# LEGISLATIVE CONFLICTS IN INDIA

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*by*
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LEGISLATIVE CONFLICTS IN INDIA

(Statement under Regulation 7(i))

...

The title, and the arrangement of the work have not, to the knowledge of the Candidate, been attempted before. Each case is newly summarised and interpreted or criticized. No portion of any other published work or idea has been made use of in this work without acknowledgement.

V.D. Sebastian.

Cochin-22,
July 7, 1976.

## CERTIFICATE UNDER REGULATION 7(iii)

This is to certify that the thesis "Legislative Conflicts in India" is a record of bonafide research carried out by Shri V.D.Sebastian under my guidance.

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Cochin-22,
July 7, 1976.

# P R E F A C E

The subject-wise distribution of legislative competence among the three legislative jurisdictions, union, state and concurrent, gives rise to a problem of legislative conflicts in India. There does not seem to have been any study exclusively devoted to this aspect of Indian federalism. This study is an attempt in that direction.

The study has been broadly divided into three parts after an historical introduction in chapter I. Chapters II to VIII deal with conflicts between the exclusive fields, chapters IX and X with conflicts in the concurrent field, and chapter XI with conflicts between the exclusive and concurrent fields. In the last chapter, i.e, chapter XII, has been collected together some conclusions which in most cases have also been noted in the course of the study.

Only the problem of conflicts on account of the vertical division of powers, as the subject-wise distribution of powers is sometimes called, has been the subject of this study. It has therefore excluded territorial conflicts and certain measures designed to prevent conflicts such as presidential assent to state bills and the role of inter-state council. The decisions of the Federal Court, the Privy Council and the Supreme Court have been mainly used for the purpose. High Court decisions have also been referred to occasionally. While all the subjects mentioned in the Seventh Schedule have not been covered, the selection of topics has been so made, it is felt, as to cover all questions of significance and the subjects left out, if included, would have merely added to the bulk of the study without shedding any light on the principles involved.

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## LIST OF ABBREVIATIONS

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|---|---|
| A.C. | Appeal Cases |
| A.I.R. | All India Reporter |
| All. | Allahabad |
| Bom. | Bombay |
| Cal. | Calcutta |
| Del. | Delhi |
| F.C. | Federal Court |
| Hyd. | Hyderabad |
| Ker. | Kerala |
| Mad. | Madras |
| M.P. | Madhya Pradesh |
| Pat. | Patna |
| P.C. | Privy Council |
| P & H. | Punjab & Haryana |
| S.C. | Supreme Court |
| T.C. | Travancore-Cochin |
| A.L.J.R. | Australian Law Journal (Reports) |
| B & S | Best and Smith Reports |
| C.A.D. | Constituent Assembly Debates |
| Can.B.Rev. | Canadian Bar Review |
| C.L.R. | Commonwealth Law Reports (Australia) |
| E.R. | English Reports |
| I.T.R. | Income Tax Reporter |
| J.I.L.I. | Journal of the Indian Law Institute |
| J.Pub.L. | Journal of Public Law |
| L. Ed. | Lawyers Edition (U.S. Supreme Court Report) |
| M.L.R. | Modern Law Review |
| U.S. | United States Supreme Court Reports |

# CHAPTER I

## HISTORICAL INTRODUCTION

1.1 The Constitution of India has brought into existence a federal State. The legislative power is divided between the federation called in the Constitution as the Union and the units called the States[1]. The Constitution of India has adopted the scheme of division of powers contained in the Government of India Act 1935, which for the first time introduced a federal pattern of government for India. Though constitutionalised federalism dates only from the 1935 Act, because of the large devolution of powers, the rudiments of federal government were in existence even earlier. It is proposed to trace briefly the evolution of Indian federation with special emphasis on the division of powers and the problem of conflict of legislative powers.

### EAST INDIA COMPANY AND CENTRALISED GOVERNMENT

1.2 It is sufficient for the present purpose to state that the East India Company, which had established trading centres at Madras, Bombay and Calcutta, obtained in 1765 the right of diwani over Bengal, Bihar and Orissa. The maladministration that followed made it necessary for the British Parliament to legislatively intervene in the affairs of the Company. The Regulating Act, 1773[2], "altered the constitution of the Company at home, changed the structure of the Government

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1. The centrally administered territories pose no problem for the present discussion.
2. 13 Geo. III, C.64.

in India, subjected in some degree the whole of the territories to one supreme control in India, and provided in a very inefficient manner for the supervision of the Company by the ministry[3]". As the Company obtained more and more territories in India the diversities in the laws of the country became very prominent. This was due to the fact that the legislative power of the Government was partly derived directly from the Crown, which introduced certain aspects of the English Common Law, and partly from the supplanted sovereignties in Indian territory, which had followed the Hindu and Mohammedan Law. In order to clear the confusion and conflicts and to bring in some measure of uniformity, greater centralisation of the legislative power was necessary. Hence the Charter Act of 1833 superseded the then existing legislative powers of the Governments of Madras and Bombay, and enlarged, subject to certain restrictions, the powers of the Governor-General in Council. Provision was also made for the establishment of a Law Commission which was to take up codification of the laws in India.

