *Article 252 (2) of Constitution of India*

406. *Part –XI and VIIth schedule of Constitution of India.*

407. *Krishanlal v. Land Tribunal, AIR 1993 SC 833.*

408. *Seventh Schedule, List 1, entry 14.*

Really, India has adopted, as a directive principle of State policy,<sup>409</sup> the promotion of international peace and security, and the fostering of the respect for international law and treaty obligation in the dealing of organized people with one another. Thus, the grant of entire legislative powers in respect of international agreements of Parliament is in accordance with the scheme, the provisions and policy underlying the Constitution.<sup>410</sup>

#### **4.5.5 Presidential Veto Power over State Legislation**

The Indian Constitution enables the Union Executive, under certain circumstances, to exercise control over legislation passed by the State Legislature.<sup>411</sup> Apart from the mandatory provisions, there is Article 200 dealing with the assent by the Governor to Bills Passed by the Legislature which provides that he may reserve a particular Bill for consideration of the President. Once a Bill so reserved, the President may either give his assent or withhold it or he may direct the Governor that the Bill be placed before the Legislature for reconsideration in accordance with message to the House.<sup>412</sup>

There are also certain other provisions in the Constitution which require either that Bills on certain State subjects shall not be introduced in the Legislative Assembly of the State without the previous sanction of the president, or that certain legislation, though competent to the State, must be reserved for the assent of the President in order to obtain validity.<sup>413</sup>

The previous discussion of legislative relation between the Centre and the State clearly reveals that there is a conscious constitutional tilt in favour of the Centre in the legislative sphere. The Courts have evolved several doctrines of interpretation to harmonize exercise of State and Union authority. One principle followed in such cases has been to establish harmony among the various seemingly conflicting entries, by restricting the ambit of broader entry in favour of the narrower entry, so that the

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409. Article 51.

410. *Maganbhai v. Union of India*, AIR 1969 SC 783 at 807.

411. Article 31 (3), 254 (2) and 288 92.

412. Article 201.

413. *The Proviso to Article 304*.

later is not extent away by the former.<sup>414</sup> This interpretative principle has helped the States, as the Centre's powers are more generally worded.<sup>415</sup>

In case of *State of West Bengal v. Union of India*<sup>416</sup>, the State of West Bengal questioned the powers of the Union to acquire land rights in the over land vested in the State. The West Bengal Government had challenged the competence of the Parliament to enact Section 47 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, which sought to acquire for the Central Government coal bearing lands and rights over them vested in the State.

The above analysis of the scheme of division of legislative powers between the union and the states reveals that there is an obvious Constitutional tilt in favour of making the centre Strong over the states. But, in spite of long enumeration of powers between the Union and State legislature, it may be asserted that the Scheme of distribution of powers lays stress more on powers sharing to bring about amount of interaction and interdependence between the centre and the states. The other reason for providing a strong centre is the experience of other federation. However, recently in *Lily Thomas v. Union of India and Ors.*<sup>417</sup>, the Apex court held that legislative powers of the central Parliament to enact any law relating to disqualification for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State can be located only in Article 102(1) (e) and 191 (1)(e) of the Constitution and not in Article 246(1) read with Entry 97 of List 1 of the Seventh Schedule of the Constitution contain the only source of legislative powers.

#### **4.6 Repugnancy between Central Laws and State Laws**

Constitution has made for the division of arrangement jurisdiction of powers between the centre and states, but there are chances when central laws and State laws may clash each other. There are several superiority clauses under the constitution by which central laws have been given superior status and in case of any conflict, it has been provided that central laws shall prevail. But, there are greater chances of conflict under the concurrent list in which both the centre and state government have equally been empowered. Both can legislate on the any subject - matter enumerated in the concurrent list if any conflict arises under such situation, even then central laws shall prevail According to the provision of the constitution:

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414. *In re C.P. motor spirit Act, AIR 1939 P.C.*

415. *State of Bombay v. Balsara, AIR, 1951 SC 318.*

416. *AIR 1963 SC 1241.*

417. *2013 (7) SCC 653.*

"If any provision of law made by the legislature of a state is repugnant to the provision of a law made by parliament which parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the concurrent list, then, subject to the provisions of the clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such state, or as the case may be, the existing law, shall prevail and the law made by the legislature of the state shall, to the extent of the repugnancy, be void."<sup>418</sup>

The same provision was enumerated in the Government of India Act 1935. It can be said in fact that the provision in Government of India Act 1935, is the predecessor to the above provision in the constitution of India. The provision under the Government of India Act 1935 was as follows:

If any provision of a provincial law is repugnant to any provision of a federal law which the federal legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the concurrent legislative list, the subject to the provisions of this section, the federal law, whether passed before or after the provincial law shall prevail and the provincial law shall, to the extent of the repugnancy, be void.<sup>419</sup>

Both the provisions i.e. Article 254(i) of the constitution of India as well as section 107(i) of the Government of India Act, 1935 used the term "Repugnance" word which has been taken from Latin 'Repugnancy' which means Re (Against), pugnare (To fight) in other words we can say the 'Repugnancy means, which are in conflict with each other,' From the plain reading of the above provision it is clear that if there is any conflict or repugnancy- between the central law and the state law, central law shall prevail. As it has been observed by Justice Venkataramiah and M.P. Singh that "in a case both the union and state legislatures are competent to make laws on a subject, it is quite possible that while legislating upon that subject they might end up in handing down inconsistent laws and observance of one law may result in non-

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418. Article 254 (1) of Constitution of India.

419. Section 107 (i) of the Government of India Act, 1935

observance of other. In such a situation a citizen will be at loss to decide which of the two laws he should follow. Article 254 of the constitution meets such an eventuality.  
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In article 254(1) a general rule has been laid down that in case of any repugnancy, central law shall prevail, but in the same article a relief has been granted to the state. Existence of the central law on the same subject doesn't take away the powers of the state government to legislate on that subject. There is an „ exception to article 254(1) that ‘where a law made by the legislature of a state with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provisions of an earlier to that matters, then, law so made by the legislature of such state shall, it has been reserved for the consideration of the president and has received his assent, prevail in that state.’<sup>421</sup>

But there is a proviso to the above provision that parliament has powers to enact at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislature of the state. Same has been discussed by Kerela high court in a Case of *Puthiyadath J avamathy Avva v. K.J. Nagakumar*<sup>422</sup> that clause (1) of article 254 lays down a general rule. Clause (2) is an exception to clause (1) and the proviso qualify that exception. The question of repugnancy arises only in connection with the subject enumerated in to the concurrent list.

But there has been a dispute regarding the exact scope of the article 254 (1) that whether this provision specifically and exclusively limited to the concurrent list or a repugnancy may occur even-with respect to the different lists. As it has been observed by M.P. Jain as follows:

It doesn't appear to be sound to confine article 254 (1) only to the situation where the central state laws fall in the concurrent lists rather than when they fall in different list and yet are inconsistent 10 some extent. It is true that situations of repugnancy arise most commonly when the two statutes fall in two different lists. The inconvenience which may arise by discarding the broader meaning of article 254 (1) may be

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420. Justice E.S. Venkataramiah and Prof. M.P. Singh in "Distribution of Legislative powers between centre and States" in Hidayatullah (Ed.) *Constitution Law of India*, 222-305 at 276.

421. Article 254 (2) of Constitution of India.

422. AIR 2001 Kerala, 40.

appreciated by the following example under article 253. Parliament can legislate even on a state matters to effectuate a treaty. It is quite possible that when parliament passes such a law, it may come in conflict with an already existing state law on that subject. There appears to be no doubt that in such a situation the central law would prevails over the state law but this result can be achieved only by invoking the wider meaning of article 254 (1)1. <sup>423</sup>

On the same line it was observed by Justice E.S. Venkataramiah and M.P. Singh as follows:

Some times a controversy,, is raised with respect to the scope and application f Article 254 (1) of the constitution. Some people hold the view that while the application of Article 254 (2) is confined to the existing or other laws with respect to a matter included in the concurrent list, Article 254 (1) applies to all cases of repugnancy between a law of parliament and state legislature. The basis of this view is the words “which parliament is competent to enact” Art 254 (1) along with the words “any provision of any existing law with respect to one of the matters enumerate in the concurrent list. <sup>424</sup>

A careful reading of the constitutional provisions reveals that the above view also finds its support from the fact that beside the non obstinate clause of article 246 (1), article 251 gives solution, if there is a conflict between central law and the state law under Art 249 and 250 but no specific solution has been provided for a conflict between central law and the state law under the article 248, 252 and 253. Supporters of the, above view seek solution for such situation under article 254 (1).

