DISTRIBUTION OF LEGISLATIVE POWERS BETWEEN UNION AND STATES – PROBLEMS AND ISSUES

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I. INTRODUCTION

> There is no dichotomy between a strong Union and strong States. Both are needed. The relationship between the Union and the State is a relationship between the whole body and its parts. For the body being healthy it is necessary that its parts are strong. It is felt that the real source of many of our problems is the tendency of centralisation of powers and misuse of authority. [1]

The above observation of National Commission to Review the Working of the Constitution (National Commission) in fact depicts the true nature of the Constitution of India which has broadly incorporated the essential features of the Government of India Act, 1935 and, in addition, has taken inspiration from some of the old and modern Constitutions of the world.

The Constitution of India envisages India to be a Union of States. It incorporates a detailed scheme of distribution of legislative powers between the Union and the states. The distribution of powers is not, however, watertight. Not only there are situations of overlapping jurisdiction in the conferment of power, there can also be conflict in the exercise of those powers. The Parliament's legislative powers extend to the whole of India and no legislation enacted by Parliament can suffer from the vice of unconstitutionality on the ground of extra-territorial operation.[2] The power of state legislatures to legislate remains confined to the territory of the state concerned. A state law may be unconstitutional on the ground of its application beyond the territory of the state concerned unless the same was saved by application of the theory of nexus.[3]

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1 REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION (2002) at 152.

2 Article 245(2), Constitution of India.

3 *State of Bombay* v. *R.M.D.C.*, AIR 1957 SC 699; *Tata Iron & Steel Company* v. *State of Bihar*, AIR 1958 SC 452; *State of Bihar* v. *Charusila Dasi*, AIR 1959 SC 1002.

II. Constitutional Scheme for Distribution of Power

The scheme of distribution of powers contained in the Constitution is based broadly on the Government of India Act, 1935. All the subjects have been specified in the form of entries in three Lists in the Seventh Schedule of the Constitution. The first one, known as the Union List (List I), contains 97 Entries. The subjects included in this List include those which are of strategic and national importance to the country and on which uniformity in law is required for the whole country. These subjects have been assigned exclusively to Parliament under article 246(1). The power of Parliament to enact legislations on the subjects included in this List is not only exclusive but also overriding the powers of the state legislatures in case of conflict and inconsistency with any subject included in the other two Lists. The state legislatures have been assigned legislative powers in respect of 66 Entries specified in the State List (List II). The subjects included in State List are of local significance and that is the reason why they have been assigned to the states for legislation. There are 47 Entries in Concurrent List (List III) on which both Parliament and the legislatures of states have concurrent powers to legislate. In case of inconsistency between the law made by Parliament and law made by the legislature of a state enacted under List III, the law made by Parliament prevails over the law made by the state legislature except when the law made by the state legislature had been reserved for consideration of the President and has received his assent.[4] The National Commission in its report recommended the insertion of a new entry in the Concurrent List with the heading "Management of Disasters and Emergencies, National or Man Made".[5] Likewise the Estimates Committee of Parliament had recommended that "Water" should be transferred from the State List to the Concurrent List of the Seventh Schedule. These recommendations have not been implemented as yet.

The state legislatures are empowered to exercise their powers subject to Parliament's power given under the Union List. This would be clear by a reading of clauses (2) and (3) of article 246 of the Constitution. The consequence of these provisions would be that if there arises a situation of conflict between a legislation enacted by Parliament in exercise of powers in the Union List and a legislation enacted by a state legislature in exercise of its power in the State List or Concurrent List and the conflict cannot be resolved by applying the principles of harmonious construction and doctrine of pith and substance, the law enacted by Parliament would be valid and the state law to the extent of conflict would be void.

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4 Article 254(2), Constitution of India.

5 *Supra* n. 1 at 155.

The Parliament has also the entire legislative power for the Union Territories[6] as well as residuary power in respect of subjects not included in the State List or the Concurrent List.[7] Besides this, the Parliament can legislate on any subject enumerated in the State List under many situations.[8]

Since the commencement of the Constitution, some legislative entries have been transferred from the State List to the Concurrent List thereby increasing the powers of Parliament to legislate in those subjects. The Constitution (Forty-second Amendment) Act, 1976 transferred many subjects from the State List to Concurrent List. These are: (1) Administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts (entry11A); (2) Education (entry 25); (3) Weights and measures except establishment of standards (entry 33A); (4) Forests (entry 17A); and (5) Protection of wild animals and birds (entry 17B).[9]

The tilt in favour of legislative powers of Parliament does not end here. A bill passed by state legislature can be reserved by the Governor of State concerned for consideration of the President under Article 201. There are many constitutional provisions which require that a Bill in respect of a particular subject shall not be introduced before the state legislature unless prior assent of the President had been obtained.[10] The Constitution neither prescribes any clear principle to indicate the kinds of Bills which can be reserved for President's consideration nor lays down any time frame within which the President should consider the Bill proposed to be introduced before state legislature or which has already been passed by the state legislature.[11]

These constitutional provisions relating to distribution of legislative powers have given rise to conflicts between the Centre and the States and have brought about bitterness in the Centre-State relationship. Despite the establishment of the Inter-State Council[12] on May 28, 1990, no serious efforts have ever been made to make it more effective in order to have harmonious legislative relationship between the Centre and States.

