

CHAPTER 24

DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE POWERS

THE nature of the federal system introduced by *our* Constitution has been fully explained earlier (Chap. 5).
Nature of the Union.

To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The Union is composed of 28 States¹ and both the Union and the States derive their authority from the Constitution which divides all powers,—legislative, executive and financial, as between them. [The judicial powers, as already pointed out (Chap. 22), are, not divided and there is a common Judiciary for the Union and the States.] The result is that the States are not delegates of the Union and that, though there are agencies and devices for Union control over the States in many matters,—subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

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

As has been pointed out at the outset, a federal system postulates a distribution of powers between the federation and the units. Though the nature of distribution varies according to the local and political background in each country, the division, obviously, proceeds on two lines—
The Scheme of Distribution of Legislative Powers.

(a) The *territory* over which the Federation and the Units shall, respectively, have their jurisdiction.

(b) The *subjects* to which their respective jurisdiction shall extend.

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

I. As regards the territory with respect to which the Legislature may legislate, the State Legislature naturally suffers from a limitation to which Parliament is not subject, namely, that the territory of the Union being divided amongst the States, the jurisdiction of each State must be confined to its own territory. When, therefore, a State Legislature makes a

Territorial Extent of Union and State Legislation.

law relating to a subject within its competence, it must be read as referring to persons or objects situated within the territory of the State concerned. A State Legislature can make laws for the whole or any part of the State to which it belongs [Art. 245(1)]. It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament.

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

Limitations to the Territorial Jurisdiction of Parliament.

The plenary territorial jurisdiction of Parliament is, however, subject to some special provisions of the Constitution—

(i) As regards some of the Union Territories, such as the Andaman and Lakshadweep group of Islands, Regulations may be made by the President to have the same force as Acts of Parliament and such Regulations may repeal or amend a law made by Parliament in relation to such Territory [Art. 240(2)].²

(ii) The application of Acts of Parliament to any Scheduled Area may be barred or modified by notifications made by the Governor [Para 5 of the 5th Schedule].²

(iii) Besides, the Governor of Assam may, by public notification, direct that any other Act of Parliament shall not apply to an autonomous district or an autonomous region in the State of Assam or shall apply to such district or region or part thereof subject to such exceptions or modifications as he may specify in the notification [Para 12(1)(b) of the 6th Sch.].³ Similar power has been vested in the President as regards the autonomous district or region in Meghalaya, Tripura and Mizoram by Paras 12A, 12AA and 12B of the 6th Schedule.

It is obvious that the foregoing special provisions have been inserted in view of the backwardness of the specified areas to which the indiscriminate application of the general laws might cause hardship or other injurious consequences.

II. As regards the *subjects* of legislation, the Constitution adopts from the Government of India Act, 1935, a *threefold* distribution of *legislative* powers between the Union and the States [Art. 246]. While in the *United States* and *Australia*, there is only a single enumeration of powers,—only the powers of the Federal Legislature being enumerated,—in *Canada* there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely, Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Sch. VII of the Constitution (see Table XIX).⁴

List I or the *Union List* includes (in 2008) 100 subjects over which the Union shall have exclusive power of legislation. These include defence, foreign affairs, banking, insurance, currency and coinage, Union duties and taxes.

List II or the *State List* comprises 61 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local government, public health and sanitation, agriculture, forests, fisheries, State taxes and duties.

List III gives *concurrent* powers to the Union and the State Legislatures over 52 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, economic and social planning and education.

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly.

In the *concurrent* sphere, in case of repugnancy between a Union and a State law relating to the *same* subject, the former prevails. If, however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnancy, but it would still be competent for Parliament to override such State law by subsequent legislation [Art. 254(2)].⁵

The vesting of residual power under the Constitution follows the precedent of *Canada*, for, it is given to the Union instead of the States (as in the *U.S.A.* and *Australia*). In this respect, the Constitution differs from the Government of India Act, 1935, for, under that Act, the residual powers were vested neither in the Federal nor in the State Legislature, but were placed in the hands of the Governor-General; the Constitution vests the residuary power, *i.e.*, the power to legislate with respect to any matter *not* enumerated in any one of the three Lists,—in the Union legislature [Art. 248],⁶ and the final determination as to whether a particular matter falls under the residuary power or not is that of the Courts.