From the foregoing paras it bcome clear that the dispute with respect to the exact scope of article 254 (1) is not baseless and the above opinion has some strong arguments in its favour, even then by tracing out some of the decision of the supreme court it is clear that the scope of article 254 (1) is basically related with the

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423. *M.P. Jain, Indian Constitution Law, at 275 (1999).*

424. *Justice E.S. Venkataramiah and Prof. M.P. Singh in "Distribution of Legislative powers between centre and States" in Hidayatullah (Ed.) Constitution Law of India, 222-305 at 277.*

repugnancy which occurs in the field Of concurrent list. In case *Tikka Ramji v. State of Uttar Pradesh*<sup>425</sup> it was observed:

We are concerned here with the repugnancy if any arising by reason of both parliament and the state legislature having operated in the same field in respect of the matter enumerated in the concurrent list and we are, therefore, not called upon to express any opinion on the controversy which was raised in regard to the exact scope and extent of article 254 (1) in regard to a law made by parliament which parliament is competent to enact- “as to whether the legislative powers of parliament therein refers to list I, list II and the residuary powers of the legislation vested in parliament under Article 248 or in is confined to the matters enumerated in the concurrent list.

Similarly it was also held in case of *J &K State v. M.S. Farooq*<sup>426</sup> repugnancy arises and Article 254 (1) applies only when both central as well as state law related with the subject matter belong to the concurrent list.

Similarly incase of *Bar council of Uttar Pradesh v. State of U.P.*<sup>427</sup> it was observed:

*The question of repugnancy can arise only in matters where both the parliament and the state legislature have competence to pass laws. In other words when the legislative powers is located in the concurrent list question of repugnancy arises.*

On the same line in *Kerala State Electricity Board v. India Aluminum Co.*<sup>428</sup> the court held:

*That question of repugnancy can arise only with reference to a legislation falling under the concurrent list is now well settled.*

From the above decisions of the apex court, it is now well established that repugnancy may occur only in the field of concurrent list, and all the speculations about the scope of article 254 (1) should now come to an end.

After considering the scope of article 254 (1) it would be relevant to discuss the working of the clause (2) of the Art 254, and its proviso in the case of *Zaverbhai*

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425. AIR 1956 SC 676

426. AIR 1972 SC 1738

427. AIR 1973 SC 231

428. AIR 1976 SC 1031

*v. State of Bombay.*<sup>429</sup> Supreme Court compared the powers of parliament under Article 254(2) with the powers of the federal government under section 107(2) of the government of India Act 1935. It was observed by the court.

Under section 107(2), Government of India Act, 1935 the position was that though a law enacted by the central legislature and within its competence would override provincial, legislation covering the same field, the central legislature had no authority conferred upon it under the government of India Act, 1935 to enact a statute repealing directly any provincial statute.

Article 254 (2), of constitution on of India, is in substance, a reproduction of section 107(2), government of India Act, 1935. But by the proviso to Article 254(2) the constitution has enlarged the powers of the parliament and under that proviso, parliament can do what the central legislature could not under section 107(2) of the government of India Act, 1935 and enact a law adding to, amending varying or repealing a law of the state when it relates to a matter mentioned in the concurrent list. The position then is that under the constitution, Parliament acting under the proviso to article 254(2) can repeal a state law. But where it doesn't expressly do so, even then the state law will be void under the provision if it is in conflict with a law regarding the same matter that may be enacted by the parliament.

Similarly in the case of *G. G. Kanungo v. State of Orrisa*<sup>430</sup> it was observed by the court:

When there is already the legislation of parliament made on a concurrent subject it operates in respect of all states in India, if not excepted. Since it is to a state legislature also to legislate on the same subject. It lies within its field on legislation falling in any entry in the concurrent list and when a particular state Legislature had made a law or Act on that subject for making it applicable to its state, all that becomes necessary to validate such law is to obtain the assent of the president by reserving it for his consideration. When such assent is obtained the provision of the state law or Act so enacted prevails in the state concerned, notwithstanding its repugnancy to the earlier parliamentary enactment made on the subject.

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429. AIR 1954 SC 752

430. AIR 1995 SC 1655

By examining the above two cases a question arises to what will be the fate of a parliamentary law vis-a-vis a state law in a case where the state law is repugnant to the central or parliamentary law. But the state law by acquiring the assent of the president, survives in the state as well as repeal the central law in the state on the similar matter. This is despite the fact, that central law prevails in rest of the country barring the state which has received presidential assent. But if such a state after some time repeals its law itself then in this situation question is that what would be the status of the central law in that context, in relation to a particular state. Which has been repealed by the state law, whether it will automatically be revive in the state or there would be a vacuum until or unless either the central law is reenacted or the state legislature comes out with a fresh legislation on that subject matter. The answer to the above question can be found by examining the observation made by the Supreme Court in the following cases. Firstly the case of *M. Karunanidhi v. India*.<sup>431</sup> Tamil Nadu state legislature passed the Public Men (criminal misconduct) Act, 1974, which was repugnant to the Central Law. But then it received the president's assent. Action was taken against the ex-chief ministers of the state. After some time the state Act was repealed. The point of dispute was whether the action could be taken against the ex-chief minister Karunanidhi under section 161 and 471 of the Indian penal code 1860, as well as under section 5(2) read with section 5(5)(d) of the prevention of corruption Act, which are the central laws. The question was, could the central laws be revived automatically? The court observed:

It is true that the doctrine of eclipse would not apply to the constitutionality of the central law and the only question we have to determine is whether there was such an irreconcilable inconsistency between the state Act and the central act that the provision of the central Act stood repealed and unless reenacted the said provision cannot be invoked even-after the state Act was itself repealed.

But in an earlier case of *Zaverbhai v. State of Bombay*<sup>432</sup> the parliament enacted the Essential supplies Act in 1946. This Act conferred powers on the Central Government that it can issue order to regulate production, supply and distribution of essential commodities. Under section 7(1) of the same Act, a contravention of any of

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431. AIR 1979 SC 898

432. AIR 1954 SC 752

the orders was punishable with imprisonment up to three years or fine or both. Considering these punishments inadequate the state of Bombay made a law in 1947 to increase the punishment as compared to central laws. Because the state law was repugnant with central law it acquired the assent of the president and came in operation into state of Bombay. But in 1950 central legislature i.e. parliament made some amendments into its Act of 1946. By these amendments punishment was enhanced. On the above facts supreme court held that Bombay Act of 1947 and the central Act 1950 dealt with the same subject of enhanced punishment and that under the proviso to Art 254(2), the state law became void because it was repugnant to the central law. Making a comment on the above decision Justice E.S. Venkataramaiah and M.P. Singh observed:

"The statement in *Zaverbhai's* case that the inconsistency impliedly repeals the union legislation, can't be taken to mean that the union legislation is taken out of the statute book and does require its re-enactment for its revival. It looks highly incongruous that the Act will be applicable and operative in all the other states but it will require re-enactment for the purpose of the particular state of course such enactment is contemplated in the proviso of clause (2) of Article 254 of the constitution but the proviso is to be availed when the state legislature doesn't repeal or change its law and parliament wants to change it. Proviso has nothing to do when the state legislature itself repeals its legislation or removes the repugnancy namely in which, in our view the union law must automatically revive without the need of re-enactment".<sup>433</sup>

It is submitted that the view of the above editor seems correct that a law is valid when enacted and should revive automatically when the shadow of the superveining laws has been removed from it and it need not be re-enacted.<sup>434</sup> This approach is also necessary to avoid any vacuum and confusion with respect to law. Infact V.D. Sebastian has raised an objection even on the use of term 'Void' in the Article 254 of the constitution of India. He observed:

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433. *M.P. Jain, Indian Constitutional Law, at 242 (1999)*

434. *ID at 285.*

“Art 254 of the constitution, and its predecessor, section 107 of Government of India Act, 1935, use the term ‘Repugnancy’ to describe the incompatibility between the union and state laws in the concurrent field. Repugnancy seems to have been used to mean inconsistency. The meaning of both the terms seems to be the same. The terms inconsistency’ and ‘Invalid’ are used in section 109 of the Australian constitution instead of the words ‘repugnancy’ and void used in .the Indian constitution. The use of the term ‘void’ to describe the status of repugnant state laws which is capable of becoming valid again if the union law is repealed is not very apt”.<sup>435</sup>

In the case *Central Bank of India v. State of Kerala and Others*<sup>436</sup> court held that : DRT Act and Securitisation Act enacted by Parliament under Entry 45 in List I in the Seventh Schedule to the Constitution and Bombay and Kerala Acts enacted by the concerned State legislatures under Entry 54 in List II in the Seventh Schedule are the two sets of legislations—Therefore, Article 254 cannot be invoked per se for striking down State legislation on the ground that the same are in conflict with the Central legislation.