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6 Article 246(4), Constitution of India.

7 Article 248, *id.*

8 Articles 247, 249, 250, 252, 253 and 356, *id.*

9 See R.C. Bhardwaj, ed., CONSTITUTION AMENDMENT IN INDIA (New Delhi: Lok Sabha Secretariat, 1995).

10 See, e.g. Articles 31C, 304(b),Constitution of India.

11 *Hoechst* v. *State of Bihar*, AIR 1983 SC 1019; *Bharat Seva Ashram* v. *State of Gujarat*, AIR 1987 SC 494; *Puthiyadeth Jayamathy Avva* v. *K.J. Naga Kumar*, AIR 2001 Ker 38.

12 Article 263, Constitution of India.

The Constituent Assembly did not start its work with respect to distribution of legislative powers in a clean slate. It had formulated the blue prints of Cabinet Mission's plan and the provisions of the Government of India Act, 1935. The problem before the Constituent Assembly was that it had to please three masters to formulate the scheme of distribution of legislative powers: (1) the Federation, (2) the Provinces and (3) the Indian states. Over and above this, the Assembly had experience of partition of India into two parts: India and Pakistan. Considering the importance of the subject and to pacify all the three masters referred above, the Assembly started its work. The Constituent Assembly constituted a Union Powers Committee and a Union Constitution Committee. These Committees recommended a clear-cut demarcation of legislative powers between centre and states with a strong centre. It was on the basis of the experiences of the world federal constitutions, recommendations of the Committees, blue prints and the foundation mentioned above that present scheme of distribution of legislative power was adopted.

A federal structure pre-supposes that: (1) The Constitution of country would be written and its amending process would be very rigid to the extent that without the consent of the federating units, the Constitution would not be amendable; (2) That there will be distribution of all kinds of powers – legislative, executive and judicial - between the federal Government and the federating units, the residuary legislative power will be vested in the federating units; (3) That the federal units have agreed to surrender part of their power in favour of federal Government; and (4) that there will be independent judiciary to adjudicate disputes between the federal Government and federal units.[13]

The Constituent Assembly addressed itself to the immensely complex task of devising a Union with a strong Centre. This task was beset with many difficulties. They had to bring into the Union not only the British Indian Provinces, but also the Princely States and the remote inaccessible Tribal Areas. They were conscious that several areas and regions of this sub-continent had, for a very long time, been following their own sub-cultures, administrative systems, traditions, customs and ways of life. It was, therefore, readily accepted that "there are many matters in which authority must lie solely with the units". Further, that "it would be a retrograde step both politically and administratively" to frame a Constitution with a Unitary State as the basis.

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[13] *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241.

In fashioning the form of Parliamentary government, the Assembly drew largely on the British model. In devising the pattern of Union-State Relations they were influenced, in varying degrees, by the principles underlying the Constitutions of Canada and Australia, which had Parliamentary system, and the United States, which had Presidential system. They made use of the Government of India Act, 1935, after making significant changes in it. Nevertheless, the Constitution as finally passed, was *sui generis*. There were substantial differences in both legal provisions and conventions between India and these countries. The geographical, historical, political, economic and sociological conditions and compulsions in India were basically different.

The Constitution as it emerged from the Constituent Assembly in 1949, has important federal features but it cannot be called 'federal' in the classical sense. It cannot be called 'unitary' either. It envisages a diversified political system of a special type. According to Dr. B.R. Ambedkar, Chairman of Drafting Committee of the Constituent Assembly, it is unitary in extraordinary situations, such as, war (or emergency) and federal in normal times. Some authorities have classified it as a "quasi-federal" Constitution. However, these labels hardly matter as both levels of Government derive their respective powers from a written Constitution, which is supreme, and there is a Supreme Court to interpret the Constitution.

Article 1 describes India as a 'Union of States'. These States are specified in the First Schedule to the Constitution. Articles 2, 3 and 4 enable Parliament by law to admit a new State, increase, diminish the area of any State or alter the boundaries or name of any State. A special aspect of the Indian Union is that the Union is indestructible but not so the States; their identity can be altered or obliterated. This is a departure from a federal feature which obtains in a classical federation like the U.S.A. The Constituent Assembly rejected a motion in the concluding stages to designate India as a 'Federation of States'. Dr. Ambedkar, Chairman of the Drafting Committee, while introducing the Draft Constitution explained the position thus:

> [T]hat though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a

> single people living under a single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their federation was indestructible. The drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation.[14]

Another distinctive aspect of the Indian Constitution is that it provides for a single citizenship for the whole of India. There is no dual citizenship, one of the Union and the other of the States. In this respect, the Indian Union basically differs from the American federation which recognizes a dual citizenship and consequent diversity in the rights of the citizens of different States. This important difference between the two countries is due to their different historical backgrounds. Whereas the American Federation was the result of an agreement between pre-existing independent States, in India the position was significantly different. Before the formation of the Indian Union, its units did not have the status of sovereign independent States.

