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Legislative Power of Union and State

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ABSTRACT

Since the classical exposition by Dicey of federalism as a natural constitution for a body of states which desire union and do not desire unity it needs hardly to explain that a federal system implies a double government and division of power between the two governments union and states. The distribution of power may obviously relate to the three branches of government: legislative, executive and judicial as had been pointed out at the outset our constitution does not purpose to divide the judicial power at all. As executive power the division broadly follows the line of division of the legislative power but in the needs not be coincide. Article 73 and 162 of our constitution primarily deal with the distribution of executive power but there are some other provision included in chapter 2 of part 9 which have been looked into in order to get a complete picture of the scheme. Our constitution seeks to effect the distribution by a detailed enumeration of the power of the two competing jurisdictions. This is which first introduced in 1935 act was. We do not dispute the facts that these proposals will open the door to litigation of a kind which has hitherto been almost unknown in India. But a statutory allocation of exclusive jurisdiction to the centre and the provinces respectively is the only possible foundation for provincial autonomy. But the bias has been towards centralization that is to say the balance that is to be say it is favorable to the union¹. Through the nature of the distribution business according to the local and political background is the division proceeds in two lines.

1 The territory over which the Federation and the unit shall respectively have their jurisdiction.

2 The subject to which their respective jurisdiction shall extend shall extend.

Keywords: Parliament, Power, Repugnancy, Center, State, Authority

1 INTRODUCTION

According to the article 1 of the constitution of India is a union of states which means a federation of states. There is in a federation a division of functions between the center and states. The main characteristics of a federal constitution is distribution of power between center and states. The Indian constitution provides for a kind of federalism to meet India peculiar needs in the matter of distribution of power. Thus the predominance has been given to union over state regarding division of power. There are three lists which provide for distribution of legislative power under 7 schedule to the constitution of India². The constitution which divides all power legislative, executive and financial as between them the judicial power as already not divided and their common Judiciary for Union and the state the result is that it cannot allocate of the Union and that through there are Agencies and devices for Union control our state in many matter are subject to such assumptions the state are autonomous and with their own spare allotted by the constitution and both the Union and the state subject to the limitation imposed by the constitution say first the existence of power been limited by fundamental right.

¹ D. D. Basu, *Commentary on The Constitution of India*, 8626 (Lexis nexis Haryana 8th edn., 2011).

² M. P. Jain, *Indian Constitutional Law* 503 (Lexis Nexis, Haryana, 7th edn., 2016).

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thus whether the union legislature nor state legislature can be said to be so brain in the legislative science each being limited by the provision of the Constitution affecting the distribution of legislative power at between them apart from one another through the provision written that power in certain matter example article 226 and the power of a profession to impose tax on profession . article 303 limiting the power of both Parliament and its relation with regard to legislation it into trade and Commerce if any of these limits is violated the law of the Literature is liable to be declared invalid by the courts .

2 Historical background

Government act 1919

This was based on what are popularly known as the MontagueChelmsford reforms First time introduce responsible government in India. Under this act the Indian legislative council at the center was replaced by a bicameral system consisting of a council of state (upper house).³Dual system was introduced in the provinces. Provincial subjects were divided into reserved subjects such as police jails land revenue, irrigation and forests and transferred subjects such as education local self-government public health sanitation agricultural and industries.

The reserved subjects were to be administered by the governor and his executive council.

The government of India act 1935

The government of India act of 1935 was passed on the basis of the report of Simon commission the outcome of the round table conference.Provision for the establishment of an all India federation at the center consisting of the provinces of British India. Division of power into three list federal provincial and concurrent.

Introduction of dual at the center the governor general and his councilors administered the reserved subjects. The council of ministers were responsible for the transferred subjects. Residuary power is with the governor general with its own discretion power. There were to be three subject list federal provincial and concurrent.