In other case *Annamalai University, by Registrar v. Secy. To Govt. Infn. & Tourism Dept., and others*<sup>437</sup> court held that : If an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature enacting it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature.

In the case *State of Maharashtra v. Bharat Shanti Lal Shah & Others*<sup>438</sup> court held that : The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in Concurrent List. In such situation the

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435. Basu's Commentary on Constitution of India 5<sup>th</sup> Ed. vol. 4, p. 194

436. 2009 (5) SCJ 884

437. 2009 (5) SCJ 81

438. 2009 (2) SCJ 55

provisions enacted by Parliament and State Legislature cannot unitedly stand and the State law will have to make the way for the Union Law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law.

In the case *Bondu Ramaswami v. Bangalore Development Authority & Others*<sup>439</sup> court held that : This contention also has no merit. The question of repugnancy can arise only where the State law and the existing Central law are with reference to any one of the matters enumerated in the Concurrent List. The question of repugnancy arises only when both the legislatures are competent to legislate in the same field, that is, when both the Union and State laws relate to a subject in List III. Article 254 has no application except where the two laws relate to subjects in List III. This Court held that in pith and substance, the BOA Act is one which squarely falls under Entry 5 of List II of the Seventh Schedule and is not a law for acquisition of land like the LA Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. This Court held that if at all, BOA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same will not be considered to be a part of the LA Act. The fallacy in the contention of the appellants is that it assumes, erroneously, that BDA Act is a law referable to Entry 42 of List III, while it is a law referable to Entry 5 of List II. Hence the question of repugnancy and Section 6 of the LA Act prevailing over Section 19 of BDA Act would not at all arise. *M/s. Hoechst Pharmaceuticals v. State of Bihar*<sup>440</sup> referred to. KG. Balakrishnan, CJI., R. V. Raveendran and D. K. Jain,

After discussing the facts of central and state laws in case of one is repealed by the other it would be important to discuss the circumstances under which repugnancy may occur. Supreme Court by following some Australian case laid down

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439. 2010 (5) SCJ 462

440. (1983) 4 SCC 45

three major tests for the repugnancy. Justice Suba Rao in case of *Deep Chand v. The State of D.P and others*<sup>441</sup> laid down the following tests:

- (i) Whether there is direct conflict between the two provision.
- (ii) Whether parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the state legislature, and
- (iii) Whether the law made by parliament and the law made by the state legislature occupy the same field.

Above test laid down in the Deep Chand Case is known as Direct Conflict Theory but his theory was not sufficient to implement the superior legislative will. Therefore judiciary developed a new theory as V.D. Sebastian observed:

The direct-conflict test may at times prove to be too narrow for the fuller realisation of the policy of the dominant legislature. Another principle was therefore evolved which stated that, if the union legislation showed an intention to lay down an exhaustive code for regulating the subject matter on the that it would be inconsistent for the state legislate for the same matter. This test provide ample scope for judiciary to uphold the values envisaged in the paramount legislation and to, defeat narrow arguments which could be raised on the basis of the direct test.<sup>442</sup>

### **Union Supremacy in case of Repugnancy**

Article 246(2) empowers both the Parliament and the Legislature of any State to legislate concurrently in respect of the matters covered in the Concurrent List. Logically, a central law and a state law on the same subject matter in the Concurrent List will be held valid because both the legislatures can plead under Article 246(2). Hence, ‘situations would result if two inconsistent laws, each of equal validity, could exist side by side within the same Indian territory.’<sup>443</sup> Article 254 of the Indian Constitution provision to obviate such an absurd situation. It is that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provisions of an existing law with respect to one of the matters enumerated in the Concurrent List,

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441. AIR 1959 SC 648

442. V.D Sebstion, *Legislative conflicts in India*, 1976.

443. *Subramian v. Muthuswami* (1940) F.C.R. 188(200) quoted in 5TH ed.,p.196. D.D. Basu, *Commentary on the Constitution of India*, Vol. IV

then, subject to the provisions of clause (2) of Article 254, the law made by the Parliament, whether passed before or after the law made by the Legislature of such state, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void. The phraseology of the provision, it will be seen on a plain reading thereof, suggests that it would apply to all cases of repugnancy between a central law and a state law. It does not say that the State law and the central law should belong to the Concurrent List only. The words 'in the concurrent list' appear to qualify only the 'existing law' which means that an existing law in relation to a matter in the Concurrent list prevails over a state law in that are in case of repugnancy. So far as the post Constitutional laws are concerned, the words used are "which Parliament is competent to enact" which are quite broad and would comprise laws made by the centre both in the central and concurrent lists. This will seen that if there is repugnancy between a state law falling in the State List and a central law falling in the Concurrent list, the latter should prevail over the former.<sup>444</sup> But the judicial interpretation has taken a different course. The words "subject to the provisions of clause (2)" which occur in clause (1) contemplates only a state law made under the concurrent list. Otherwise, these words will become meaningless. This view has been confirmed in *Premnath v. State of J&K*<sup>445</sup>, in that case, the Supreme Court observed –

*" The essential condition for the application of Article 254(1) is that the existing law must be with respect to one of the matters enumerated in the Concurrent List; in other words, unless it is shown that the repugnancy is between the provisions of a subsequent law and those of an existing law in respect of the specified, the Article would be inapplicable."*

Thus, the first condition for the operation of the Article 254(1) is that the state law must pertain to a subject matter enumerated in the concurrent list. If a law falls within the State list and it incidentally into the Concurrent List then this Article cannot be invoked. In *Krishna v. State of Madras*,<sup>446</sup> the Madras Prohibition Act relates to intoxicating liquor, a State subject. But it laid down provisions relating to search, seizure for trial of offences committed under section 4(1) of the Act. The court uphold the impugned Act, holding that since the State law fall entirely in the

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444. M.P. Jain, *Indian Constitutional Law*, 2nd ed. P. 310

445. AIR, 1959 SC 749

446. AIR 1957 S.C. 297.

State jurisdiction and the provisions in question are purely ancillary to the exercise of the legislative powers conferred under item 31 of the List II, the State law cannot be held to be inconsistent with the Central law in the Concurrent matters. But it has been submitted that “while applying the rule of pith and substance in the Krishna case, the Court accepted the point that the State law encroached into the Concurrent list. And therefore, to this extent the law must have been held to be repugnant with the Central laws. It is one thing to hold the State law valid when it does not come in conflict with a Central law, but quite another thing when there is such a conflict; while the rule of pith and substance would apply in the first case, the second is essentially a different proposition..... The danger in taking the logic of the Krishna case too far is to destroy the unity achieved so far in the country in the area of procedural and evidence laws, for then the Cr.P.C. would become limited to the offences under I.P.C., and each State will be free to lay down its own procedures and evidence for trial of offences created by its own legislation falling in List II. Such a development would be inconsistent with the objectives of keeping the basic procedural laws uniform in the country.<sup>447</sup>

- (a) Existing laws :- The expression “existing law” cannot be restricted to mean only Central laws but would include a law made, before the commencement of the Constitution, by any legislature( including Provincial Legislatures), authority of persons having powers to enact such law. Laws made on the subjects which have been enumerated in the Concurrent List, before the commencement of the Constitution, will be ‘existing law’ within the meaning of the expression used in this Article. The case of *Bangtu Lal v. Radhe Shyam*,<sup>448</sup> furnishes a good example of the meaning of ‘existing law’ and application of this Article on that law. Before the commencement of the present Indian Constitution, the Bihar Buildings(lease, rent and eviction) Control Act, 1947, was passed for a definite period. The life of this Act was extended further by the Bihar Legislature after the commencement of the Constitution. Section 11 of the Bihar Control Act was repugnant to the provisions of Transfer of Property Act, 1882. Now, the subject of ‘transfer of property’ is enumerated in the Concurrent List, hence any law passed on this

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447. *M.P. Jain, Indian Constitution Law, p. 310-11.*

448. *AIR 1953 Pat. 14.*

matter, before the commencement of this Constitution, will be held 'existing law'. On this promise, the Transfer of Property Act, 1882, then existing law on the subject. The Court had no hesitation in striking down the Section 11 of the Bihar Control Act for being repugnant to the provisions of an existing law on the subject, viz., the Transfer of Property Act, 1882.<sup>449</sup>

*(b) Validation by President's Assent*

Article 254(2) engrafts an exception to the general rule laid down in Article 254(2). It is an expedient to keep alive a State law which is repugnant to a Central law, on a matter in the Concurrent List. Article 254(2) enacts that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision of an earlier law made by the Parliament or an and mental deficiency including places for treatment for lunatics and mental deficiencies.