The Union legislature or Parliament has two Houses, the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Unlike in most federations, representation in both is on the basis of population, through indirect election in the former and direct election in the latter. The Council of States has been given some special functions regarding matters effecting States, while the House of the People has been given some special role regarding financial matters. States have been given some flexibility about having bicameral or unicameral legislatures.

The Constitution contains detailed provisions regarding the distribution of taxing powers between the Union and the States. The fields of taxation have been enumerated either in the Union List or in the State List. There is no subject of taxation in the Concurrent List. The Constitution recognizes that the financial resources of the States may not be adequate for discharging their onerous responsibilities. It, therefore, envisages certain tax revenues raised by the Union to be shared with the States. It provides not only for their distribution between the Union and the States but also *inter se* among the States on the recommendations of the Finance Commission.[15]

It is noteworthy that though the Constitution creates a dual polity based on divided governmental powers, this division is not watertight. It is flexible. The large concurrent sphere let alone, several entries in the State List have an interface with the Union List. Such entries are either subject to certain entries in the Union List or Concurrent List, or a law made by Parliament.

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[14] CONSTITUENT ASSEMBLY DEBATES, Volume VII at 43.

[15] Articles 268 – 281, Constitution of India.

Introducing the draft Constitution, Dr. Ambedkar pointed out that when diversity created by division of authority in a dual polity goes beyond a certain point it is capable of producing chaos. In this context, he emphasized:

> "The Draft Constitution has sought to forge means and methods whereby India will have Federation and at the same time will have uniformity in all basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Committee are three:
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> (1) a single judiciary;
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> (2) uniformity in fundamental laws, civil and criminal; and
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> (3) common All-India Civil Service to man important posts."[16]

There are other special features also which highlight the predominance of the Union. Where, with respect to a matter, there is irreconcilable conflict or overlapping as between the three Lists of the Seventh Schedule, the legislative power of the States must yield to that of the Union [Non-obstante clauses in Articles 246(2) and (3)]. A law made by a State legislature, repugnant to a law made by Parliament or an existing law applicable in that State, in regard to any matter enumerated in the Concurrent List, shall be void to the extent of repugnancy [Article 254 (1)]. However, if such a State law having been reserved for the consideration of the President and receives his assent, it shall remain operative [clause (2) of Article 254]. Nevertheless, Parliament may amend or repeal such State law notwithstanding the President's assent.

III. Response of Judiciary

The above discussion of legislative relations between the Centre and the States clearly reveals that there is a conscious constitutional tilt in favour of the Centre in the legislative sphere. However, the courts have upheld state legislation on matters in the Concurrent List until the Parliament exercised its supervening power. As regards state legislation with respect to certain entries in the State List which overlap the entries in the Union List, there arises the question of determining inter-relationship among them. The courts have evolved several principles of interpretation to harmonize the exercise of State and Union authority. The principle followed in such cases has been to establish harmony among the various seemingly conflicting

[16] Constituent Assembly Debates, Volume VII at 36-37.

entries, by restricting the ambit of broader entry in favour of the narrower entry, so that the latter is not wiped away by the former.[17] This interpretative principle has helped the States, as the Centre's powers are more generally worded.[18]

Another norm is the doctrine of 'pith and substance' which is a judicial innovation aimed at avoiding conflicts between the Centre and the States and giving due scope for the full exercise of legislative jurisdiction within the spheres allotted to them under the Constitution. The courts examine the true nature and character of a particular legislation and if it substantially falls within the powers conferred on the legislature, which has enacted it, it is not declared invalid, even if it incidentally trenches on matters assigned to another Legislature.[19] Since the principle of 'pith and substance' of almost all legislations may be characterised in various ways, the rule gives an element of flexibility to the whole scheme of distribution of legislative powers. The courts have been characterizing state legislation so as to permit it to stand whenever possible. Thus, they have enabled the states to exercise their legislative powers to the full extent.[20]

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[17] The best illustration of the rule of reconciliation of entries and avoidance of conflict is found in the pre-Constitutional case of *In re C.P. Motor Spirit Act*, AIR 1939 FC I. In this case, a provincial tax on retail sales of petrol and lubricants was challenged by the Centre on the basis that it was a duty of excise and not sales tax. The Federal Court did not accept the contention and held the tax valid. By itself, the Central power could have been interpreted broadly, but there was the question of harmonizing the two entries. Hence, the general power of the Centre was interpreted restrictively, so as to give effect to the narrower power of the provinces. Similarly in the post-Constitution period for the application of this principle to uphold State legislation, see *Calcutta Gas Co. (Prop) Ltd.* v. *State of W.B.*, AIR 1962 SC 1044.

[18] *State of Bombay* v. *Balsara,* AIR, 1951 SC 318; *Tikaramji* v. *State of UP*, AIR 1956 SC 676.

[19] See *A.S. Krishna* v. *Madras State*, AIR 1957 SC 297, 303.