It should be noted, however, that since the three Lists attempt at an exhaustive enumeration of all possible subjects of legislation, and the Courts interpret the ambit of the enumerated powers liberally, the scope for the application of the residuary power will be very narrow.⁷

While the foregoing may be said to be an account of the normal distribution of the legislative powers, there are certain exceptional circumstances under which the above system of distribution is either suspended or the powers of the Union Parliament are extended over State subjects. These exceptional or extraordinary circumstances are—

Expansion of the Legislative Powers of the Union under different circumstances.

(a) In the *National Interest*. Parliament shall have the power to make laws with respect to any matter included in the State List, for a temporary period, if the Council of States declares by a resolution of 2/3 of its members present and voting, that it is necessary in the *national* interest that Parliament shall have power to legislate over such matters. Each such resolution will give a lease of one year to the law in question.

A law made by Parliament, which Parliament would not but for the passing of such resolution 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 resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period [Art. 249]. The resolution of the Council of States may be renewed for a period of one year at a time.

(b) Under a *Proclamation of Emergency*. While a Proclamation of 'Emergency' made by the President is in operation, Parliament shall have similar power to legislate with respect to State subjects.

A law made by Parliament, which Parliament would not but for the issue of such Proclamation have been competent to make, shall, to the extent of 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 [Art. 250].

(c) *By agreement between States*. If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those States, Parliament shall have such power as regards such States. It shall also be open to any other State to adopt such Union legislation in relation to itself by a resolution passed in that behalf in the Legislature of the State. In short, this is an extension of the jurisdiction of Parliament by consent of the State Legislatures [Art. 252].⁸

Thus, though Parliament has no competence to impose an estate duty with respect to *agricultural* lands, Parliament, in the Estate Duty Act, 1953, included the agricultural lands situated in certain States, by virtue of resolutions passed by the Legislatures of such States, under Art. 252, to confer such power upon Parliament. That Act has since been repealed.

Other examples of such legislation are: Prize Competition Act, 1955; Urban Land (Ceiling and Regulation) Act, 1976; Water (Prevention and Control of Pollution) Act, 1974.

(d) *To implement Treaties.* Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject [Art. 253].

Examples of such legislation are: Geneva Convention Act, 1960; Anti-Hijacking Act, 1982; United Nations (Privileges and Immunities) Act, 1947.

(e) *Under a Proclamation of Failure of Constitutional Machinery in the States.* When such a Proclamation is made by the President, the President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament [Art. 356(1)(b)].

The interpretation of over 200 Entries in the three Legislative Lists is no easy task for the Courts and the Courts have to apply various judicial principles to reconcile the different Entries, a discussion of which would be beyond the scope of the present work.⁹ Suffice it to say that—

Interpretation of the Legislative Lists.

(a) Each Entry is given the widest import that its words are capable of, without rendering another Entry nugatory.¹⁰

(b) In order to determine whether a particular enactment falls under one Entry or the other, it is the 'pith and substance' of such enactment and not its legislative label that is taken account of.¹¹ If the enactment substantially falls under an Entry over which the Legislature has jurisdiction, an incidental encroachment upon another Entry over which it had no competence will not invalidate the law.¹⁰

(c) On the other hand, where a Legislature has no power to legislate with respect to a matter, the Courts will not permit such Legislature to transgress its own powers or to encroach upon those of another Legislature by resorting to any device or 'colourable legislation'.¹²

(d) The motives of the Legislature are, otherwise, irrelevant for determining whether it has transgressed the constitutional limits of its legislative power.¹²

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

Distribution of Executive Powers.

I. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive power of a State is, in the main, co-extensive with its legislative powers,—which means that the executive power of State shall extend only to its own territory and with respect to those subjects over which it has legislative competence [Art. 162]. Conversely, the Union shall have exclusive executive power over (a) the matters with respect to which Parliament has exclusive power to make laws (*i.e.*, matters in List I

of Sch. VII), and (b) the exercise of its powers conferred by any treaty or agreement [Art. 73]. On the other hand, a State shall have exclusive executive power over matters included in List II [Art. 162].