Prevention of cruelty to animals.

(17a) Forests<sup>450</sup>

(17b) Protection of wild animals and birds.

In nut-shell it can be concluded that the following are the condition in which there will be no repugnancy'

- (i) Laws which are applicable at different period of time.
- (ii) If the parliamentary laws expressly provides for the 'adjustment' or application of the state law.
- (iii) If the state law specifically leave place for the application of central law.
- (iv) If the state law provides only for the additional benefit.

#### **4.7 Tension between Strong Centre and Autonomy of States**

The Centre's strength lies in its large legislative powers, and in its control over state legislation.

The scheme of distribution of legislative powers under the Indian Constitution is mainly based on the scheme of Government of India Act, 1935. A comparison of the number of entries under each of the three lists of the two documents make it very clear that the constitution has added further to the powers of the union by enlarging the union and the concurrent lists, compared to the state list. The number of items in

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449. *Prem Nath v. State of J&K, A.I.R. 1959 SC 249*

450. *Inserted by Constitution(42nd Amendment) 1976, Section 57*

the union list has been revised from 59 to 97, in concurrent list from 3 to 47 and in state list from 54 to 66.

Where, with respect to a matter, there is irreconcilable conflict or overlapping as between the three lists of the Seventh schedule, the legislative powers of the Union.<sup>451</sup> A law made by the state legislature, repugnant to a law made by Parliament or an existing law applicable in regard to any matter enumerated in the concurrent list, shall be void to the extent of repugnancy.<sup>452</sup> In other words, inconsistency between the laws made by Parliament and State Legislature on any matter in the Concurrent List (list III) or State List (List II).

Article 246 provides that the matters in List I of the Seventh Schedule fall exclusively within legislative powers of the Union, but those in List III are concurrent. Article 248 empowers parliament with exclusive powers to legislative with respect to matters not enumerated either in the concurrent list (List III) or State List (List II) and this is called residuary.

Inconsistency between the laws made by Parliament and a State Legislative on any matter in the concurrent list is to be resolved in favour of the centre.<sup>453</sup>

Every Citizen in the state is subject to the operation of the laws of the Union and the States. Implementation of Union laws could be entrusted to either a separate Union agency, if any, or to a State agency. The latter course has been followed in our constitution in regard to a large number of union laws. Art. 256 and Art. 257 casts obligation on the states to comply with union laws and the existing laws, and not to impede the exercise of the executive powers of the union. The Union is authorised to give directions as may be necessary for this purpose.

Parliament can also enact a law with respect to subject matters covered by the state list, but only under conditions and circumstances permitted and envisaged in the constitution itself. These exceptional circumstances are: -

1. If the council of States by a resolution supported by not less than two-third majority declares that it is necessary in the national interest to do so.<sup>454</sup>
2. During a proclamation of emergency.<sup>455</sup>

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451. *Non-obstantic clause in Article 246 (2) and (3)*

452. *Article 254 (1)*

453. *Constitution of Indian Article 254*

454. *Constitution of Indian, Article 249*

455. *Constitution of Indian, Article 250*

3. If the legislatures of two or more states pass a resolution to the effect that it is desirable to have a law passed by parliament on any matters in the state list.<sup>456</sup>
4. For giving effect to the treaties and international agreements and<sup>457</sup>
5. In case of failure of .constitutional machinery in a state.<sup>458</sup>

Thus by comparing the constitutional position of the centre and the states, it become quite obvious that there is a conscious constitutional list in favour of the centre. Now the question arises that does this amounts to undue weight age in favour of the centre? Or does the centre encroaches upon the autonomy of the states?

From inauguration of the constitution of the commencement of the fourth General Elections, Centre- State relations had been smooth primarily because they had operated largely in the context of “one party dominance”. But since 1967, when non-congress parties came into powers in several states, the interpretation of various articles of the constitution, connected with the federal system, and the way they are looked upon by various actors and parties in these areas have created irritants in centre state relations.

Several states like Kerala, Tamil Nadu and West Bengal have, for quite some time, been demanding a larger measure of autonomy for the constituent units of the Indian Union. In 1969, Tamil Nadu had even set up a centre-state relations enquiry committee under the chairmanship of Mr. R.J. Raj Kumar to suggest appropriate changes in the constitution in this field.<sup>459</sup>

In 1977 the Government in West Bengal laid down III its Memorandum a new model for Centre-State relationship. This memorandum prepared by the West Bengal Government suggested wide-ranging changes in the constitution regarding Centre State relations. The main suggestions made by West Bengal government in the memorandum can be summarized as follows:<sup>460</sup>-

According to the memorandum, only foreign relations, defence communications, currency, economic coordination and related matter’s should fall within the exclusive domain of the centre. Article 248 of the constitution should be amended and Article 249 deleted in order to deprive Parliament of the right to

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456. *Constitution of Indian, Article 252*

457. *Constitution of Indian, Article 253*

458. *Constitution of Indian., Article 365 (1) and 357*

459. *Indian Administration; Shriram Maheswari, at 366.*

460. *Ibid.*

legislate on matters not enumerated in the union or the concurrent list. Articles 356 and 357 and article 360 should be altogether deleted, the first two in order to deny the centre the powers to impose President's rule in any state, and the last to deprive it of the right to interfere in a State administration on the ground of threat to financial stability. Seventy-five percent of all revenues collected by the centre in whatever head should be allocated to the states, the provisions regarding presidential assent to State bills and Articles 200 and 201 be delete the composition of Rajya Sabha should be changed so that its members are directly elected and each state is to have equal representation irrespective of size and population.

Another striking provision in the memorandum is its insistence on the disbandment of all- India services. It observed that the IAS, IPS and other all- India services should be abolished. There should only be Central Administrative Services and State Services which should be recruited respectively, by the Union and State Governments. Personnel of the Union Government should be under the Central of Union Govt. and those of the State Government under the control of respective State Governments. The Central Government should have no control over the personnel of a state service. This is a radical recommendation, carrying profound implications for the polity.<sup>461</sup>

The voice for more political and Financial autonomy was desired by the West Bengal Government and soon other states joined the issue and supported West Bengal memorandum 1977. It was supported by the State Government of Tamil Nadu, Kerala, Punjab and Jammu and Kashmir, so as to make the Indian Constitution a truly federal one.<sup>462</sup>

States are demanding larger measure of autonomy, asserting the argument that it shall make the Indian federation a true federation. Here, it is relevant to quote former solicitor General of Australia:

If there is such a thing as a strict, pure or unqualified federal principle, then the hard fact is that these are no federation and no federal constitutions.<sup>463</sup>

It is hard to propound any absolute federal principle. Federal constitution of the world can be compared with each other, but it is perhaps impossible to find in them a common thread which can be described as a Basic feature of federalism. The

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461. *The West Bengal Memorandum 1977.*

462. *India's Political System, Richard L. Park, 66 (New Jersey, 1967).*

463. *K.H. Bailey, Summary Report of Proceedings of International Legal Conference New Delhi (1953-54).*

memoranda of the Karnataka. The memoranda of the Karnataka Government and the West Bengal Government demand two major changes in the constitution:

- a) Deletion of Article 248 and introduction of an explicit provision, so that residuary powers of legislation vest with the states and not with the union.
- b) Abolition or amendment to Articles 249, Article 252 and Article 254 so that no state could be deprived of any legislative powers which belong to it without its prior concurrence.

A study of memoranda by the various state governments reveal that it requires major alterations in the constitution of India, so as to bring it in accord with their own perception of an idea of federal system.