[20] The instances of Court's tendency to uphold state legislation may be found in *State of Rajasthan* v. *G. Chawla*, AIR 1959 SC 544; *K. Kunhikoman* v. *State of Kerala*, AIR 1962 SC 723; *Ram Narain Medhi* v. *State of Bombay*, AIR 1959 SC 459; *Raghubar Sarup* v. *State of U.P.*, AIR 1959 SC 909; *Ratanaprova Devi* v. *State of Orissa*, AIR 1964 SC 1195; *Harak Chande* v. *Union of India*, AIR 1970 SC 1553. Important cases under the Government of India Act, 1935 are: *Prafulla Kumar* v. *Bank of Commerce, Khulna*, 74 IA 23; *Subramanyam* v. *Mutuswami*, AIR 1941 FC 47.

However, the courts have been reluctant to allow states to usurp the power of central legislature. In *State of West Bengal* v. *Union of India*,[21] the State of West Bengal questioned the power of the Union to acquire land rights in and 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 state contended, *inter alia*, that the Constitution being federal one, the states share sovereignty with the Union. Hence, the Parliament does not have legislative competence to pass a law depriving the states of property vested in them as sovereign entities. The Court by majority rejected the contention and concluded that the present Constitution did not conform to any traditional model of federation. Provinces are not sovereign and sovereignty is vested in the people of India. Further, the Court referred to the absence of dual citizenship and absence of independent Constitutions of the states and the unusual power of Parliament to alter the boundaries of the states and even to extinguish the existence of a state. In view of these special features of the Constitution giving large powers to the Parliament, it was held that the Parliament was competent to acquire property owned by a state, by a legislation.[22]

Thus the Court decided the case on the basis of the legislative competence of Parliament to acquire property under entry 42, List III. The Court, therefore, rejected the concept of state sovereignty and instead concluded that the states under the Indian Constitution enjoyed merely a subordinate role.[23]

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[21] AIR 1963 SC 1241.

[22] The Court also examined the working of the federal Constitution of the United States, Canada and Australia and found that in the United States and Canada, the power to acquire property of States to effectuate federal purposes is inherent in the concept of federal government in a federation. In Australia alone, the Constitution has a specific provision empowering the Commonwealth to acquire State property on payment of compensation. *Id.* at 1258-59.

[23] *Id.* at 1265-66. Subba Rao, J. gave a dissenting judgment questioning some of the reasoning of the majority opinion. He conceded that the federal concept in India has a strong bias towards the Centre to prevent the separatist tendencies in a country so vast and varied as India is. Nevertheless, it is a federation. Sovereign powers are divided between the Centre and the States within the sphere allotted to them.

The net effect of the majority judgment in this case represents a functional approach to the division of powers in a federation. The decision is based on the realistic appraisal of the overall scheme of the division of legislative powers under the Constitution.

The judgment in *Union of India* v. *H.S. Dhillon*[24] is of major significance in so far as it seeks to give an expansive interpretation to the Union's residuary powers. This case involved a central law, the Wealth Tax Act, which was applied to agricultural property. The Finance Act, 1969 was upheld by the Supreme Court under the Centre's residuary powers. The subject-matter of the legislation was found not to fall under entry 86 of the Union List. The Court by majority held that the subject-matter of the impugned law did not fall under any entry and so the Centre could justifiably legislate under its residuary powers. Even if a part of the Act fall within entry 86 of the Union List, the residuary clause could still be invoked to justify the rest of the legislation. The main question in this case was whether residuary power could be invoked to make law on a topic partly included in an entry and partly excluded from the scope of an entry. In earlier cases,[25] the residuary power had been invoked to make law on a topic when the subject-matter of legislation did not fall within any of the lists. The principle formulation was that the test to determine the scope of residuary powers was to examine whether the subject-matter fall under List II or III or not. If the subject-matter of legislation did not fall under List II or III, then Parliament would have the requisite power. To reach this conclusion, Article 248 was invoked according to which Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent or State List. The minority view, on the other hand, taking a restrictive view of the residuary power, ruled that once a topic or field of legislation is enumerated in any entry in any List, then residuary power could not be invoked. But the minority view has a serious flaw that it could give rise to a vacuum in the Constitution, as there could be matters on which neither the Centre nor the States could legislate. Imposition of wealth tax on agricultural property would have been one such matter if the minority view were to be accepted. Thus, after the majority ruling in the *Dhillon* case, any danger that any vacuum may arise in the area of legislation has receded.

The Bombay High Court in one case had held that the entries in the legislative lists were to be construed according to the pith and substance. Bombay Money-Lenders Act, 1946 was enacted under entry 30 of State List

[24] AIR 1972 SC 1061.

[25] *Jaora Sugar Mills* v. *State of M.P.*, AIR 1966 SC 416; *Second G.T.D Mangalore* v. *D.H. Nazareth*, (1970)1 SCC 749.

which was related to 'Money-lending and money-lenders; relief of agricultural indebtedness." It was held that it did not fall within entry 46 of the Union List.[26] The Supreme Court in another case had observed:[27]

> Entries in the legislative lists, it may be recalled, are not sources of the legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression with respect to Article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the test is whether the legislation looked at as a whole is substantially with respect to the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic.

