Dr. VIPIN KUMAR SINGH

Assistant Professor

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Topic- DISTRIBUTION OF POWERS BETWEEN UNION AND STATE

DISTRIBUTION OF POWERS BETWEEN UNION AND STATE

The main characteristic of a federal constitution is the distribution of powers between the union and the states. The Indian constitution provides for a new kind of federalism to meet India's peculiar needs. In the matter of distribution of powers, the framers followed the pattern of the Government of India Act, 1935. Thus, predominance has been given to the union parliament over the state legislatures or assemblies regarding the distribution of legislative powers.

The legislative powers are subject to the scheme of distribution of powers between the union and state legislatures (as provided in three lists under the constitution), fundamental rights (i.e. legislative powers cannot contravene the fundamental rights) and other provisions of the constitution (articles 245-254).

There are three lists which provide for distribution of legislative powers under 7th Schedule to the constitution:-

(1) U*nion List* (List 1) – It contains 97 items and comprises of the subjects which are of *national* importance and admit of uniform laws for the whole of the country. Only the union parliament can legislate with

respect to these matters. For example, Defence, foreign affairs, banking, currency, union taxes, etc.

(2) *State List* (List 2) – It contains 66 items and comprises of subjects of *local* or *state* interest and thus lie within the legislative competence of the state legislatures, viz. public order and police, health, agriculture, forests, etc.

(3) C*oncurrent List* (list 3) – It contains 47 items, with respect to which; both union parliament and the state legislature have a concurrent power of legislation. The concurrent list (not found in any federal constitution) was to serve as a device to avoid excessive rigidity to a two-fold distribution. It is a 'twilight zone', as for not so important matters, the states can take initiative, while for the important matters, the parliament can do so. Besides, the states can make supplementary laws in order to amplify the laws made by union parliament. The subjects include general laws and social welfare – civil and criminal procedure, marriage, contract, planning education, etc.

However, in spite of the distribution of legislative powers under the three lists, the predominance has been given to the union parliament over the state legislatures. The constitution makes a two-fold distribution of legislative powers: –

(1) With respect to *territory.*
(2) With respect to *subject matter* of legislation, (i.e. three lists).

[1] Territorial Legislative Jurisdiction [Article 245]

Article 245 defines the *ambit* or *territorial limits* of legislative powers. Subject to the constitutional provisions, Parliament may make laws for whole or any part of the territory of India, and a state legislature for the territory of that state and no law made by the parliament would be invalid on the ground that it would have extra-territorial operation i.e. takes effect outside the territory of India."

Theory of Territorial Nexus

The doctrine of territorial nexus is deeply rooted in laws of India even before the commencement of Constitution of India in 1950 the government.

[2] Distribution of Legislative Subjects [Article 246]

Article 246 provides:-

(1) notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in the list 1 *(union list)*.
(2) notwithstanding anything in clause (3), parliament, and, subject to clause (1), the state legislature also, have the power to make laws with respect to any of the matters enumerated in the list 3 *(concurrent list)*.
(3) subject to clauses (1) and (2), the state legislature has exclusive power to make laws for such state with respect to any of the matters enumerated in list 2 *(state list)*.
(4) Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a state, notwithstanding that such matter is a matter enumerated in the state list.

Thus, article 246 provides that the parliament has exclusive power to make laws with respect to union list; the state legislature for the state list; and, the parliament and the state legislature, both, for the concurrent list. However, as it will be seen later, there is a predominance of the union parliament in matters of legislative lawmaking.

Autonomy to Centre and States (legislative powers)

In **Javed versus State of Haryana**, the apex court upheld the constitutional validity of certain provisions of Haryana Panchayati Raj Act, 1994, which disqualified a person for holding office of sarpanch or a panch of a gram panchayat, etc. if he had more than two living children, though a similar provision was not found to have been enacted by the parliament or other state legislatures.
In **State of MP versus GC Mandawar,** it was held that two laws enacted by two different governments and by two different legislatures could be read neither in conjunction nor by comparison for the purpose of finding out if they were discriminatory.

Principles of interpretation of lists

The distribution of subject-matters cannot be claimed to be scientifically perfect and there happens to be overlapping between the subjects

enumerated in the three lists. Whether a particular subject falls in the sphere of one or other government (i.e. union or state), the supreme court has evolved following principles to determine respective powers of union and state legislatures.

Plenary power of legislature

It is an absolute power to enact laws (even if it is contrary to any understanding or guarantee is given by the state), subject only to its legislative competence and other constitutional limitations. No limitation can be read on the ground of legislative practice or legitimate expectations.

