

LEGISLATIVE RELATION BETWEEN UNION AND STATES

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CONSTITUTIONAL LAW II

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CHAPTER I- INTRODUCTION

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the National Government and separate states. The tendency of federalism to limit on every side the action of the government and to split up the strength of the state among co-ordinate and independent authorities is especially noticeable, because it forms the essential distinction between a federal system. And a unitary system of Government. ” A Federal Constitution establishes the dual polity with the union at the centre and the states at a periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the constitution.” “The one is not subordinate to the other in its own field, the authority of one is co-ordinate with that of other”. In fact, the basic principle of federation is that the legislative, executive and financial authority is divided between the centre and state not by any law passed by the centre but by constitution itself. This is what Indian constitution does.

CHAPTER II -LEGISLATIVE RELATIONS

The constitution of India makes two fold distribution of legislative powers-

A] With respect to territory;

B] With respect to subject matter.

2.1) TERRITORIAL JURISDICTION

As regards territory Article 245(1) provides that subject to the provisions of this constitution, parliament may make laws for the whole or any part of the territory of India. According to clause (2) of Article 245 a law made by parliament shall not be deemed to be invalid on the ground that it has extra-territorial operation, i.e. takes effect outside the territory of India. In *A.H. Wadia v. Income tax Commissioner, Bombay*¹, the Supreme Court Held : “In the case of a sovereign Legislature question of extra- territoriality of an enactment can never be raised in the municipal court as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognized by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are concerned.”

THEORY OF TERRITORIAL NEXUS

The Legislature of a state may make laws for the whole or any part of has extra-territorial operation i.e. takes effect outside the state.² However, there is one exception to this general rule. A state law of extra-territorial operation will be valid if there is sufficient nexus between the object and state.

¹ AIR 1949 FC 18

² Kochuni Vs. State of Madras, AIR 1960 SC 1080

In *Wallace v. Income tax Commissioner, Bombay* a company which was registered in England was a partner in a firm in India. The Indian Income tax Authorities sought to tax the entire income made by the company. The privy council applied the doctrine of territorial nexus and held the levy tax valid. It is said that the derivation from British India of a major part of its income for a year gave to a company for that year sufficient territorial connection to justify its being treated as at home in India for all purposes of tax on its income for that year from whatever source income may be derived.

In *State of Bombay v. R. M. D. C.*³ the Bombay state levied a tax on lotteries and prize competitions. The tax was extended to a newspaper printed and published in Bangalore but had wide circulation in Bombay. The respondent conducted the prize competitions through this paper. The court held that there existed a sufficient territorial nexus to enable the Bombay state to tax the newspaper. If there is sufficient nexus between the person sought to be charged and the state seeking to tax him, the taxing statute would be upheld. But illusory and the liability sought to be imposed must be pertinent to that connection. Whether there is sufficient connection is a question of fact and will be determined by courts in each accordingly.

2.2) DELEGATED LEGISLATION

Delegated or subordinate Legislation may be defined as rules of law made under the authority of an Act of parliament. Although laws are to be made by the Legislatures, but the Legislature may by statute delegate its power to other persons or bodies. Such a statute is commonly known as “the enabling Act” and lays down the broad principles and leaves the

³ AIR 1957 SC 699

detailed rules to be provided by regulations made by a minister or other persons. Delegated legislation exists in the form of rules, regulations, orders and bye-laws

FACTORS RESPONSIBLE FOR THE GROWTH OF DELEGATED LEGISLATION

The practice of delegating power to make subordinate legislation has greatly increased in the modern times due to the following reasons;

1] Pressure on parliamentary time- parliament being a busy body has insufficient time to deal adequately with the increasing mass of legislation necessary to regulate affairs of a complex modern state.

2] Technicality of subject matter- 'Technicalities' of modern legislation require expertise knowledge of problems which is not expected of the legislators in the legislature which are composed of politicians.

3] Opportunity of subject matter- Delegated legislation is more flexible, easily amendable and revocable than ordinary legislation. There is enough scope for experimentation.

4] Unforeseen contingencies- Subordinate legislation enables a Government to deal with problems which could not be foreseen when the 'enabling Act' was passed and to act quickly in an emergency.

5] Emergency powers- During the emergency quick and decisive action is necessary and at the same time it is to be kept confidential. The legislature is not fit to serve this end and therefore the executive is delegated the powers to make rules to deal with such situations.

The Indian constitution permits subordinate legislation by delegation. Art. 13 (3) provides that "law" "includes any ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law. The theory of separation of power

which is an important feature of the American constitution is absent in India as well as England. So, there is no constitutional impropriety in the practice of delegating legislative power to executive. In the U.S.A. the entire legislative power is vested in congress.