Sarkaria Commission Report<sup>464</sup> on centre- state relations has also identified some major issues in the Union and state relations. Some of major issues as alleged by the states from the report can be listed as follows:

- 1) Actions of the union have led to a very large degree of over-centralization in all aspects, reducing the states to mere administrative agencies of the Union. Such over centralization in legislative relations' sphere, it is contended, has been effected by the union to the detriment of the states.
- 2) Union has occupied most of the concurrent field leaving little for the states, and by indiscriminately making declaration of public interest or national importance taken over, excessive area of the linked entries in the state field at the expense of the state legislative powers. They point out that legislation in these fields is " more often than not, undertaken with no or inadequate prior consultation with the states. The net effect of many recent amendments of the Supreme Court has been to give more powers to the Union than was contemplated by the Constituent Assembly."
- 3) It is also pointed out that institutions or forums specially envisaged in the constitution for sorting out problems arising in the working of inter-governmental relations (e.g. a permanent inter-state council as contemplated in Art. 263) have not been created at all. It is urged that in matters of dispute between union government and a state government the former should not be both the disputant and the judge but should get the case examined by an independent assessor before taking a decision.

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464. B. Shivarao "Constitution Making Since 1950", *Summary Report on Centre State relation* at 552-553.

- 4) Union-state relations were intended to be worked on the basis of co-operative federalism and consensus in all areas of common interest, they have not been so worked and the forums envisaged by the constitution for that purpose, have not been established.

#### **4.8 Doctrine in India**

##### **4.8.1 Doctrine of Extra territorial Nexus**

As noted above Indian constitution-provides for the two types of legislative division of powers. Article 245 provides for the territorial division of powers while Art 246 provides for the subject wise distribution of powers. After having a glimpse of Art 245 there remains no clouds of doubt that parliament may make laws for the whole or any part of the country, while legislatures of states may make laws for the whole or any part of the state. At the same time clause (2) of article 245 provides that parliament may make even such law, which may be extra-territorial in nature. It means whenever parliament enact a law which has its applicability outside its boundary or territory or even it is related to some foreign nationals, such law can't be declared invalid on the ground of being extra-territorial in nature.

But the question arises as regarding the fact of law enacted by the legislatures of the states, which has its applicability outside the boundary of that particular state.

On the surface it appears that such law can't claim legality or can't be declared constitutionally valid. But the point of dispute is that whether state laws will be declared unconstitutional in each and every case, wherever it is extra-territorial in nature. To avoid this problem courts have developed doctrine of extra - territorial nexus. To answer the question raised in the forgoing lines one has to take the shelter of this doctrine of extra-territorial nexus. The meaning of the word 'extra-territorial' has been beautifully summarized by justice Venkatarama Ayyar in the *Bengal Immunity Company Limited v. The State of Bihar and others*<sup>465</sup> which would be helpful to understand the doctrine.

*“The words extra-territorial operation’ are use in two different senses as connoting firstly, laws in respect of acts or extent which take place inside the state but have operation outside, and secondly, laws with reference to the nationals of a state in respect of their acts outside; that in its former sense, the law*

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465. AIR 1955 SC 661.

*are strictly speaking extraterritorial and that under Article 245 (1) it is within the competence of the parliament and of the state legislatures to enact the laws with extra-territorial in operation in that sense. The word laws with extra-territorial operation in Article 245 (2) must be understood in their second and strict sense as having reference to the laws of a state for their nationals in respect of the act done outside the state otherwise, the provision would be redundant as regards legislation by parliament and inconsistent as regards laws enacted by the states”.*

By the above discussion it is inferred that parliament can enact an extra-territorial law in both senses i.e. first as well as in second sense, Such law can't be questioned on the ground that they are extra-territorial in nature, The basic philosophy behind this is that is an assertion of the sovereignty of the nation. Besides this is a question of policy matter also, which can't be questioned in the municipal courts. Same view was taken by the chief Justice Karla in *A.H. Wadia v. Income Tax Commissioner*.<sup>466</sup> But in answer to the basic question that whether a state legislature can enact an extra-territorial law, it can be inferred from the preceding observation of justice Venkataraman Ayyar in the *Jengal Bengal Immunity Company Limited v. The State of Bihar and Others* that although there is no expressed constitutional mandate given to the states even then they can enact an extra-territorial law in the first sense.

Although Judiciary has made things easy for the state legislatures but they have been not given free hand to enact an extra territorial laws or against the well established constitutional norms. The act has been belled by the judiciary itself by laying down certain judicial test and condition through various judicial decisions. States can make extra-territorial laws in situation where acts or events which take place inside the state but have its operation outside the state provided there is a sufficient nexus between the state and the extent or the subject- matter of law. Supreme Court has some condition in a case of *State of Bombay v. R.M.D.C.*<sup>467</sup> It was held by the honourable court that sufficiency of the territorial connection involves a consideration of two element, which are,

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466. AIR 1949 PC 18, 25

467. AIR 1958 SC 699

- (a) The connection must be real and not illusory and
- (b) The liability sought to be imposed must be pertinent to the connection.

Regarding the fact of this case that a tax was imposed by the state of Bombay on the lotteries and prize competition was extended to the newspaper published from outside the state. Although the newspaper was published from Bangalore but it had large number of readers and participant in Bombay i.e. the state which imposed the tax. The legislation was challenged on the ground that it affects men residing and carrying business outside the state. However it was held valid because the newspaper although printed and published outside the state had a wide circulation there. They had also established their office at Bombay to collect the entry fee for the competition. The provision in the question sought to, collect the tax only on the amount received by the newspaper from the state and therefore there was sufficient territorial nexus, which entitled the state to impose the tax.

Above arguments suggest that state can enact extra territorial laws provided reasonable territorial nexus is established. For establishing territorial nexus it is not necessary that the subject matter of legislation must be physically located within the state. The piece of legislation would be perfectly valid if the sufficient territorial nexus is established.

Now an important question rises that how this territorial nexus can be established and when this nexus would be considered as sufficient? In answer to this question an old case *Law Governor General v. Raleigh Investment Co.*<sup>468</sup> can be quoted. In this case the assessee company was a company incorporated in England. Those nine companies carried on business in British India and declared and paid dividends in England to its share holders including the share holder company. The assessee company was charged to income tax under section 4 (1) of Indian Income tax Act. Though the assessee company was not a resident in India nor did it carry any business in India still because the nine sterling companies derived their income, profits or gains out of the businesses in British India out of which they paid dividends to the assessee company was regarded as sufficient nexus so as to fasten the tax liability on the assessee company in respect of the income it derived from the nine companies. Later on this case was followed by Supreme Court in many cases.

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468. AIR 1944 PC 51

The term territorial nexus can not be defined in a watertight compartment or in another word. There is no fixed or general formula for it. As for as territorial connection is concerned there can be two broad condition for it

- (a) The connection must be real and not imaginary and
- (b) The liability sought to be imposed must be pertinent to that connection.

What degree of connectivity will be sufficient to declare a law to be constitutionally valid, it vary from case to case. It is the duty of the court to decide whether connection is real or imaginary. Whether it is sufficient or not was considered in case of *State of Bihar v. Charusila Das*<sup>469</sup> in this case some tax was charged upon the property of a trust which was situated outside the state under the Bihar Hindu Religious Trust Act. A plea was taken that Act is extra-territorial in nature therefore it must be declared as invalid. The honourable Supreme Court by applying the doctrine of territorial nexus, rejected this argument. The supreme court held that Bihar Hindu Religious Act, could affect the trust property situated outside the state, tax must be levied on the property related to a trust situated in Bihar where the trustees functioned. The court found that the nexus is real and not illusory as the religious institution and the property appertaining there to formed integrated whole.

In a case of *Khyerbari Tea co. Assam*<sup>470</sup> it was held by the honourable court that a state can impose a tax on the carriage of goods through its territory. Even if goods belong to a person who is a non resident in the state and tax is payable by him. In this case the tea company carried some of its product through inland water in the state, which was to be marketed in Calcutta. The state of Assam impose tax on the profit of that product. This was challenged by the company. But applying the doctrine of territorial nexus court rejected the objection to imposing the tax.

But in case of *State of Bombay v. Narayandar Mangilal*<sup>471</sup> in order to prevent bigamous marriage state of Bombay declared it a criminal offence by enacting a law that prohibited bigamous marriage and made it a criminal offence. Marriages which were contracted outside the state by such peoples who were residing outside the state but domicile in the state of Bombay were also brought under its application. Bombay High Court declared it Ultra-vires to the constitution because by any stretch

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469. AIR 1959 SC 1002

470. AIR 1964 SC 925

471. AIR 1958 Bombay 68

of imagination there is no territorial nexus between the marriage performed outside the state even if parties to the marriage are domiciled in the state.