The principle to interpret the entries (in lists) so as to make the legislative power of parliament and state legislatures 'plenary' is that the entries should not be read in a narrow or restricted sense. Each general word in an entry should be construed to include all ancillary or subsidiary matters which can fairly and reasonably be said to comprehend it.

The following points are important to understand the nature of plenary power:-

(1) The power to make a law includes the power to give effect to it *prospectively* (i.e. *for future* acts – law to take effect from a future date) as well as *retrospectively* (i.e. *for past* acts – law to take effect from a backdate).
(2) The meaning of a *validation act* is to remove the causes of ineffectiveness or invalidity of actions or proceedings which are validated by a legislative measure. A validating law is upheld first by finding out whether legislature possesses competence over die subject matter/and, whether by validation the legislature has removed the defects which the courts have found in the previous law.
(3) where an impugned act (i.e. an act whose validity is questioned) passed by a state legislature is invalid on the ground that state legislature did not have legislative competence to deal with the topic covered by it, then even parliament cannot validate such act, because such validation

would give the state legislature power over subjects outside its jurisdiction.

(4) When the legislature cures the said infirmity and passes a validating law, it can make the said provisions of earlier law effective from the date when it was passed. The retrospective application of law thereby removing the basis of earlier judicial decision (i.e. a decision based on earlier law) is not an encroachment on the judicial power. However, the legislature cannot by bare declaration, without anything more, reverse or override a judicial decision.

(5) Doctrine of Colorable Legislation

The constitution distributes the legislative powers between the parliament and the state legislature, and, they are required to act within their respective spheres. Often the question arises as to whether or not the legislature enacting the law has transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect. The doctrine of colorable legislation is applied when the transgression is disguised, covert and indirect. The "colorable legislation" simply means a legislation which, while transgressing constitutional limitation, is made to appear as if it were quite constitutional.

If the law enacted by the legislature is found in substance and in reality beyond the competence of the legislature enacting it, it will be *ultra vires* and void, even though it apparently purports to be within the competence of the legislature enacting it. It is the substance of the act that is material and not merely the form or outward appearance. This doctrine is based on the maxim that 'what one cannot do directly, that cannot be done indirectly.' It is also characterized as a fraud on the constitution because no legislature can violate the constitution by employing an indirect method.

'Color ability' is thus bound up with *incompetency* and not tainted with bad faith or evil motive. If the legislature has the power to make law, motive in making the law is irrelevant. A thing is colorable which in appearance only and not in reality, what it purports to be. the court will

look into 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. The propriety, expediency, and necessity of a legislative act are for the determination of the legislative authority and are not for determination by courts.

It is *not* too often that a law is declared bad on the ground of colorable legislation. Further, if a statute is found to be invalid on the ground of legislative incompetence, it does not permanently inhibit the legislature from re-enacting the same if the power to do so is properly traced and established. in such a situation, it cannot be said that subsequent legislation is merely a colorable legislation or a camouflage to re-enact the invalidated previous legislation.

In **State of Bihar verses Kameshwar Singh** , the court held that the Bihar Land Reforms Act, 1950 apparently purported to lay down rule for determination of compensation but in reality it did not lay down such rule and indirectly sought to deprive the petitioner of his property without any compensation and hence it was a colorable legislation and invalid. in this case, a state law dealing with the abolition of the landlord system provided for payment of compensation on the basis of income accruing to the landlord by way of rent. Arrears of the rent due to the landlord prior to the date of acquisition were to vest in the state, and half of these arrears were to be given to the landlord as compensation.

The entry 42, list 3, which provided for 'principles on which compensation for property acquired or requisitioned for the purpose of union/state or for other public purpose is to be determined,' was modified as 'the taking of the whole and returning a hair meaning nothing more or less than taking half without any return. It was held that this is naked confiscation, no matter in whatever specious form it may be clothed or disguised. The impugned provision, therefore, in reality, does not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent.

Inconsistency or Repugnancy between union and state laws (Article 254)

***Clause* (7):** "if any provision of a law made by state legislature is repugnant to any provision of a law made by parliament which parliament is competent to enact, or to any provision of an existing law with respect to matters enumerated in *concurrent list,* then subject to clause (2) provisions, the parliamentary law, whether passed before or after state legislatures' law, or the existing law, shall prevail and state law shall, to the extent of repugnancy, be *void."*

Article 254(1) enumerates the rule that in the event of a conflict between a union and a state law, the former prevails. The union law may have been enacted prior to the state law or subsequent to the state law. the *principle* behind is that when there is legislation covering the same ground both by the Centre and by the state, both of them competent to enact the same, the central law should prevail over the state law.