LIMITS-

The limits of delegated legislation have been set out in the various decisions of the courts after the new constitution came into force. It has been held that the legislature cannot delegate its essential functions which consist in declaring the legislative policy and laying down the standard which is to be enacted in to a rule of law with sufficient clearness, and what can be delegated is the task of subordinate legislation which by very nature is ancillary to the statute which delegates the power to make it effective. The courts cannot interfere in the discretion vested in the legislature in determining the extent of the delegated power in particular case.⁴

NEED TO CONTROL EXERCISE OF DELEGATED LEGISLATION-

In 1929 the Lord Chief Justice, Lord Hewart in his book 'The New Despotism' criticized the growth of delegated legislation and pointed

out the dangers of its abuse. As a result, the committee on ministers Powers was set up which in its report accepted the necessity for delegated legislation but considered but the power delegated might be misused and recommended the following modes of control over the delegated legislation namely :

⁴ Ajay Kumar Banerjee v. Union of India, (1984) 5 SCC 127, In re the Delhi Laws Act, 1912, AIR 1951 SC 332

1. Nomenclature of various forms of delegated legislation should be supplied and better provision be made for publication.
2. The precise limits of law-making power which parliament intended to confer on a Minister should be clearly defined.
3. The use of “Henry VIII clause” authorizing a minister to amend the enabling Act itself to be an exception and be confined to bringing an Act into operation. Clauses excluding jurisdiction of the courts should be abandoned in all but the most
4. exceptional cases.
5. Consultation with interested bodies should be extended.
6. Parliamentary scrutiny and control should be improved

TWO TYPES OF CONTROL OVER DELEGATED LEGISLATION-

1. **Judicial control.**- the courts have power to consider whether the delegated or subordinate legislation is consistent with the provisions of the ‘enabling Act’. Their validity can be challenged on the ground of ultra vires i.e., beyond the competence of the legislature. The courts can declare the parent Act unconstitutional on the ground of excessive delegation or violation of fundamental rights or if it is against the scheme of distribution of legislative powers under Art. 246 of the constitution. The parent Act may be constitutional but the delegated emanating from it may come in conflict with some provisions of the constitution and hence it can be declared unconstitutional.
2. **Parliamentary control.**- it is the primary duty of the legislature to supervise and control the exercise of delegated power by the executive authorities. Parliamentary control over the delegate legislation is exercised at three stages. The first stage is the stage when

power is delegated to the subordinate authorities by Parliament. This stage comes when the bill is introduced in the legislature. The second stage is when the rules made under the statute are laid before the Houses of Parliament through the committees on subordinate legislation. The committee on subordinate legislation scrutinizes the rules framed by the executive and submits its report to the legislature if the rules are beyond the permissible limits of delegation. These rules are laid before the legislature and debated in the legislature. If they are ultra vires questions may be put to the minister concerned and if necessary even a motion of censure on the minister responsible for the rules and regulations may be moved.

CHAPTER III SUBJECT MATTER

As we pointed out at the outset, a federal system postulates a distribution of powers between the centre and states. The nature of distribution varies according to the local and political background in each country. In America, the sovereign states which were keen to federate, did not like complete subordination to the central government hence they believed in entrusting subjects of common interest to the central government, while retaining the rest with them. Thus American constitution only enumerates the powers of the central government and leaving the residuary power to the states. Australia followed the American pattern of only one enumeration powers i.e., of Central Government leaving the residuary power to the states because their problems were similar to the Americans. In Canada there is double enumeration, Federal and Provincial leaving the residue to the Centre. The Canadians were conscious of the unfortunate happenings in U.S.A culminating in Civil War of 1862. They were of the shortcomings of the weak centre. Hence, they opted for a strong Centre. Our constitution makers followed the Canadian scheme obviously opting for a strong Centre. However, they added one more list-the Concurrent List. The Government of India Act, 1935, introduced a scheme of three fold enumeration, viz., Federal, Provincial and Concurrent.

The present constitution adopts the method followed by the Government of India Act. 1935, and divides the powers between the Union and states in three Lists- the Union List, the state list and the Concurrent List.

1. The Union List consists of 97 subjects. The subject mentioned in the union List is of national importance, i.e., defence, foreign affairs, banking currency and coinage, union duties and taxes.

2. The State List consists of 66 subjects. There are of a local importance, such as, public order and police, local government, public health and sanitation, agriculture, forest, fisheries, education, state taxes and duties. The states have exclusive power to make laws on subjects mentioned in the State list.
3. The Concurrent List consists of 46 subjects. Both centre and States can make laws on the subject mentioned in the Concurrent List. But incase of conflict between the Central and the State law on concurrent subjects, the Central law will prevail. The Concurrent List is not found in any federal constitutions. The framers added this List to the Constitution with a view to secure uniformity in the main principles of law throughout the country. The Concurrent List was to serve as a device to avoid excessive rigidity to two-list distribution. The Concurrent List thus, in the words of Pyle, is “a twilight zone, as it were, for both the Union and the States are component to legislate in this field, without coming into conflict.”