II. It is in the *concurrent* sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List (*i.e.*, List III), the executive function shall *ordinarily* remain with the States, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the Union. Under the Government of India Act, 1935, the Centre had only a power to give directions to Provincial Executive to execute a Central law relating to a Concurrent subject. But this power of giving directions proved ineffective; so, the Constitution provides that the Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject.

In the result, the executive power relating to concurrent subjects remains with the States, except in two cases—

(a) Where a law of Parliament relating to such subjects vests some executive function specifically in the Union, *e.g.*, the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Proviso to Art. 73(1)]. So far as these functions specified in such Union law are concerned, it is the Union and not the States which shall have the executive power while the rest of the executive power relating to the subjects shall remain with the States.

(b) Where the provisions of the Constitution itself vest some executive functions upon the Union. Thus,

(i) The executive power to implement any treaty or international agreement belongs exclusively to the Union, whether the subject appertains to the Union, State or Concurrent List [Art. 73(1)(b)].

(ii) The Union has the power to give directions to the State Governments as regards the exercise of their executive power, in certain matters—

(I) *In Normal times:*

(a) To ensure due compliance with Union laws and existing laws which apply in that State [Art. 256].

(b) To ensure that the exercise of the executive power of the State does not interfere with the exercise of the executive power of the Union [Art. 257(1)].

(c) To ensure the construction and maintenance of the means of communication of national or military importance by the State [Art. 257(2)].

(d) To ensure protection of railways within the State [Art. 257(3)].

(e) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the States [Art. 339(2)].

(f) To secure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups [Art. 350A].

(g) To ensure the development of the Hindi language [Art. 351].

(h) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution [Art. 355].

(II) *In Emergencies:*

(a) During a Proclamation of Emergency, the power of the Union to give directions extends to the giving of directions as to the *manner* in which the executive power of the State is to be exercised, relating to any matter [Art. 353(a)]. (so as to bring the State Government under the complete control of the Union, without suspending it).

(b) Upon a Proclamation of failure of constitutional machinery in a State, the President shall be entitled to assume to himself all or any of the executive powers of the State [Art. 356(1)].

(III) *During a Proclamation of Financial Emergency:*

(a) To observe canons of financial propriety, as may be specified in the directions [Art. 360(3)].

(b) To reduce the salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and High Courts [Art. 360(4)(b)].

(c) To require all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State [Art. 360(4)].

III. While as regards the legislative powers,* it is not competent for the Union [apart from Art. 252, see *ante*] and a State to encroach upon each other's exclusive jurisdiction by mutual consent, this is possible as regards executive powers. Thus, with the consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [Art. 258(1)]. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [Art. 258A].

IV. On the other hand, under Art. 258(2), a law made by Parliament relating to a Union subject may *authorise* the Central Government to delegate its functions or duties to the State Government or its officers (irrespective of the consent of such State Government).

REFERENCES

1. The creation of Chhatisgarh, Uttaranchal (now Uttarakhand) and Jharkhand States by carving out their territories from the territories of the Madhya Pradesh, the Utt. Pradesh and the Bihar States respectively in 2000 has raised the number of States from 25 to 28.
2. See Author's *Constitutional Law of India* (Prentice-Hall of India, 6th Ed., 1991) pp. 265, 458.
3. *Ibid.*, p. 467.
4. As stated earlier, the distribution does not apply to the Union Territories, in regard to which Parliament is competent to legislate with respect to any subject, including those which are enumerated in the 'State List'.
5. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 281-84.
6. *Ibid.*, p. 279.

7. See *Second Gift Tax Officer v. Hazareth*, AIR 1970 S.C. 999; *Union of India v. Dhillon*, (1971) 2 S.C.C. 779; *Azam v. Expenditure Tax Officer*, (1971) 3 S.C.C. 621; *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' etc.
8. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), p. 280.
9. *Vide* Author's *Commentary on the Constitution of India*, 5th Ed., Vol. IV, pp. 95 *et seq.* and *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' etc.; *Constitutional Law of India* 6th Ed., pp. 475-500.
10. *State of Bombay v. Balsara*, (1951) S.C.R. 682; *Ramakrishna v. Municipal Committee*, (1950) S.C.R. 15 (25).
11. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (325).
12. *K.C.G. Narayana Deo v. State of Orissa*, (1954) S.C.R. 1.