'Repugnancy' between two pieces of legislation, generally speaking, means that conflicting results are produced when both the laws of the state as well as union legislature with respect to a concurrent list are applied to the same facts. the expression *'existing law'* refers to laws made before the commencement of constitution by any legislature, authority, etc. example criminal law, civil procedure, evidence, contract, etc.

***Clause* (2):** Enacts an *exception* to the rule of clause (1). "where law made by state legislature with respect to matters in concurrent list contains any provision repugnant to an earlier parliamentary law or an existing law with respect to that matter, then state law shall, if reserved for consideration by president and has received his assent, prevail in that state. *Provided* that nothing in the clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding, amending, varying or repealing state law."

Article 254(2) provides for *curing* of repugnancy which would otherwise invalidate a state law which is inconsistent with a union law or an existing law in order that the state law should prevail in that state, the following conditions must be satisfied:

(1) There must be in existence a union law;

(2) Subsequent to the union law the state legislature enacts a law with respect to a matter in the concurrent list; and

(3) The state law having been reserved for the president's consideration has received his assent thereto.

However, the *proviso* to article 254(2) lays down that parliament may again supersede state legislation which has been assented to by the president under clause (2) by making a law on the same matter. It is important that the later (union) legislation must deal with the *same matter* (as of earlier state legislation) and not distinct matter, though of cognate and allied character. Further, in the case of repugnancy, not the entire state law becomes void, it becomes void only to the extent it is repugnant to the central law.
The state law may be amended or repealed by parliament either directly or by enacting a law repugnant to it with respect to the same matter. Where it does not expressly do so, even then state law will be repealed by necessary implication.

Legislative Powers: Predominance of Union Law and limitations of State Legislatures

(1) In case of an overlapping between the three lists, regarding a matter, the predominance is given to the union (article 246). Thus, entries in state list have to be interpreted according to those in the union and concurrent lists.

(2) In the concurrent sphere, in case of a repugnancy or inconsistency between union and states law relating to the *same* subject – the union law prevails (article 254).
(3) Extensive nature of Union List — Some subjects normally intended to be in the jurisdiction of states are in the union list example industries, universities, election and audit, inter-state trade and rivers, etc.
(4) Residuary powers (article 248) – Power to legislate with respect to any matter not enumerated in any of the three lists (example imposition of taxes) is given to the union.

(5) Expansion of powers of union legislature under certain circumstances – in the following situations, parliament can legislate with respect to "state list" subjects:

(a) when the Rajya Sabha declares by a resolution of 2/3rd majority (members present and voting) that it is necessary for national interest; it shall be lawful for parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. (Article 249)

(b) Under a proclamation of emergency; it shall be lawful for parliament to make laws for the whole or any part of the territory of India with respect to matter in the state list (article 250). Thus, during emergency, the parliament can legislate on subjects in all the three lists and the federal constitution gets converted into unitary one.
Nothing in articles 249 and 250 shall restrict the power of state legislature to make any law which under this constitution it has the power to make, but 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 has under either of the said articles power to make, the law made by parliament, whether passed before or after the law made by the legislature of the state, shall prevail, and the law made by the legislature of the state shall to the extent of the repugnancy, but so long only as the law made by parliament continues to have effect, be inoperative (article. 251).

(c) by agreement between the states i.e. with the consent of state legislatures; if it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which parliament has no power to make laws for the states (except as provided in articles. 249 and 250) should be regulated in such states by parliament by law, and if resolutions to that effect are passed by all the house of the legislatures of those states, it shall be lawful for parliament to pass an act for regulating that matter accordingly, and 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 states' house. the parliament *(not* state

legislature) also reserves the right to amend or repeal any such act (article. 252).

(d) **To implement treaties:- N**otwithstanding anything in the foregoing provisions of this chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other bodies (article 253). Treaties are not required to be ratified by parliament. They are, however, not self-operative. Parliamentary legislation will be necessary for implementing them. But laws enacted for the enforcement of treaties will be subject to the constitutional limits i.e. such a law cannot infringe fundamental rights.

(e) **Failure of constitutional machinery in a state** (article 356). The president can authorize the parliament to exercise the powers of the state legislature during the proclamation of emergency due to the breakdown of constitutional machinery in a state.

(6) Distribution of legislative powers does not apply to union territories, in which parliament can legislate with respect to 'any subject' including those in the state list. Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a state) notwithstanding that such matter is a matter enumerated in the state list [article. 246(4)].

(7) Notwithstanding anything in this chapter, Parliament may by law provide for the establishment of any additional.