3.1 THE RESIDUARY POWERS-

Article 248 vests the residuary powers in the parliament. It says that parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List. Entry 97 in the Union List also lay down that Parliament has exclusive power to make laws with respect to any matter not mentioned in the State List or the Concurrent List including any tax not mentioned in either of these Lists. Thus the Indian Constitution makes a departure from the practice prevalent in U.S.A., Switzerland and

Australia where residuary powers are vested in the states. This reflects the leanings of the Constitution-makers towards a strong Centre.

3.2 PRINCIPLES OF INTERPRETATION OF LISTS

THE POWER OF Centre and states are divided. They cannot make laws outside their allotted subjects. It is that a scientific division is not possible and questions constantly arise whether a particular subject falls in the sphere of one or the other government. This duty in a federal constitution is vested in the Supreme Court of India. The Supreme Court has evolved the following principles of interpretation in order to determine the respective power of the Union and the States under the three lists.

- Predominance of the Union List- the opening words of Art. 246 (I) “notwithstanding anything in clauses (2) and (3)” and the opening words of clause (3) “subject to clauses (1) and (2)” expressly secure the predominance of the Union List over the State List and the Concurrent List And that of concurrent List over the State list. Thus in case of overlapping between the union and the Concurrent List, it is again the Union List Which will prevail. In case of conflict between the concurrent List and state List, it is the Concurrent List that shall prevail.
- Each Entry to be interpreted broadly- Subject to the overriding predominance of the Union List, entry in the various lists should be interpreted broadly. In *Calcutta Gas Ltd. V. state of Bengal*.⁵ the supreme Court said that the “widest possible” and ‘most liberal’ interpretation should be given to the language of each entry. A general word used in an entry..... must be construed to the extent to all ancillary

⁵ AIR 1962 SC 1044

or subsidiary matters which can fairly and reasonably be held to be included in it.⁶
The Court should try, as far as possible, to reconcile entries and to bring harmony between them. When this is not possible only then the overriding power of the Union Legislature- the non obstante clause applies and the federal power prevails.⁷

In Union of India v H.S. Dhillon,⁸ the question involved was whether parliament had legislative competence to pass Wealth-tax Act imposing wealth tax on the assets of a person in agricultural land. The Court held that in case of a central Legislation the proper test was to inquire the matter fell in List II (State List) or List III (Concurrent List). Once it is found that matter does not fall under List II, Parliament will be competent to legislate on it under its residuary power in Entry 97 of List I. In such a case it becomes immaterial whether it falls under Entries I-96 of List or not .

Pith and substance- Within their respective spheres, the Union and the State legislature are made supreme and they should not encroach into the sphere reserved to other. If a law passed by one encroaches upon the field assigned to the other the court will apply the doctrine of pith and substance to determine whether the legislature concerned was competent to make it. If the pith and substance of law, i.e., the true object of the legislation or a statute, relates to a matter with the competence of Legislature which enacted it, it should be held to be intra vires even though it might incidentally trench on matters not within the competence of Legislature. In order to ascertain the true character of the legislation one must have regard to the enactment as a whole, to its object and to the scope and effect of its provision. The Privy Council applied this doctrine in Profulla

⁶ Prem Chand Jain v. R.K. Chabra, (1984) 2 SCC 302

⁷ State of Bombay v. F.N. Balsara, AIR 1951 SC 318, 322

⁸ AIR 1972 SC 1061

Kumar v. bank of Khulna.⁹ in this case the validity of the Bengal Money Lenders' Act, 1946 which limited the amount and the rate of interest recoverable by a money lender on any loan was challenged on the ground that it was ultra vires of the Bengal Legislature in so far as it related to 'promissory notes', a central subject. The Privy Council held that the Bengal Money-Lenders Act was in Pith and substance a law in respect of Money-Lending and Money-lenders a state subject, and was valid even though it trenched incidentally on "Promissory note"- a central subject.

In State of Bombay v. F.N. Balsara¹⁰ the Bombay, Prohibition Act, which prohibited sale and possession of liquors in the state, was challenged on the ground that it incidentally encroached upon import and export of liquors across custom frontier- a central subject. It was contended that the prohibition, purchase, use, possession and sale of liquor will affect its import. The court held that Act valid because the pith and substance of the Act fell under the State List and not under the Union List even though the Act incidentally encroached upon the Union Powers of Legislation.

- Colorable Legislation- in K.C.G. Narayan Dev v. State of Orissa¹¹ the Supreme Court explained the meaning and scope of the doctrine of colorable legislation in the following terms:-

“If the Constitution distributes the legislative power amongst different Legislative 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

⁹ AIR 1947 PC 60

¹⁰ AIR 1951 SC 318; State of Rajasthan v. G. Chawla, AIR 1959 SC 544

¹¹ AIR 1953 SC 375

fundamental rights, question arises 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 be disguised, covert or indirect, or and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter is substance which is beyond The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. In these cases the Court will look in the true nature and character of the legislation and for that its object, purpose or design to make law on a subject is relevant and not its motive. If the legislature has power to make law, motive in making the law is irrelevant.