On the whole, it may be concluded that scheme of allocation of legislative powers as interpreted by the judiciary has well stood the test of the time and has fulfilled so far, and is capable of fulfilling in future, the contemporary needs of the country. Adjustments in the sphere of Centre-State legislative relation is a constant problem in a federal system. In U.S.A., the needed adjustments have been achieved through the judicial process. In Canada and Australia, necessary adjustments to some extent have been made both by constitutional amendment and judicial process. But still the position in these federations is not regarded as very much satisfactory as the Centre feels lack of necessary power in the economic sphere. In the Indian federation such difficulty may not arise. The courts have played a creative role in the area as is evidenced by the cases mentioned above, although the entries in the lists being very elaborate do not provide much scope for judicial interpretation. However, the courts decided in favour of the existing legislation and the principles of interpretation are flexible enough to enable them to reach such a result. But whenever there has been a serious conflict on a matter between the Centre and the States, the courts have by and large upheld the Centre's power.[28]

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[26] *Bhanushankar* v. *Kamal Tara Builders*, AIR 1990 Bom 140, 141 (DB).

[27] *Ujagar Prints* v. *Union of India*, AIR 1989 SC 516, para. 23.

[28] See *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241; *State of Karnataka* v. *Union of India*, AIR 1978 SC 68.

IV. Distribution of Legislative power under Articles 245 to 256: Salient Features

The distribution of legislative power between Centre and States provided under Articles 245 to 256 of the Constitution of India brings out the broad features:

(1) The power of Parliament to legislate for the whole of the country is not only broad but also override the powers of state legislatures in many respects. This is clear from reading of the provisions of Articles 252 to 254 and Article 356.

(2) The Parliament's power to legislate in respect of any matter enumerated in the Union List of VII Schedule is subject only to judicial review and there is no other kind of limitation in the Constitution.

(3) The state legislatures have no doubt been given "exclusive" power to legislate in respect of any matter enumerated in State List of VII Schedule but the power in fact can be exercised by the Parliament in special situations e.g. under Article 257 the Parliament can legislate on any subject for establishment of additional courts for the better administration of laws made by Parliament or of any existing law; under Article 249 the Parliament can legislate on any matter in the State List in national interest if so resolved by Council of States by 2/3 majority; under Article 250 Parliament can legislate on any matter in State List during the operation of proclamation of emergency declared under Article 352; the Parliament can legislate on the request of state legislatures under Article 252; under Article 253 the Parliament can legislate on any matter for giving effect to international agreements and finally the Parliament can legislate on any matter in the State List under Article 356 if the President so declare. In view of the above, it is clear that the power of state legislature to legislate on matter in the State List is not exclusive.

(4) The residuary power of legislation, which normally vests in the federal units in case of a federal constitution, has in fact been vested in the Parliament under Article 248 of the Constitution of India. The power of legislation in matters mentioned in Concurrent List of the VII Schedule is no doubt vested both in Parliament as well as state legislature, but here again the Parliament power is superior as compared to power of the state legislature. This is clear from the provisions of Article 254 which envisages cases of repugnancy.

(5) While interpreting the provisions of Article 254, alongwith various entries in the three lists of VII Schedule, the Supreme Court has propounded and applied various doctrines such as, rule of harmonious construction,[29] rule of pith and substance,[30] rule of colourable legislation[31] and plenary power of legislation.

There have been occasions, when Parliament transferred some entries of the State List and incorporated them in Concurrent List. This action requires constitutional amendment under Article 368 of Constitution which envisages not only a special majority for passing a constitutional amendment Bill in each house of Parliament but also requires ratification by not less than half of the State Legislatures.

(6) The Constitution of India contains many provisions such as Article 3, 304 (b) which require Presidential assents for initiating any legislative action by the State Legislature. There is general provision under Article 201 which empowers the Governor of the State to reserve any bill passed by the State Legislature for the consideration of the President of India. Experience shows that the Governors of the States have been exercising this power without any guidelines. Moreover, the bills reserved for the consideration of the President are not cleared expeditiously thereby creating a lot of problems for the States.

In *Jamalpur Gram Panchayat* v. *Malwinder Singh,*[32] the Supreme Court held that if the assent of the President were sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it. The court held that if the assent is sought and given, in general terms so as to be effective for all purposes, different considerations might arise. In the case before the Supreme Court the assent was given by the President for giving protection to the legislation under Article 31 (as it then stood) and Article 31A and the court held that such asset would not operate for the purposes of Article 254 (2) of the Constitution. However, the court upheld the law passed by the state legislature on the ground that it fell under entry 18 of the State List and not entry 41 of the Concurrent List.

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[29] See *R.S. Rekhchand Mohota Spg. & Wvg. Mills Ltd.* v. *State of Maharashtra,* AIR 1997 SC 2591.

[30] *State of Bombay* v. *Narottamdas*, AIR 1951 SC 69, 96; *Atiabari Tea Co.* v. *State of Assam*, AIR 1961 SC 232; *Kannan D.H.P. Co.* v. *State of Kerala*, AIR 1972 SC 2301. See also *Sita Ram* v. *Rajasthan,* AIR 1974 SC 1373.

[31] See *R.M.D. Chamarbaugwala* v. *State of Mysore*, AIR 1962 SC 594; *State of Haryana* v. *Sant Lal* (1993) 4 SCC 380.

[32] AIR 1985 SC 1394.