INDIAN COUNCILS ACTS AND DECENTRALISATION

1.3 When the Crown assumed direct responsibility for the Government of India after the proclamation of 1857 and the passing of the Government of India Act 1858, there was a highly centralised governmental system in operation. However,

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3. Keith, Constitutional History of India, 2nd Edn., Reprinted (1961), pp.70-71.

the size of the territory and the diversities present therein made centralised control in everything, without devolution of authority, impossible. The process of decentralisation was legislatively inaugurated by the Indian Councils Act of 1861.[4] "The Act restored to the Governments of Madras and Bombay the powers of legislation which the Act of 1833 had withdrawn, but with one important distinction. Formerly the laws enacted by the local legislatures had been complete in themselves and came into operation of their own force. Thenceforth the previous sanction of the Governor-General was made requisite for legislation by the local councils in certain cases, and all Acts of the local councils required the subsequent assent of the Governor-General in addition to that of the Governor. To this extent the Governor-General was given direct and personal control over the exercise of all legislative authority in India"[5].

1.4 From 1861 onwards till the reforms of 1919 there was centralised government with no attempt to rigidly demarcate the spheres of the government of India and of the provincial governments. The dominant conception, that the entire governmental system was one indivisible whole and amenable to the sovereignty of the British Parliament[6], made the position of the Provincial governments one of complete subordination. The

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4. 24 & 25 Vict. C.67.
5. Para 63 of the Montagu Chelmsford Report (1918).
6. Para 50, ibid.

Central Legislature used to legislate on a wide field. The great Indian Codes were passed during this period.[7] The practice of the local governments of first consulting the Government of India in matters of legislation and the requirement of Governor-General's assent for the validity of every provincial legislation ensured that there was no conflict between the central and the provincial legislation.

1.5 The reforms of 1919 envisaged progressive self-government for India. Indians were to be associated in a limited way with the governance of the country. This called for a greater demarcation between the functions of the Government of India and of the provincial governments as only a part of the provincial function was proposed to be transferred to Indian hands. "The increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an 'integral part of the British Empire'[8], however did not need from the British point of view the formation of a federal pattern for the government of India. Stating clearly that the task of the reformers was not the formation of a federal government, the Montagu Chelmsford Report said:-

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7. For a brief account of the legislative activity see Keith, op. cit. p.210 et seq.

8. Montagu's announcement in the House of Commons on August 20, 1917 regarding British policy on Indian Constitutional reforms.

"Granted the announcement of August 20, we cannot at the present time envisage its complete fulfilment in any form other than that of a congeries of self-governing Indian provinces associated for certain purposes under a responsible government of India; with possibly what are now the Native States of India finally embodied in the same whole, in some relation which we will not now attempt to define. For such an organisation the English language has no word but 'federal'. But we are bound to point out that whatever may be the case with the Native States of the future into the relation of provincial and central governments, the truly federal element does not, and cannot, enter. There is no element of pact. The government of the country is at present one; and from this point of view the local governments are literally the "agents" of the Government of India. Great powers have been delegated to them because no single administration could support the Atlantean load. But the process before us now is not one of federalizing. Setting aside the obstacles presented by the supremacy of Parliament, the last choice of making a federation of British India was in 1774, when Bombay and Madras and rights to surrender. The provinces have now no innate powers of their own, and therefore have nothing to surrender in a foedus. Our task is not like that of the Fathers of the Union in the United States and Canada. We have to demolish the existing structure, at least in part, before we can build the new. Our business is one of devolution, of drawing lines of demarcation, of cutting long-standing ties. The Government of India must give, and the provinces must receive; for only so can the growing organism of self-government draw air into its lungs and live. It requires no great effort of the imagination to draw a future map of India which shall present the external

> semblance of a great new confederation within the Empire. But we must sedulously beware the ready application of federal arguments or federal examples to a task which is the very reverse of that which confronted Alexander Hamilton and Sir John Macdonald".[9]