The same view had been taken by the supreme court in *Bengal Immunity v. State of Bihar*<sup>472</sup> that when a statute is impugned as having an extra-territorial operation, the validity of that legislation depends on the sufficiency of the purpose for which it used the territorial connection in the absence of such territorial nexus, a state legislation which deals with a subject matter lying outside its territorial limits must be held ultra vires.

Even the state sale tax legislation doesn't remain untouched by this doctrine. In *Tata Iron and steel Co. Ltd. v. the state of Bihar*,<sup>473</sup> in this case the provision of Bihar sale Tax Act. 1947 was challenged. The Act defines the term, 'sale of good' very widely for the purpose of imposition of tax. According to the Act irrespective of the place of contract of sale, a sale will be deemed to have taken place in the state of Bihar if either the goods were actually in that state at the time of such contract or if they were produced or manufactured in that state at the time of such contract or if they were produced or manufactured in that state. The company which had its registered office in Bombay and head office in Calcutta but its factory and works in Bihar challenged the above said provision on the ground that it is extra territorial in its application. It was also argued that doctrine of extraterritorial nexus can't be extended to legislation related with sale tax beside this was also alleged that nexus was not pertinent to the subject matter of taxation. In reply to the above arguments, the supreme court rejected the idea that doctrine of territorial nexus should not be applied to the sale tax legislation. The court said that there was, "no cogent reason why the nexus theory should not be applied to sale tax legislation", in answer to that the nexus was not pertinent to the subject- matter of taxation the court hold that, it is sufficient to the state that in a sale of goods, goods of necessity must play an important part, for its is the goods in which, as a result of the sale, the property will pass. In our view, the presence of the goods at the date of the agreement for sale in the taxing or the production or manufacture in that state of goods the property where in eventually passed as a result of the sale whenever that might have taken place, constituted a sufficient nexus between the taxing state and the sale. From the above

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472. AIR, 1955 SC 661.

473. AIR 1958 SC 452

decision it is very clear that there must exist real nexus. M.P. Singh has made a very relevant observation over the sufficiency in the following words:

*The most important consideration for invoking the doctrine is that the connection between the state and the subject-matter of the law must be real and not illusory. Thus, if you are allowed to tax a dog it must be within the territorial limits of your taxable jurisdiction. You can't tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation. Equally, after the birth you can't tax it simply because its tail is cut off and sent back to the fond owner.*<sup>474</sup>

From the discussion in all the preceding paras and with the help of above cases in which courts have laid down various principles and tests it is clear that doctrine of extra territorial nexus has facilitated, the state legislature to enact certain extra territorial laws, in fact this doctrine is based on practicality.

#### **4.8.2 The Doctrine of Colourable Legislation**

The doctrine of colourable legislation is based on the maxim that what can't be done directly can't also be done indirectly. This doctrine comes in the play when a legislature tries to cross its constitutional limit. In other words, if it is not competent to enact particular law but it still tries to those very objective by applying some indirect those very objective by applying some indirect method or by enacting that very law clothed in some other form. This doctrine is directly related to competency of legislature. It envisages that if a legislature is not competent to enact any law it cant enact it in any other form whatever it may be as it was observed that:

In respect of a particular legislation, the question may arise whether the legislature has transgressed the limit imposed on it by the constitution. Such transgression may be patent, manifest or direct, or may be disguised, covert or indirect, it is the later class of cases that the expression colourable legislation is applied. The underlying idea is that although, apparently, a legislature in passing a statute purports to act within the limits

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474. V.N. Shukla, "Constitution of India at 497 (1990)

of its powers yet, in mere pretence or disguised. If it is so, the legislation in questioned is invalid. The essence of the matter is that a legislature having restrictive powers can't seek to do something indirectly which it can't accomplish directly within the scope of its powers. A legislature cannot overstep the field of competency indirectly.<sup>475</sup>

Colourable legislation is like pretending to be some powerful mythological character by wearing a Mask, while knowing fully well that one is actually not him, Because, simply by putting a mask on the face he can't acquire all tile characteristics of that Mythological character. It is like withdrawing money from some one else's account by pretending to be him; It is a total fraud. That is why some times colourable legislation is said to be a fraud on the constitution. Same was held in the case of *Jalali trading Co. v. Mill Mazdoor sabha*.<sup>476</sup> It was observed by the Supreme Court that no legislature can violate the constitution by employing an indirect, method. The main focus is on the capacity of the legislature, courts are, only concerned with the powers of the legislature, if a particular legislature has the capacity to enact a particular law, motive is immaterial. It also hardly matters whether a legislature is enacting any law directly or indirectly.

It was held in the case of *State of Bihar v. Kameshwar*.<sup>477</sup> In this case a state law dealing with the abolition of the land lord system, provided for the payment of a compensation on the basis of income occurring to the land lord prior to the date of acquisition was to be vested in the state, and half of these arrears were to be given to the land lord as compensation. The provision was held to be colourable legislation and hence void under entry 42, list - III, as the taking of the whole and returning half means nothing more or less than taking half without any return and this is naked confiscation no matter in whatever specious form it may be clothed or disguised. The impugned provision in reality doesn't lays down any principle for determining the compensation to be paid for acquiring the arrear of the rent. It may be noted that in the above case motive of the legislature, was commendable that is the land reform but once the legislature is lacking initial competence, the motive hardly matters.

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475. *M.P. Jain, Indian Constitution Law, p. 273.*

476. *AIR 1967 SC 691*

477. *AIR 1952 SC 289*

Again the similar view was taken In case of *Gullapalli Nageshwara Rao. v. Andhra Pradesh Road Transport Corporation*<sup>478</sup> where is was observed that legislature can only make laws within its legislative competence, its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by constitution. The legislature can't overstep the field of competency directly or indirectly. The court will scarifies the law to ascertain whether the legislature purposes to make a law which though in form appears to be within its sphere, in effect and substance reaches beyond it, if in facts, it has powers to make the law. Its motives are irrelevant.

It has been again and again emphasized that the whole concept of Doctrine of colourable legislation is based on the capacity of powers of a particular legislature, which constitution has given to it. A particular legislature cannot throw a colour of constitutionally on anything which at the very birth of its was unconstitutional. If it tries colour or paint any enrolment to give it a colour of constitutionality, the judiciary will scratch the upper layer to check out the original colour i.e. the real intention of that particular legislation. As in the commercial field a seller can't use the trade name or trade mark of other. He can also not sell its own product under the wrapper of other established name or brand because it is fraud. Similarly under the constitutional field, a legislature can't cross the LAXMAN REKHA by playing fraud on the constitution. The legislative distribution which has been provided by the constitutor each legislature is abide by it.

In a case of *K. C. Gajpati Narayan Deo and other v. The state of Orissa*<sup>479</sup>, It was observed by the Court:

*If the constitution of a state distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question do arise as to whether the legislature in a particular case has or has not in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also*

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478. AIR 1959 SC 308

479. AIR 1953 SC 375

*be disguised, covert and indirect and its is to this latter class of cases the expression colour able legislation has been applied in certain Judicial pronouncement. The ideal covered by the expression is that although apparently a legislature in passing a status purported to act within the limit of its powers, yet in substance the reality it transgressed these powers, the transgression being veiled by what appears, on proper examination to be a mere pretence or disguise.*

Again in a case *Minerva Mills Ltd. and others, v. Union of India and others*<sup>480</sup> in that case supreme court quashed the newly introduced clause (4) and (5) of article 368 of the constitution. The court observed that clause (5) confers upon the parliament a vast and undefined powers to amend the constitution even so as to distort it out of recognition. Since the constitution had conferred a limited amending powers on the parliament, the parliament can not under the exercise of that limited powers in large that very powers into an absolute powers. The court also observed that newly introduce clause (4) of article 368 must suffer the same fate as clause (5) because thile two clauses are interlinked. Clause (5) purports to remove all the limitations on the amending powers while clause (4) deprives the courts of their powers to call in question any amendment of the constitution.

In nut shell it can be concluded that colourable legislation is basically related with the competency of the legislature and the motive of the legislature or form of the enactment are immaterial if a legislature is not entitled to enact, any law but it still tries to enact it by some covert mean. It would be ultra wires to the constitution.