It is desirable that a suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution. It would be inappropriate to drag the assent of President into such arguments. From the time the Bill is introduced till the assent of President is given, the whole procedure and proceedings are legislative in character. It is a collective action of the President, the House of the People, and the Council of States. It is not permissible to enquire as to how the mind of each member of the House and the President worked during the entire proceedings beginning with the introduction of the Bill and concluding with the according of the assent by the President. The procedures are certainly internal matters which are beyond the jurisdiction of the court to inquire into. The court is entitled to go into the questions as to whether the enactment is either ultra virus or unconstitutional. The assent of the President is not justiciable.[33] Even if noting sent to the President by the concerned Ministry does not reflect all the articles in the Constitution, which referred to the effect of the assent of the President i.e. Articles 31A, 31C, 254, it cannot be presumed that the President was not aware of or did not bear in mind, the relevant articles dealing with the effect of the assent of the President. However, when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.

A suitable article should be inserted in the Constitution to the effect that an assent given by the President to an Act should not be permitted to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution.

During the last five decades the scheme of distribution of legislative powers came for judicial interpretation and discussion. The Indian judiciary has not created any inroad in the working of the Indian federalism rather filled the vagueness and corrected the infirmities. The case laws in this area in general points towards strong center, thus toeing the wavelength of the Constituent Assembly and the existing provisions of the Constitution. During the regime of Congress the seven amendments to the Constitution dealing with scheme of distribution of legislative powers were made bringing the following directions: (1) More power in the concurrent jurisdiction; (2) curtailment of the state subject; and (3) minor addition to the power of Parliament. On the whole it shows a co-operative approach. In such an

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[33] *Hoechst Pharmaecuticals Ltd* v. *State of Bihar,* AIR 1983 SC 1019, 1048.

important matter and for the healthy growth of center-state relations the need of the hour is to have a detailed discussion, clause by clause, word by word of any proposal dealing with the distribution of the legislative power. It would be better that a Joint Committee of both houses of Parliament be constituted to make recommendations in this area.

V. Fresh Look at Federal Structure

In last three decades, states have been demanding a fresh look at the Indian federal structure including the legislative relationship of the center-state. The central government and the state governments made five attempts through commission, committees, memorandum and conclave. It is interesting to note that the central commission suggested *status quo* except that the working of federalism be put in true spirit. On the other hand, the state's commission, memorandum and conclave opted for an overall change in the legislative relation giving more autonomy to the state. Nearly after two decades of the first central commission, the Congress party in the power at the center constituted a commission under the chairmanship of a retired Supreme Court Judge, Justice Sarkaria, who had a long judicial experience in balancing the centre-state relations. This commission made detailed preparation to examine the existing constitutional provisions and its working and also involved cross-sections of constitutional authorities and people at large. The commission also examined the available literature, recommendations and reports of the previous commissions, committees and memorandum on the subject.

There were four main questions raised by this Commission and the last one dealt with response or reaction on the need of any change or reform in the field of legislative relations between the centre and states. The supplementary questionnaire added two more questions about Articles 249 and 253.

All the state governments were unanimous, and rightly so, that Article 245 needs no change. This article has not curtailed their territorial jurisdiction and the courts while employing the doctrine of territorial nexus have not in spirit reduced any arc of jurisdiction.

In the general subject-wise jurisdiction of legislative powers, nearly twenty state governments have responded to the questionnaire. The broad outcome was that the states having Congress party in power and other states numbering nearly fifteen also toed the line of Congress advocated for a *status quo* in the subject. Out of the fifteen state governments, only nine made recommendations for minor changes in the Seventh Schedule. On the other hand, state governments of Andhra Pradesh, Karnataka, Tamil Nadu, Tripura

and West Bengal opted to tilt the balance in favour of the state autonomy. One interesting point in these responses may be seen that wherever there was a change in the ruling party at the state, the state government submitted modified response. It is submitted that the commission should not have allowed modification to the response already submitted as the political parties have also been given a say in the matter.

Coming to concurrent power of legislation there were seven states - Tamil Nadu, Karnataka, Punjab, Maharashtra, Kerala, Andhra Pradesh and Assam – with only one dissent Himachal Pradesh, which advocated for prior concurrence of the state legislature before Parliament exercises the concurrent jurisdiction given in Article 246 (2) read with List III.

Regarding the exceptional power of the Parliament to pass law, on the state subject(s), the state governments were not very vocal except on Article 249 where there was no unanimity in the state governments. There were three different opinions: The state governments of Karnataka, Punjab, Tamil Nadu and West Bengal opined for deletion of Article 249; The state governments of Haryana, Himachal Pradesh and Maharashtra advocated maintaining *status quo*; whereas Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Sikkim, Tripura and Uttar Pradesh governments recommended for a periodic review of the Parliamentary intervention in the state's exclusive field. The government of Tamil Nadu was one of the states, which took the stand that Parliament should not be given any exceptional power to encroach on the exclusive power of the state legislature. In this philosophy it is recommended to delete even Articles 250 and 253.

There were in all six state governments which gave their positive response on residuary power of legislation. Whereas, rest of the 14 state governments did not send their point, meaning thereby that they were interested in the *status quo* position. These recommendations had three shades of opinions. Firstly, the residuary power of the Parliament be given to the state legislature. Secondly, the residuary power be put in concurrent jurisdiction. And lastly, the *status quo* be maintained with some restrictions on its functioning. None of the federal constitutions of the world have put the residuary power either in the concurrent jurisdiction or restrictions have been woven on its exercise.