1.6 Therefore, while recommending the devolution of greater financial and legislative powers in favour of the provinces, the Montagu Chelmsford report recognised that the Government of India should have the power to intervene in Provincial matters for the protection and enforcement of the interests within its responsibility, to secure uniformity of legislation considered desirable for the whole or any part of India and to pass legislation which might be adopted by the Provinces with or without modification. But the demarcation of functions should not lead to challenges in the courts of legislative enactments on the ground of excess of powers as it would subject "every Government in the country to an almost intolerable harassment". In view of the large responsibility of the central Government for defence and law and order it was inexpedient to put statutory limitations on its powers. Adoption of constitutional conventions, which had already gained some force in India, according to which the Government of India would not without strong reasons legislate in the internal affairs of the Provinces was suggested to achieve harmony in the relations between the central and the provincial governments.[10]

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9. Montagu Chelmsford Report (1918), para 120.
10. Ibid, para 212.

THE SCHEME OF THE GOVERNMENT OF INDIA ACT, 1919

1.7 To give effect to the recommendations of the Montagu Chelmsford Report, the Government of India Act 1919, provided for the making of rules for the classification of subjects, in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature.[11] The Act also provided that rules be made for the devolution of authority in respect of provincial subjects to local governments and for the allocation of revenues or other moneys to those governments and for the settlement of doubts arising as to whether any matter did or did not relate to a provincial subject.[12] The Devolution Rules issued in 1920,[13] in pursuance of the above provisions classified the functions of government into central subjects and provincial subjects. The list of central subjects contained 47 items and the list of provincial subjects contained 51 items.[14] Defence of India, external relations, all India communications,

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11. Section 45A of the Government of India Act, 1915, as inserted by the Government of India Act, 1919.
12. Sub-section 1(b) and 2(v) of Section 45A, ibid.
13. No.308-S., dated the 16th December, 1920, see the Government of India Act with Rules and Notifications thereunder, Government of India Central Publication Branch, Calcutta, 1924, pp.185-216.
14. Schedule I to the Devolution Rules, 1920.

shipping, posts and telegraphs and criminal law were included as central subjects. Local Government, medical administration, public health, education with certain exceptions, agriculture, police and prison were included in the provincial list.[15] All matters expressly excepted from inclusion among provincial subjects and all other matters not included among provincial subjects were to be treated as included among central subjects.[16] Item 51 in the provincial list provided that any matter, though falling within a central subject, declared by the Governor-General in Council to be of a merely local or private nature within a province should be considered as a provincial subject. It was also provided that any matter included in the list of provincial subjects should, to the extent of such inclusion, be excluded from any central subject of which, but for such inclusion, it would form part.[17]

1.8 The Devolution Rules also provided for the settling of doubts with regard to provincial subjects. If any doubt arose as to whether a particular matter did or did not relate to a provincial subject the Governor-General in Council was to decide the matter finally.[18] Since residuary powers were included in the list of central subjects as per item 47 referred to above, the question to be determined in deciding whether a topic of legislation belonged to the central sphere

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15. The full lists are given in Annexure A.
16. Items 46 and 47 of Part I, Schedule I, ibid.
17. Rule 3(2), ibid.
18. Rule 4, ibid.

or provincial sphere was really solved when a decision was reached on the question whether it belonged to the provincial sphere or not. It may be noted that in giving enumerated powers to the provinces and the residuary powers to the centre, the pattern of the distribution of legislative power in the Canadian Constitution was followed.[19]

1.9 The classification of subjects of legislation into central and provincial made by the Devolution Rules however did not introduce the federal principle. Its main purpose was to introduce in the provincial sphere the so-called 'dyarchy' to satisfy partially the Indian demand for self-government, by identifying provincial subjects some of which could be treated as 'transferred subjects' to be administered by Governors acting with responsible ministers.[20] The Central Legislature could legislate on any subject even though it was classified as a provincial subject and the provincial legislature could legislate on any subject for its own territory even though it was classified as a central subject. Even the Acts of provincial legislatures could become law only on the assent of the Governor-General.[21] The validity of any Act of the Indian Legislature or of any local legislature could not be questioned in any legal proceedings on the ground that the Act affected a provincial subject or a central subject as the case might be.[22]

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19. Sections 91 and 92 of the British North American Act, 1867.
20. Part II of Schedule I to the Devolution Rules, 1920, gave a list of 'transferred subjects'.
21. Section 81(3) of the Government of India Act, 1916.
22. Section 84(2) ibid.

It will thus be seen that it was the Government of India Act, 1935,[23] which for the first time introduced the federal principle in the governance of India.