### **4.8.3 Doctrine of Pith and Substance**

On the face of it, structure of Indian constitution provides for a rigid division of powers between the centre and states. It also contains three long exhaustive lists. These lists have different legislative powers contained under various entries. On the basis of the above facts it may be inferred that under the Indian constitutional arrangement there are no chances of intermingling of legislative powers of the centre and states. But, this is not true, there are grey areas where it is very difficult to decide, whether a particular subject matte or enactment belongs to this entry or that entry. It must be submitted that legislative entries in different list doesn't always work

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480. AIR 1980 SC 1789

independently. Some times they are interlinked. For such situations judiciary has developed doctrine of 'pith and substance'. In India this doctrine has been taken from Canada<sup>481</sup> and now 'doctrine' of pith and substance' is well established in India.

No doubt that constitution has limited or fixed the area of both parliament as well as the legislatures. Both should respect, this constitutional scheme. They must keep intact the sanctity of this constitutional division of powers and legislature must keep within the domain assigned to it. If they violate this constitutional arrangement their law would automatically be considered ultra vires to the constitution. But before declaring a law as void or ultra vires court must apply the doctrine of 'pith and substance'. If it is alleged that particular piece of legislation infringe the constitutional scheme or it encroaches upon the powers of some other legislative body, the court will apply the rule of 'pith and, substance' to see the real intent or objective of that particular piece of legislation. If court on such enquiry finds objects of such legislation or what have been tried to achieve through such legislation is within the legislature jurisdiction of that legislative and it incidentally encroach upon the other list then such law is considered perfectly valid. In other words it can be said that this doctrine conceives the idea that before declaring a law bad or void its true nature and character must be dictated by the courts to find out whether it falls in the list of particular legislature by which it has been enacted. If the true nature and character of the legislation falls in the domain of duly authorized legislative body and it incidentally or by chance trench or encroaches on matters assigned to another legislature, it would not be declared void.

The true nature and character of the legislation can't, be examined until or unless it is examined' as a whole. It should not be examined as a mere collection of section while interpreting the different entries it should be given widest amplitude. In a reconstitution case of recentral provinces and Berar relating to the, Sales of motor spirit and Lubricants Taxation Act, 1938<sup>482</sup> Chief Justice Gwyer had laid down some of the guidelines for the interpretation of constitutional provisions in general and the

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481. *The doctrine of pith and substance' was first evolved by' privy council' to interpret the legislative powers of British North America Act, 1867 (i.e. constitution of Canada). Some of the Canadian cases on this rule are: All General for Canada v. Attorney. General for British Columbia, 1930, A.C. 111, Russell v. the queen A.C. 829.*

482. *AIR 1939 PC 1*

interpretation of the legislative list in particular. He observed that “a broad and liberal spirit should inspire those whose duty is to interpret.” It must be submitted that this golden rule given by the Chief Justice Gwyer was followed by courts in many subsequent cases. It seems that this rule has hardly been questioned since then, if the rigid principle of division of powers between the centre and states are applied there are chances that many laws could have been declared void simply for the reason that legislature enacting them may appear to have legislated in other legislative sphere. Similarly in a recent case of *Union of India and other v. Shah Goverdhan L. Kabra Teachers College*<sup>483</sup> it was held by the honourable Supreme court that article 246 is the source of powers to legislate and the entries in the three lists are fields of legislation’ Widest interpretation has to be given to the entries subject to the condition that the meaning of words should not be extended beyond their reasonable connotation and that construction should not be so wide as to override another entry.

Therefore when ever there arises a doubt about the legislative jurisdiction of a particular legislature, the court applies the rule of pith and substance and gives the entries it widest possible meaning and interpret it in their natural sense.

In the case of *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd. Khulna*,<sup>484</sup> the validity of the Bengal money lender’s Act 1946 was questioned. This Act was challenged under the provision of Government of India Act, 1935. The Bengal money lender’s Act, 1946 was enacted by the Bengal state legislature under entry 27 of list II money lending and money lender, which an exclusive provincial subject under the Government of India Act, 1935 objective of the money lenders Act was to put a limit on the amount and rate of interest recoverable by a money-lender on any loan. The Act was challenged as ultra vires on the ground that it also dealt with “Cheques bills of exchange, promissory notes and other like instruments”, which was an exclusive central subject under entry 28 of list I, of Government of India, Act, 1935, privy council applied the doctrine of ‘pith and substance’ and held that since the subject matter of the legislation is money lending and not the promissory note and it only- incidentally touch upon the promissory note, therefore Bengal money lender’s

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483. (2002) 8 SCC 228

484. AIR 1947 PC 60

Act, 1948 if perfectly valid. In other words it can be said that doctrine of pith and substance save the enactments which incidentally touch upon the promissory note, therefore Bengal money lender's Act, 1948 if perfectly valid. In other words it can be said that doctrine of pith and substance saves the those enactments which incidentally touch upon a forbidden sphere. Same interpretation was followed by the supreme court in case of state of *Bombay v. Narotlam Das Jethabhai*<sup>485</sup> Where it was observed:

*The doctrine of pith and substance postulates for its application, that the impugned law is substantially within the legislative competence of the particular legislature that made it, but only incidentally encroaches upon the legislative field of another legislature. The doctrine saves this incidental encroachment, if only the law is in pith and substance within the legislative field of the particular legislature which made it.*

Again in a case of *State of Bombay v. F.N. Balsara*<sup>486</sup> the validity of the Bombay Prohibition Act, 1949 was challenged. The Act was passed by the Bombay state legislature under entry 31 of list II of the Government of India Act, 1935, which among other things dealt with. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale intoxicating liquors, opium and other narcotic drugs." It was argued that the Act was void because it also dealt with possession and sale of imported liquors because 'import' was a subject-within the exclusive jurisdiction of federal government under 'entry 19 list 1. Supreme court rejected all such arguments and while upholding the validity of Bombay prohibition Act, the honourable supreme court observed that it is well settled that the validity of an Act is not affected if it incidentally encroaches on the matters outside the authorized field and, therefore it is necessary to inquire into each case as what is the pith and substance of the Act, Impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which

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485. AIR 1951 SC 69

486. AIR 1951 SC318

enacted it, then it can't be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature.

Than in an another case<sup>487</sup> supreme court noted that with respect to the question of invasion into the territory of another legislature it is to be determined not by the degree but by the substance. Nevertheless, the extent of invasion is altogether irrelevant for the determination of the question. Though the validity of an Act is not be determined by discriminating between degrees of invasion, the extent of invasion into another sphere may itself determine what is the 'pith and substance' of the impugned Act.

But once the pith and substance of the legislation is determined and it is found to be within the powers of the legislature, the extent of invasion into the other sphere can't invalidate the law.<sup>488</sup> It is also submitted that the name of the particular legislation is irrelevant. The court is concerned with the real motive or object of the legislation nothing less nothing more.

While detecting whether a law is valid or void court must try to reconcile between the two conflicting entries contained in two different lists. Even finding out repugnancy between central and state law, courts apply the rule of pith and substance, In the case of *Vijay Kumar Sharma v. State of Karnatka*<sup>489</sup> Justice Sawant observed that whenever repugnancy between the state and central legislation is alleged, what has to be first examined is whether the two legislation cover or relate to the same - subject matter. The test for determining the same is the usual one. Namely, to find out the dominant intention of the two legislations. If the dominant intention, i.e. the pith and substance of two legislation is different.

From the forgoing paras it is clear that doctrine of pith and substance is basically related with the real intent of the legislation. Whenever it is alleged that a particular piece of legislation is not within the legislative jurisdiction of the legislature by which it has been enacted, the court- will apply the doctrine of pith and substance to find out real intent of the legislation, and if legislation incidentally touch

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487. *Amar Singh v. State of Rajasthan* 1955 2 SCR, 803.

488. *Chatterbhai v. Union of India* AIR 1960 SC 424.

489. *AIR 1990 SC 2072*

upon a forbidden sphere' but mainly belong to the legislature which enacted it, it will not be declared as void. This doctrine has played a significant role in saving many laws in general and state laws in particular. States have been the main beneficiary of this doctrine. Some has been observed by Chandrapal:

*Since the principle of 'pith and substance' of almost all legislation may be characterized in various ways, and thus the rule gives an element of flexibility to the whole scheme of distribution of legislative powers.*<sup>490</sup>

Therefore it can be submitted that doctrine of pith and substance in nothing but an another 'attempt by the judiciary of get rid of rigid legislativdistribution of powers between centre and state.

The distribution of executive powers between the Union and the States is somewhat more complicated than that of the. legislative powers.

I. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive powers of State is, in the main, coextensive with its legislative powers,—which means that the executive powers of State shall extend only to its own territory and with respect to those subjects over which it has legislative competence. The limitations on the exercise of executive powers by the Government are twofold, first, if any Act or law has been made by the State legislature conferring any function or any other authority, in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive powers nor can the Governor exercise such powers in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive powers of the State Government does not create any embargo for the legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.<sup>491</sup> [Art. 162]. Conversely, the Union shall have exclusive executive powers over

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490. Dr. Chandrapal, 'Centre- State Relation and Co-operative Federalism at 91 (1985).

491. P.H. Paul Manoj Pandian v. P. Veldurai, (2011) 5 SCC 214 (230).

- (a) the matters with respect to which Parliament has exclusive powers to make laws (i.e., matters in List I of Sch. VII), and
- (b) the exercise of its powers conferred by any treaty or agreement [Art. 73]. On the other hand, a State shall have exclusive executive powers over matters included in List II [Art. 162].

In the case *A.P. Public Service Commission v. Balaji Badavath and Other*<sup>492</sup> court held that Article 162 is relates to the Executive powers of the State to issue governmental orders. Notification containing similar provisions as contained in G.O.Ms. No. 570 dated 31-12-1997 issued by Public Service Commission If the terms of the notification were held to be unconstitutional, the said G.O.Ms. could have also been declared as such.

In another case *Janita Hill Truck Owners Association v. Shailang Area Coal Dealer and Truck Owner Association and Others*<sup>493</sup> court held that : Article 162 of the Constitution of India in unequivocal terms provides that the executive powers of a State shall extend to the matters with respect to which the Legislature of the State has powers to make laws. Such executive powers having regard to the Rule of Executive Business are framed in terms of Article 166. Clause (3) of Article 166 empowers the Governor to make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Minister of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion.

There exists a distinction between an executive order made in terms of Articles 73 and 162 of the Constitution of India and one made under the Sixth Schedule thereof.

- II. It is in the concurrent sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List (i.e., List III), the executive function shall ordinarily remain with the States, but subject to the provisions of the Constitution or of any law of Parliament conferring such

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492. 2009 (4) SCJ 623

493. 2009 (8) SCJ 426

function expressly upon the Union. Under the Government of India Act, 1935, the Centre had only a powers to give directions to Provincial Executive to execute a Central law relating to a Concurrent subject. But this powers of giving directions proved ineffective; so, the Constitution provides that the Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject. In the result, the executive powers relating to concurrent subjects remains with the States, except in two cases—

- (a) Where a law of Parliament relating to such subjects vests some executive function specifically in the Union, e.g., the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Proviso to Art. 73(1)]. So far as these functions specified in such Union law are concerned, it is the Union and not the States which shall have the executive powers while the rest of the executive powers relating to the subjects shall remain with the States.
- (b) Where the provisions of the Constitution itself vest some executive functions upon the Union. Thus,
  - (i) The executive powers to implement any treaty or international agreement belongs exclusively to the Union, whether the subject appertains to the Union, State or Concurrent List [Art. 73(1)(b)].
  - (ii) The Union has the powers to give directions to the State Governments as regards the exercise of their executive powers, in certain matters—
    - (I) In Normal times:
      - (a) To ensure due compliance with Union laws and existing laws which apply in that State [Art. 256].
      - (b) To ensure that the exercise of the executive powers of the State does not interfere with the exercise of the executive powers of the Union [Art. 257(1)].

- (c) To ensure the construction and maintenance of the means of communication of national or military importance by the State [Art. 257(2)].
- (d) To ensure protection of railways within the State [Art. 257(3)].
- (e) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the States [Art. 339(2)].
- (f) To secure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups [Art. 350A].
- (g) To ensure the development of the Hindi language [Art. 351].
- (h) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution [Art. 355].
- (II) In Emergencies:
  - (a) During a Proclamation of Emergency, the powers of the Union to give directions extends to the giving of directions as to the manner in which the executive powers of the State is to be exercised, relating to any matter [Art. 353(a)]. (so as to bring the State Government under the complete control of the Union, without suspending it).
  - (b) Upon a Proclamation of failure of constitutional machinery in a State, the President shall be entitled to assume to himself all or any of the executive powers of the State [Art. 356(1)].
- (III) During a Proclamation of Financial Emergency:
  - (a) To observe canons of financial propriety, as may be specified in the directions [Art. 360(3)].
  - (b) To reduce the salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and High Courts [Art. 360(4)(b)].
  - (c) To require all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State [Art. 360(4)].

- III. While as regards the legislative powers, it is not competent for the Union [apart from Art. 252, see ante] and a State to encroach upon each other's exclusive jurisdiction by mutual consent, this is possible as regards executive powers. Thus, with the consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [Art. 258(1)]. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [Art. 258A].
- IV. On the other hand, under Art. 258(2), a law made by Parliament relating to a Union subject may authorise the Central Government to delegate its functions or duties to the State Government or its officers (irrespective of the consent of such State Government)<sup>494</sup>.

From the above discussion it becomes clear that the doctrine in its classical sense which is structural rather than functional cannot be literally applied to any modern government because neither the powers of the governments can be kept in watertight compartments nor can any government run on strict separation of powers. Nevertheless, in America, people criticized the growth of administrative law on the ground that it violates the principles of the doctrine of separation of powers. The criticism became more intense at the growth of statutory commissions to regulate the new area' of activity. These Commissions were given wide legislative, executive and judicative powers. Regulatory powers exercised by regulatory authorities such as Inter-State Commerce Commission, Civil Aeronautics Board, Federal Communication Commission, Federal Power Commission and Security Exchange Commission represented an amalgam of functions devised with little regard to constitutional theory of separation of powers because the control of concentrated industrial powers through concentrated governmental powers had become inescapable. This led to the appointment of Attorney-General Committee to review the entire growth of administrative process. The Committee saw no danger to the personal liberty in the growth of administrative process if the control mechanism is activated properly. On the recommendations of this Committee, the Administrative

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494. Dr. Durga Das Basu, *Introduction to the Constitution of India*, 20<sup>th</sup> Edition, pp. 331-333.

Procedure Act, 1946 was passed, The Act "represents a moderate adjustment on the side of fairness to the citizens in the never-ending quest for a proper balance between governmental efficiency and individual freedom". This never-ending quest further led to the appointment of the Task Force of the Second Hoover Commission which also recommended an effective control mechanism to safeguard the liberty of the people in the face of growing administrative process.

Before all these commissions, the main problem was how to reconcile the delegation of legislative and judicial powers to administrative agencies with the doctrine of separation of powers. First attempt at such reconciliation, was made by using the word 'quasi'. It was pointed out that what the administrative agencies exercise is only a quasi-legislative and quasi-judicial powers. No matter, to soften a legal term by a 'quasi' is a time-honoured lawyer's device, yet, in the sphere of administrative process it becomes illogical to grant legislative and judicial powers to administrative agencies and still to deny the names. Therefore, now it is being increasingly realized that the 'cult of quasi' has to move from any theoretical prohibition to a rule against unrestricted delegation circumscribed by the powers of judicial review under the compulsions of modern government. The doctrine of separation of powers in its classical sense, which is now considered as a high school textbook interpretation of this doctrine, cannot be applied to any modern government, this does not mean that the doctrine has no relevance in the world of today, The logic behind this doctrine is still valid. The logic behind this doctrine is of plurality rather than strict classification, meaning thereby that the centre of authority must be dispersed to avoid absolutism. In the same manner professor Wade writes that the Objection of Montesquieu was against accumulation and monopoly rather than interaction.<sup>495</sup> Montesquieu himself never used, the word 'separation' therefore, not impassable barriers and unalterable frontiers but mutual restraint in the exercise of powers by the three organs of the state is the soul of the doctrine of the separation of powers. Hence the doctrine can be better appreciated as a doctrine of 'check and balance' and in this administrative process is not an antithesis of the doctrine of

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495. *National Cable Television Assn. v. U.S.*, 415 US 336.

separation of powers. In *Indira Nehru Gandhi v. Raj Narain*<sup>496</sup>, Chandrachud, J. also observed that the "political usefulness of the doctrine of separation of powers is now widely recognized." No constitution can survive without a adherence to its find checks and balances. "Just as courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of volour."<sup>497</sup>

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496. *1975 Supp. SCC 1*

497. *Ibid.*