Even those constitutions which confer such power on the state, because of their historical reasons or as a compromising formula to form a federation or confederation, the judiciary in those constitutions has carved out areas for the federal interferences even in the residuary power of the state legislature. It is suggested that a *status quo* be maintained so far as Article

248 is concerned with a minor change that this Article may find one addition that subjects not mentioned in List I will also be treated as residuary subject. This will clear the conflicting judgments and divergent opinions expressed by the individual judges.

Coming to the responses of the overall setting of the Seventh Schedule, fourteen state governments responded to the questionnaire of the commission. One group advocated for abolition of List III and the subjects of this list be transferred to the List II. Second group of state governments demanded for taking out certain subjects from List I to List II and the others recommended for shifting of certain items from Concurrent List to the State List.

It is suggested that the Seventh Schedule does not require any drastic change. However, with the changing time and circumstances a subject which may be of local importance may become a subject of common or national importance and vice-versa. Such changes could be made without affecting the existing structure.

Regarding the concurrent jurisdiction, there were only two regional parties – Tamil Arasu Kazhagam and the action committee of North East Regional Conference which asked for abolition of the Concurrent List; whereas, seven other parties were of the opinion that there should be consultation of state legislature before Parliament makes any enactment in the Concurrent List. It is submitted that the suggestions given by the political parties cannot be given a base in the Constitution as it is antithesis to a common jurisdiction or a cooperative approach or a *cooperative federalism*. Therefore, it is suggested that the concurrent jurisdiction be not abolished.

The exceptional powers of Parliament to encroach on the state subjects have not been digested by regional political parties for the simple reason that they viewed them as carving out areas from the state autonomy. But in letter and spirit this is not the position. The working of exceptional provisions from Articles 249 to 253 hardly indicate any ill growth in the development of federalism in India. The provisions of Article 249 came under severe criticism by the political parties which included the CPI (M) and its Madhya Pradesh and Kerala state units, CPI and its West Bengal unit, Kerala unit of Janta Party, Lok Dal, DMK, Kerala unit of Muslim League, Socialist Party of India, Revolutionary Socialist Party and its Kerala unit – Democratic Socialist Party, Asom Jatiyavadi Dal and JMM. They were of the opinion that Article 249 be deleted from the Constitution of India. On the other hand, the Indian National Congress (I) advocated deletion of Articles 252 and 253. The Kerala unit of CPI further demanded for repeal of Article 250.

Coming to the residuary power, apart from the parties which have advocated for the abolition of Concurrent List, there were some more parties, which included Indian National Congress (Socialist) – Kerala Unit, the Kerala Congress (Mani Group), Malayalee Desheeya Munnani, Namadhi Kazham and Siromani Akali Dal, which advocated that Parliament's residuary power be transferred to the state legislature.

Various commissions have brought out the recommendation to restructure the subjects in the Concurrent List. This will give a clear picture of the major subjects and will avoid any vagueness, leaving minimum scope for confrontation and interpretation. Further, this recommendation, if adopted, will not attract the plea of violation of basic structure, as it will simply put the scattered subjects in order. Committees, Memorandum and commissions have brought out an interesting solution for the healthy growth of federalism by suggesting that subjects and matters like 'public interest' or 'national interest' be reviewed from time to time with the help of a co-operative approach based on cooperative federalism. The subject which the constituent assembly though in 1949 to be local or state, national or common importance may not remain same with the changing time and circumstances, and therefore, review in this area must be undertaken from time to time.

The exceptional power of Parliament attracted a mixed approach of the commission. So far as the provisions of Articles 247 and 250 were concerned, various commissions rightly advocated for the *status quo*. However, the report kept silence on the provision of Article 253. It is submitted that the silence may be taken to have voted in favour of no change in the present position. In case of Article 249, the commission's stand that the Article not to be repealed, be supported.

However, the commission while advocating for 'consensus' in the House, has demanded for setting up a special committee to go through any proposed exercise by Parliament under Article 249. It is suggested that more representation in the Council of States be brought in through the additional requirement of resolution to be passed by the majority of the total membership of the house.

In the common subject jurisdiction under Article 252 the commission has come out with two improvements : Firstly, the state legislature could participate in the amendment of the parliamentary law under Article 252 for its application to the concerned state with the approval of the President. Secondly, the enactment under this Article should not take a perpetual base.

In case a central legislation does not suit a state, it should be allowed to opt out of the implementation of the parliamentary law. The Water Act,

1974 is still in operation after nearly 25 years. It is suggested that a Joint Committee of both the Houses of Parliament must review the continuation of such law after every twenty-five years. Once a state legislature prefers to go out it should not be permitted to join the application of the parliamentary law.

Sarkaria Commission had done hard work in categorizing the subjects of the Concurrent List and also of the Union List. The subjects of List III have been put under certain groups. While grouping the subjects, the Report took into consideration two parameters. One, the inter-state character and two, the national importance. Any subject which did not come under either of the above two parameters was placed in the State List. It may be pointed out that the concurrent jurisdiction will play an important role in the existing changed political scenario in the country which Sarkaria had not experienced.