Parliament is empowered to make law with respect to matter in union list and as well as in the concurrent list in the state list also when it is necessary for the national interest List 1 includes union has exclusive power to make law with respect to any of the matter enumerated in union list this list has at present 100 subject (originally) 97. List 2 state legislatures has in normal circumstances has exclusive power to make laws With respect to matter in state list.List 3 is the concurrent list where center and state is make the law.The power to make the law in respect to residuary subject is vested to the center not with the state

In USA only the powers of the federal government are enumerated in the constitution and the residuary power with the state. In the Australia constitution followed the American pattern of single enumeration of powers . In Canada there is a double enumeration federal and provincial and residuary power are vested in the center. The constitution of India being federal in structure divides all power legislative financial and executive power. The center and state are supreme in their own field and have maximum autonomy.⁴

Article 245 to 255 in part 11 of the constitution deal with legislative relations between the Centre and the states.The main characteristic of a federal constitution is the delivery of power between center and states. The Indian constitution provides for a new kind of federalism to meet India basic needs. Thus the predominance has been given to the union over state regarding the distribution of legislative powers.

Constitutional PROVISION

Article 245 deals with the ambit or territorial limits of legislative powers .subject to the constitutional provision, parliament may make laws for the whole of the INDIA and a state legislature make the law for the territory of that state legislature for the territory of that state clause 2 NO law made by the parliament would be invalid on the ground that it would have extra territorial operation i.e. is takes effect outside the territory of India.

The legislative power of the parliament and state legislature is subject to the provision of the constitution

- 1 the scheme of the distribution of power
- 2 fundamental rights
- 3 other provision of the constitution

THEORY OF territorial nexus

THE doctrine of territorial nexus is deeply rooted in laws of even before the commencement of india in 1950 article 245 has made doctrine of territorial nexus a part of scheme of distribution of legislative power of the constitution . it is applied where a particular state law has extra territorial operation . it signifies that the object to which the laws applies need not be physically located within the territorial boundaries of that State but what Is necessary is that it should have a sufficient

³ Rajiv Ahir , a Brief History of Modern India 509 , (Spectrum book(P) ltd, New Delhi,25th edn .,2019).

⁴M LAXMIKANT, Indian polity 14.2 (Mc Graw hill education India private limited, Chennai, 5th edition., 2017).

Territorial related with the state, if there is territorial nexus between the subject matter of the act and the state making the law then the statute in question is not regarding having extra territorial operations .

Whether there is a question of fact and it would be determined by the courts only .ⁱ

⁵DELEGATED legislation .it is simply known as secondary subordinate legislation is enacted by the administrative branch of the government

Factor responsible for the growth of delegated legislation

- 1 pressure on parliamentary time
- 2 technicality of the subject matter
- 3 Unforeseen contingencies

Union and state delegated his legislative power. There must be some limitation. It has been held that the essential legislative function cannot be delegated.

EXTRA TERRITORIAL OPERATION clause (2)

It simply means legislation which attaches significance for courts within the jurisdiction to facts and events occurring outside jurisdiction.ⁱⁱ

Article 245 (2) no law made by the parliament would be invalid on the ground that it would have extra territorial operation.ⁱⁱⁱ

For example if a citizen of India goes to USA and marries American girl while his first wife is alive he can be prosecuted in India for the bigamy .

Bengal immunity company ltd v state of Bihar⁶

The court held that extra territorial operation is used in two sense firstly the act or event took place inside the state and operation outside the state secondly law with reference to the nationals of a state in respect to outside the state

The constitution places the certain restriction on the territorial jurisdiction and its simply means parliament cannot make the law.

Firstly the president can make the law and regulation for the union territories. Secondly the governor is empowered to direct the parliament cannot apply in schedule areas .

Distribution of legislative subject article 246

Article 246 of the constitution does not provide for the competence of parliament or the state law making as is simply understood but merely provides for the respective legislative fields. Each entry of the 7 schedule has to interpret in a broad manner. The constitution provides a threefold of a legislative provision between Centre and state in the 7 schedule that is union list concurrent list state list.

The parliament has exclusive power to make laws with respect to any matter in the list.

THE state legislatures has in normal circumstances exclusive power to make laws in state list

The parliament and state legislatures can make law in the concurrent list .

3 DOCTRINE OF PITH AND SUBSTANCES

It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list and the different provision of that blind adherence to a strictly verbal interpretation would result in a large no of statute being declared invalid because enacting them may appear to have legislated in forbidden sphere. Hence the rule which has been evolved by the judicial committee where by the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determine whether it is legislation with respect to matter in this list or in that .