State of Bihar v. Kameshwar Singh¹² is the only case where a law has been declared invalid on the ground of colorable legislation. In this case Bihar Land Reforms Act, 1950 was held void on the ground that though apparently it purported to lay down principle for determining compensation yet in reality it did not lay down any such principle and thus indirectly sought to deprive the petitioner of any compensation.

¹² AIR 952 SC 252

CHAPTER IV REPUGNANCY BETWEEN A CENTRAL LAW AND A STATE LAW ART.

254- Article 254(1) says that if any provision of law made by the legislature of the state is repugnant to any provision of a law made by parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then 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 the repugnancy be void.

Article 254(1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List. But the question is how the repugnancy is to be determined? In *M. Karunanidhi v. Union of India*¹³ Fazal Ali, J., reviewed all its earlier decisions and summarized the test of repugnancy. According to him a repugnancy would arise between the two statutes in the following situation:

1. It must be shown that there is clear and direct inconsistency between the two enactments (Central Act and State Act) which is irreconcilable, so that they cannot stand together or operate in the same field.
2. There can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

¹³ AIR 1952 SC 252

3. Where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. Where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

The above rule of repugnancy is however, subject to the exception provided in clause (2) of this Article. According to clause (2) if a State law with respect to any of the matters enumerated in the Concurrent list contains any provision repugnant to the provision of an earlier law made by parliament, or an existing law with respect to that matter, then the state law if it has been reserved for the assent of the president and has received his assent, shall prevail notwithstanding such repugnancy. But it would still be possible for the parliament under the provision of clause (2) to override such a law by subsequently making a law on the same matter. If it makes such a law the State Law would be void to the extent of repugnancy with the Union Law.

In *Zaverbhai v. State of Bombay*¹⁴ parliament enacted the Essential Supplies Act, 1946, for regulating production and distribution of essential commodities. A contravention of any provision of the above Act was punishable with imprisonment upto 3 years or fine or both. In 1947, considering the punishment inadequate, the Bombay Legislature passed an Act enhancing the punishment provided under the Central Law. The Bombay Act received the assent of the president and thus prevailed over the Central Law and became operative in Bombay. However, in 1950 parliament amended its Act of 1946 and enhanced the

¹⁴ AIR 1954 SC 752

punishment. It was held that as both occupied the same field (enhanced punishment) the state law became void as being repugnant to the Central law.

Parliaments power to legislate on state subject-

1. Power of parliament to legislate in the national interest.- According to Article 249, if Rajya Sabha passes a resolution supported by 2/3 of the members present and voting that it is necessary or expedient in the national interest and parliament should make laws with respect any matter enumerated within State Law, then it shall be lawful for the parliament to make laws for the whole or any part of the territory of India with respect to that matter so long as the resolution remains in force. Such a resolution normally lasts for a year; it may be renewed as many times necessary but not exceeding a year at a time. These laws of parliament will, however, cease to have effect on the expiration of the period of six months after resolution has ceased to operate.
2. During a proclamation of Emergency.- According to Article 250 while the proclamation of Emergency is in operation the parliament shall have power 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.
3. Parliaments power to legislate with the consent of the states.- according to Article 252 if the legislature of two or more states pass resolution to the effect that it is desirable to have a law passed by parliament on any matters in the State :List, it shall be lawful for parliament to make laws regulating that matter. Any other state may adopt such a law by passing a resolution to that effect. Such Law can only be amended or repealed by the Act of Parliament.

4. Parliaments power to legislate for giving effect to treaties and international agreements.- Article 253 empowers the parliament to make any law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions. 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 in the State list. Art. 253 enables the Government of India to implement all international obligations and commitments.
5. In case of failure of constitutional machinery in a state.- Under Article 256 parliament is empowered to make laws with respect to all matters in the State List when the parliament declares that the Government of the state cannot be carried on in accordance with the provision of the constitution.

CHAPTER V CONCLUSION

Thus from the scheme of distribution of legislative powers between the Union and the States it is quite evident that the framers have given more powers to the Union Parliament as against the States. The States are not vested with exclusive jurisdiction even over the subjects assigned to the States by the Constitution and thus it makes the states to some extent subordinate to the Centre. Indeed this is a clear departure from the strict application of federal principle followed in America and Australia.

CHAPTER VI BIBLIOGRAPHY

Dr. J.N. Pandey; Constitutional Law of India 44th Edition (2007)

T.K. Tope; constitutional Law of India P. 523 (1982 Ed)