In the area of requirement of consultation with the state, the commission advocated that no such special provision be incorporated in the Constitution. It, however, opined that a convention be developed in this regard. It is suggested that a mandatory convention is not justified. In its place, it is suggested that when on the concurrent subject more than one-third of total number of states demand that there should be consultation then Parliament may allow this process.

The commission had advocated for a major change in the scheme of the residuary legislative powers. They, according to commission, be transferred to the Concurrent List. It is submitted that this view point will allow the state legislature either to carve out subject(s) from the existing lists in the name of the residue or embark upon totally new subjects. It is suggested that Article 248 be allowed to operate in its present form with the modification that if a subject does not find place in any of the Lists of the Seventh Schedule, the Parliament shall have the residuary legislative power over the subject. It may be pointed out that none of the federal Constitutions of the world has either such a provision or the existing provision have been interpreted to bring the aforesaid provision.

In the State List, the commissions could not make any recommendation except with respect to only two entries. This shows that the commission did not want to distort the existing autonomy of the state legislature under Article 246 (3) read with List II. No subject can be static. It may become a subject of national or common importance in course of time.

It becomes necessary that the competitive exercise of power which is the dominant characteristic of federal governments in federations, has to be checked and the other characteristics like rigidities, technicalities,

conservatism, excessive legalism and over centralisation, have to be minimised to the suitable extent if the interests of the public are to be promoted to the maximum extent.[34] It is for curing these ills of federalism that the reality has moved far away from what is called 'classical federalism' and has given birth to a new phase of federalism, that is, cooperative federalism. It is a system by which state and national governments supplements each other and jointly or collaboratively perform a variety of functions. Furthermore, cooperative federalism depends not so much on an institutional system and devices but on the congruence of the national norms and the trends in the pattern of economic, political, social and cultural life of the nation.[35] The so called cooperative federalism does not replace the legal framework of federalism. Rather, it supplements, corrects federalism and checks over centralisation in the federalism by providing a just system of resolution of Centre-State and inter-State conflicts through an adequate institutional system for consultation, co-ordination, interchange and integration. It emphasizes the interdependence and sharing of functions between the Centre and the States. It also focuses on the mutual leverage that each level is able to exert on the other.

Thus it may be asserted that 'dual federalism' was wrong because it encouraged a false competition between national and state governments and left too many problems in a no-man's land in between. Cooperative federalism is an improvement, because it presumes that there will always be room for some government to act, and it encourages the two levels to act jointly on occasion. Theoretically, it tends to assume that the responsibilities of national and state governments are to coordinate, but in practice, the national government needs to be superior. It is so because the cooperation of the national government with the states should always be on the basis of national standards rather than adjusting its scales to state-local standards which in many cases would be below those of the national government.[36]

VI. Conclusions

The Indian Constitution aims at cooperative federalism, which seems to be a panacea for the grievances of the States. The Centre's powers should not be diminished further. But it is essential to make more effective all the

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[34] See Chandra Pal, State Autonomy in Indian Federation (1984).

[35] L.M. Singhvi, *Cooperative Federalism: A Case for the Establishment of an Inter-State Council*, Journal of Constitutional and Parliamentary Studies, Special Number 1969 at 212.

[36] *Supra* n. 34.

constitutional, extra-constitutional and statutory institutions devised so far for solving the Centre-State problems.

The solution to the problem of the Centre-State tensions lies in cooperative federalism and that calls for a continual consultation between the Centre and States. The Constitution of India lays down the foundations of cooperative federalism in India not by the device of a meticulous balance or an approximate equivalence between the Union and the States, but by emphasizing the dominance of the Centre occasionally and somewhat as the Karta in a Hindu joint family. It assumes that equality of States inter se or equality between the Centre on the one hand and the States on the other is not a necessary pre-condition for cooperative federalism.

The Indian Constitution also accepts that the principle of operation of the Federal and State Governments in watertight departments is undesirable, if not impossible, and it includes a large number of provisions[37] for interaction between the Central and State Governments and further provides for other means of securing flexibility.

The Constitution has empowered the President to establish an Inter-State Council[38] to effect co-ordination between the Centre and the States and between the States *inter se*. The Constitution is silent on its composition but it specifically lays down the duties that may be assigned to this institution. The duties are to enquire into disputes arising between States, to investigate and discuss subjects of common interest to the Union and the States or to the State themselves and to recommend a better coordination of policy and action with respect to matters so investigated. Although Inter-State Council has been created on May 28, 1990, it could not work effectively to resolve the problems of the Centre and States. It is therefore suggested that the Council should hold meetings, preferably before the start of every parliamentary session. It should have secretariat competent enough to prepare notes and papers on matters coming up in the meetings. The Council cannot but have an advisory status under our system of governance but a convention should be evolved to accept its recommendations. Among the prerequisites of its success are the confidence in it and the attitudes of give and take from all sides for immediate solution of emerging issues and problems between the Centre and States.

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[37] Articles 131, 249, 250, 253, 256, 257, 258, 258A, 262, 275, 286, 293, 301,303, 312, 356 etc., Constitution of India.

[38] Article 263, *id.*