In Kerala SEB v Indian aluminum co .Ltd⁷

It was held that whether any entry fall in the theory of pith and substance has been evolved by the courts . if its is fall in one list or other but the same portion is the subject matter of the that legislation incidentally trenches upon and might come to fall under another list . act as a whole is valid

4 DOCTRINE OF COLOURABLE LEGISLATION

THE doctrine of colorable legislation is based on the principle that no legislation can violate constitutional prohibitions by employing an impermissible method. Constitutional power cannot be used for achieving the goals.

The question whether the laws was a colorable legislation and as such void depends upon on the competence of the legislature to pass that particular laws .it is the substance of the act. That if material and not merely its form or outward

⁵ J N Pandey , Indian constitutional law (central law agency , Allahabad , 53th edition., 2017).

⁶ Air 1955 SC 661.

⁷ (1976) 1 SCC 466

Appearance What the court have to determine in such cases is whether though the legislatures has purported to act within the limits of its power it has substance and reality transfer those power being veiled by want appears on proper examination to be mere presence .the question whether a law was a c l and as such void did not depends on the motive or best of the legislation in passing law It is based on the legal maxim what cannot do directly what you do directly.

The doctrine of cl is applicable where when legislation seeks to don something in a indirect manner. The doctrine refers to the question to the competency of the legislature to enact a particular law .the doctrine of colorable legislation does not involve any question of bonafide or malafide on the part of the legislation . If there is do not have a competency then no question of motive arises. The question shall be arise if there is limitation of transgressed and it is imposed by constitution⁸ . If a statue is found ultra-virus on the ground of legislative competence then it does not permit.

5 HARMONIOUS CONSTRUCTION

An endeavor must be made to solve the problem by having recourse to the context and scheme of the act and reconciliation attempt between the apparently conflicting jurisdiction by reading the two entries together and by interpreting and where necessary modify the language of the act if indeed such a reconciliation should prove impossible then and operate and federal power prevails . A general power or ought not so construed as to make a nullity of a particular power conferred bang the formal in amore restricted same the same act and operating in the same field when by the reading the formal in a more restricted same effect can be given to the latter in its ordinary and natural and meaning .

Subject to the predominance of the union list the entries in the various list should be interpreted broadly. It is an attribute of plenary power of legislation.

6 ASPECT THEORY

It is formed as a separate rule of legislative competence in the federationcase .the federation was challenged the vires of the expenditure tax act 1987⁹. A union legislation make a law of 10 per cent tax on expenditure incurred in a hotel in which the room tariff exceeded RS 400 per day. The Gujarat government enact the tax and imposing the tax on luxury goods in a hotel. The court held that that there was no reason to limit the legislative competence to impose a particular tax to the economist definition

7 ARTICLE 254

If any provision of a law made by the state legislatures is repugnancy to any provision of a law made by the legislatures of state

1 if any provision of a made by state legislatures is conflict to any provision of a law made by center is to enact or to any provision of an existing law with the respect to matters enumerated in concurrent list, then subject to the clause 2 provision the parliamentary law whether passed before or after state legislature law or the existing law shall prevail and state law or the existing law shall prevail and state law shall to the extent of repugnancy bevoid.¹⁰

Article 254 enumerates the rule that in the event of a conflict between a union and a state the former prevails. The center law may have been enacted prior to the state law or subsequent to the state law. the principal behind is that when there is legislation convincing the same ground both by the center and by the state both of them competent to enact the same the central law should be prevail over state laws . The expression exiting laws refers to the laws made before the commencement of constitution by any legislatures authority etc.

A law made by parliament which parliament is competent to enact does not include a law with respect to a matter in union list . State legislation will be ultra-virus u article 246, however a repugnancy may arise while legislation within their exclusive jurisdiction and yet dealing with the same subject matter

8 REPUGNANCY¹¹

The question of repugnancy of repugnancy between the parliamentary legislation and state legislation arise in two ways

1 Where the legislation though enacted with respect to matters in their allotted sphere overlap and conflict.

2 where the two legislation are with respect to matters in the concurrent list and there is a conflict.