TOWARDS THE ACT OF 1935

1.10 The appointment in 1924 of the Reforms Enquiry Committee presided over by Sir Alexander Muddiman, followed in 1927 by a Royal Commission with Sir John Simon as Chairman, having failed to satisfy Indian aspirations, a Round Table Conference with the representatives of British India and the Indian States was convened by the British Government. During the period from 1930 to 1932 the Conference held three sessions.[24] On January 19, 1931, at the conclusion of the first session of the Round Table Conference, Ramsay MacDonald, the then British Prime Minister, stated the policy of the British government as the setting up of an all India federation comprising of British India and the Indian States. This was followed in December 1931 by a further statement to the second session of the Conference. The statement was presented to the Houses of the British Parliament in a White Paper.[25] The proposals of the White Paper which envisaged a federal set-up

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23. C.42 (25 and 26 Geo v.).
24. The Indian National Congress boycotted the first session, but after the Gandhi-Irwin Agreement of March 5, 1931, was concluded, Gandhiji attended the second session in 1931 as the Chief spokesman of the Congress.
25. Command Paper 4268, printed as First Appendix to the Report of the Joint Committee on Indian Constitutional Reform, Vol.I, (Part I), Manager of Publications, New Delhi (1934), pp.232-330.

were further scrutinised by a Joint Select Committee of the Parliament to which Indian delegates were also invited. The Government of India Act, 1935 was based on the Report of the Joint Select Committee.

THE WHITE PAPER PROPOSALS

1.11 The White Paper noted that the conception of federation would necessitate a departure from the then existing system of concurrent jurisdiction. The Federation and the Provinces were to have exclusive legislative jurisdictions. The legislative fields for this purpose were to be defined in terms of subjects mentioned in a schedule to the Constitution Act. It was also proposed that with regard to some subjects, while some measure of uniformity of law might be necessary, variation of detail to meet local conditions was no less necessary. Hence the necessity for including in the schedule a list of subjects over which the Federation and the Provinces would have concurrent legislative jurisdiction was also recognised.[26]

1.12 In accordance with the above proposals, the White Paper gave in Appendix VI,[27] three Legislative Lists. Lists I and II set out matters with respect to which the Federation and each of the Provinces were to have exclusive power to make laws for the peace and good government respectively of the federation

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26. Paras 52 and 53 of the Introduction to the White Paper.
27. Appendix VI is reproduced as Annexure B.

or any part thereof and a province or any part thereof. List III set out matters with respect to which the Federation and the Provincial Legislatures were to have concurrent jurisdiction. Though the Lists were intended to be exhaustive, it was not possible to enumerate every subject of a local and private character with regard to which the legislative power could appropriately vest with the provinces only. Hence a general power was included in the Provincial List which would enable a Province to legislate "on any matter of a merely local and private nature in the Province not specifically included in that List and not falling within List I or List III". But a subject, in its inception of a merely local or private character, which subsequently became of all India interest, was to be subject to Federal legislation with the sanction of the Governor-General in his discretion.[28]

1.13 With regard to a residual subject, if any, not falling within the scope of any of the three lists, the Federal or Provincial Legislatures could legislate with the previous sanction of the Governor-General given in his discretion.[29]

1.14 It was proposed to empower the Federal Legislature to legislate on a provincial subject at the request of two or

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28. Thus item 76 in List II read "Generally, any matter of a merely local or private nature in the Province not specifically included in this List and not falling within List I or List III, subject to the right of the Governor-General in his discretion to sanction general legislation on that subject."

29. Para 115 of the White Paper Proposals.

more provinces. A time limit was to be prescribed for challenging the validity of legislation and any question about the validity of legislation arising in a subordinate court was to be referred to the High Court for decision.[30] The consent of the Governor-General given in his discretion was required for the introduction in the Federal or Provincial Legislature of certain types of legislation.[31] The Federal and Provincial Legislatures were not to have the power to pass certain types of discriminatory legislation.[32]

1.15 In order to resolve conflicts between federal legislation and provincial legislation it was provided:

> "In the event of a conflict between a Federal law and a Provincial law in the concurrent field, the Federal law will prevail unless the Provincial law was reserved for, and has received, the assent of the Governor-General. The Federal Legislature will have no power to repeal or amend a Provincial law to which the Governor-General has thus assented, save with the prior sanction of the Governor-General".[33]

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30. Para 118, ibid.
31. These were: legislation which repeals or amends or is repugnant to any Act of Parliament extending to British India, or any Governor-General's or Governor's Act or Ordinance or which affects any Department reserved for the control of the Governor-General, or the coinage and currency of the Federation, or the powers and duties of the Federal Reserve Bank in relation to the management of currency and exchange, or religion or religious rites and usages, or the procedure regulating criminal proceedings against European British subjects, paras 119 and 120 ibid.
32. Para 122 to para 124 ibid.
33. Para 114 of the White Paper Proposals.