In the both the condition parliament dominant.

Clause 2 where the law made by the state legislatures with respect to matters in concurrent list contain 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 law shall if reserved for the consideration by president and has received his assent prevail in that state provided that nothing that in the clause shall prevent parliament from enacting at any time any law with respect to the same matter

⁸ M P JAIN, INDIAN CONSTITUTIONAL LAW 565 (Lexis Nexis , Haryana 7th edition 2014).

¹⁰ P M Bakshi, The constitution of India 302 (universal law publishing, Haryana, 14th edition., 2017).

¹¹ P M Bakshi, commentary The constitution of India 691 (universal law publishing, New Delhi, 5th edition ., 2014).

Parliament Proverbially federalism has been characterized as a rigid form of government. . Constituted as it is of a dual polity there is rigid distribution of meaning between the center and the states support by no less a sanction that the of the constitution. The balance thus drawn between the center and the state cannot be disturbed by one of them unilateral. Neither the center nor the states can trench upon the jurisdiction assigned to the other. A change in the scheme of distribution of power only affected by way of amendment of the constitution which is not always easy to effectuate as the process of constitution amendment in a federation is always.

Concurrent create the barrier between state and union. When there are two exclusive areas allotted to them. The concurrent list makes it possible for either center or the states or both of them operate on a matter related to the demand of the situation at a given time a further flexibility has been introduced in this areas by providing for an expedient to keep a state law alive in the face of a central

9 ARTICLE 249 IN THE CONSTITUTION OF INDIA 1949

249. Power of Parliament to legislate with respect to a matter in the State List in the national interest¹²

When we look at article 249 we only find that law making power of parliament are only in term of whole of the or any part of the territory of India . The provision does not remove the power of state legislatures in same matter. But in case of conflict between union and state then union law is prevail. There are four in built safeguard against misuse of power conferred by article 249 parliament only do if these condition is satisfy

If rajya Sabha two third member present and voting and pass the resolution That matter must be in state list Only for the one year in force proverbially federalism has been characterized as a rigid form of government. . Constituted as it is of a dual polity there is rigid distribution of meaning between the center and the states support by no less a sanction that the of the constitution. The balance thus drawn between the center and the state cannot be disturbed by one of them unilateral. Neither the center nor the states can trench upon the jurisdiction assigned to the other.

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a number of constitutional provision enable parliament to legislate in the state sphere from time to time .

10 ARTICLE 250

power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have, power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List

A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period

under Articles 249 and 250 and laws made by the Legislatures of States Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has 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.¹³

248. Residuary powers of legislation

1 Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List

2 Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Constitution of India has vested the residuary power as an exclusive head of power in the Union by entry 97 of List I of the Seventh Schedule.

The residuary power of parliament relates to passing of legislation on such matters which are not enumerated in any list. On such residuary matters only parliament can legislate which has been given exclusive power for this purpose.

The scope of the residuary power is very wide for example under list 3 and entry 3 center can make law for prevention detention and similar center can make law related same subject matter in list 1 entry 9. And parliament can make law in any ground with respect to residuary power . COFEPOSA act is the best example where residuary power is used by center govt. It is related to smuggling and foreign exchange.¹⁴

Parliament cannot use to destroy the autonomy of the state legislatures The framers of the constitution were conscious of the fact that human knowledge is

¹² P M Bakshi, The constitution of India 300 (universal law publishing, Haryana, 14th edition., 2017).

¹³ P. M. Bakshi, The constitution of India 300 (universal law publishing, Haryana, 14th edition., 2017).

¹⁴ Supra note 2 at p. 579.

limited and human perception imperfect and no one could foresee what contingency may arise in future needing legislation. Your residuary power is intended to take care of such matters as could not be identified at the time of making constitution.

11 CENTRAL CONTROL OVER STATE LEGISLATION

There are a few provision in the constitution as stated below which prescribe assent of the president.

- 1 article 200 proviso that a state governor has been ordained not to give assent but to reserve for the president
- 2 article 301 declares that trade commerce and intercourse shall be free throughout INDIA but state can impose reasonable restriction but on the ground of public interest

But prior permission of president

- 3 If state imp use tax in respect of electricity under article 288 or any authority established by the parliament for regulating any interstate river. Ha no effect unless assent by president.

There are the same situation is good but not all if we see the past practice of Centre. Its violate or domain the state legislature domain.

12 JUDICIAL PRONOCUMENT

*PrafullaKumar v bank of commerce*¹⁵

In this case the validity of Bengal money lender act which limited the amount and the rate of interest recoverable by a money lender on any loan was questions on the ground that it was ultra vires the Bengal legislatures in so far as it related to promissory notes a central subject entry 21 list 2 state list – money lending and money lenders entry 28 list 1 union list cheese bills of exchange promissory notes and other like instrument

The court held that the pith and substance of the act being money lending a state subject and it was valid though it trenched incidentally on promissory notes.

To take a promissory notes as security for a loan is the common practice of money.

Following principal are deducible from the decision in this case

1 A clear cut distinction is not possible between legislative powers of union state legislatures because they are bound to overlap. To upheld the validity of the impinged act, the question to be asked is what is the pith and substance of impugned act? In ascertaining one must consider a object of the act b scope of the act and c effect of the act as awhile. After having ascertained the true nature of law the courts must point out in which of the three list an act of that nature truly falls.

2 the extent of invasion by a legislature in other list is an important matter not for determining validity of law but for determining the pith and substance of impugned act. Its provision may advance so far into federal territory as to show that its true in nature is not concerned with the regional matters but is the trespass whatever it be such as to show that pith and substance of the impugned act is not money lending but promissory notes or banking?

3 where there list are in conflict list 1 has priority over list 2 and list 3 over 2. but the question still remains priority in what respect? does the priority of the federal legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an activist and whatever its ancillary effect attribute it to the appropriate list according to its true nature.

The Privy Council held that the disputed act was not the void as whole pr anomaly part as being ultra-virus the provincial legislatures.

*Karunanidhi vUOI*¹⁶

The appellant abused official position thus a prosecution launched under Ipc and prevention of corruption act. The state act relating to public men was passed after obtain president assent and later repealed. The question arose whether action could take under central laws Ipc and the prevention of corruption act.

The Supreme Court held that the state act was not repugnant and therefore did not repeal central acts which continued to be in operation. the state act was rather a complementary act and it itself provide that central acts to come to its aid after an investigation is completed. It provides that public men will have to be prosecuted under the central, laws.

¹⁵ AIR 1947 P.C 60.

¹⁶ AIR 1979 SC 89.

13 CONCLUSION

The important is that strong center is the need of current India because curtail the influence of other enemy country like Pakistan and china . The strong center maintain the unity and integrity of the nation. The Indian Constitution is to establish either cooperative or supportive federalism. Through the separation of powers between the Centre and the States, a certain independence is granted to the States to ensure that the administration at the grass-root level remains efficient. Simultaneously, the Centre exercises its power over the States to maintain a balance. Before passing law in concurrent list there must be the consultation with the states. The purpose of strong center is for need good development and fast economic growth and industrial progress.

14 SUGGESTIONS

The residuary power must be in hand of center but ,must be take consult with the two third of the states .residuary power do not shift to the states like American constitution if it does so then it is the biggest disaster in Indian history . States like Jammu and Kashmir, khalistan movement must use it and might be separate from the India .

7 in respect of bills passed by the state governor take the decision within 3 months either grant the assent or take it for the consideration for the president .The governor appointed from the center and this problem is mostly arises where the center and state have different party ruling e.g. center govt in the name of BJP and state government t in the name of congress where the governor take most of the bill for consideration for president that why governor is famous for his name rubber stamp of the center . This constitutional position is misused so many times but if the center do so how the state is developed.

8 article 356 should not be used in the arbitrarily manner must be used for the revive of the state govt in the state .In the Indian history most of the central government for their own benefit and used the muscle and money and destroy the state government in 2016 the uttarakhand government is the best example for all where the BJP misuse the power arbitral manner . then the high court of uttarkhand held that if court used the power in right manner then no government is stand more than 5 minutes .