1.16 The Indian States were expected to accede to the Federation by a formal Instrument of Accession. The powers and jurisdiction in respect of such matters as a ruler of a State was willing to recognise in federal matters were to be transferred to the Federation.[34] Such federal jurisdiction in the States was not exclusive as in the Provinces. The States also could exercise existing powers of legislation in relation to subjects treated as federal by the Instrument of Accession. Paragraph 117 of the White Paper made the following provision for settling conflicts between Federal legislation and legislation by an acceding State.

> "If any provision of a law of a State is in conflict with an Act of the Federal Legislature regulating any subject which the Ruler of that State has by his Instrument of Accession accepted as a Federal subject, the Act of the Federal Legislature, whether passed before or after the making of the law of the State will prevail".

THE JOINT COMMITTEE REPORT

1.17 The Joint Committee of the British Parliament which considered the White Paper proposals reported in 1934.[35] The proposal to have an exclusively Federal List and an exclusively Provincial List was approved. With regard to the Concurrent List, while it was necessary for the Provinces to have legislative power, the need for the legislative jurisdiction

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34. Para 2 of the White Paper Proposals.
35. Op. cit., note 25 supra. Paragraphs 50 to 56 and 229 to 242 dealt with the distribution of legislative powers and the resolution of conflicts.

of the Central Legislature "to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial effort, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province"[36], was also recognised However, "as some mitigation of the uncertainty arising from the inevitable risks of overlapping between the entries in the Lists", it was necessary to provide that the jurisdiction of the Federal Legislature should, notwithstanding anything in the Provincial and Concurrent Lists, extend to matters enumerated in the Federal List, and that the federal jurisdiction under the Concurrent List should, notwithstanding anything in the Provincial List, extend to matters enumerated in the Concurrent List. Such a provision would ensure that in cases of conflicts between entries in the List the federal jurisdiction always prevailed.[37]

1.18 The adhoc allocation by the Governor-General of the residuary of legislative power as and when the need for legislation arose was thought to be the best compromise between the Hindu opinion for vesting it in the Centre and the Muslim

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36. Instances of the First were provided by the subject-matter of the great Indian Codes (for example, the Indian Penal Code and the Code of Criminal Procedure), of the second, by such matters as labour legislation, and, of the third, by legislation for the prevention and control of epidemic disease, para 51 of the Report.

37. Para 232 of the Report.

opinion for vesting it in the Provinces. If it had been possible to allocate the residuary power to the Centre or to the Provinces it would have been possible to manage with two Lists, the Concurrent List and one enumerated Provincial or Federal List.[38]

1.19 The Joint Committee also made some changes in the Lists included in the White Paper Proposals.[39] These proposals were accepted. The provisions governing the distribution of legislative power and the resolution of conflicts in the Government of India Act 1935 were based on the Joint Committee Report.

THE GOVERNMENT OF INDIA ACT, 1935

1.20 The Government of India Act envisaged the establishment of an All India Federation comprised of the British Indian Provinces and the Indian States. The federation was to come into effect on the issue of a Proclamation by His Majesty on presentation to him of an Address by each of the Houses of Parliament in that behalf. In addition, the condition for the issue of the Proclamation establishing the federation was that the rulers of states representing not less than half the population of the States and entitled to choose not less than 52 members of the Council of State (Upper House of the Federal Legislature) had acceeded to the federation.[40] The federation thus had two types of units. The previous British

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38. Paras 54 to 56 of the Report.
39. For the revised Lists see para 242 of the Report.
40. Section 5 of the Government of India Act, 1935.

Indian Provinces and the Indian States which might later on join the federation. With regard to the former the distribution of the legislative power between the federation and the units was based on the list system recommended by the Joint Committee.[41] With regard to the States, the federal jurisdiction would extend only to such subjects as were included in the Instrument of Accession accepted by the British Government.[42]

1.21 A Federal Court was also established with original jurisdiction to settle disputes between the federation and the units regarding the interpretation of the Government of India Act 1935 or of the Orders in Council made thereunder or about the authority vested in the federation by virtue of an instrument of accession accepted by a state. The Federal Court was also given appellate jurisdiction to entertain appeals from the decisions of the High Courts regarding the interpretation of the Government of India Act or any Order in Council made thereunder.[43] The provincial part of the Government of India Act came into operation from 1st April 1937. And elections were held according to the scheme of the Act and popular ministries entered office. However, the Central Government continued under the 1919 Act. There was opposition from the principal political parties for the establishment of the federation as provided in the Act. The Muslim League considered the All India Federal Scheme "most reactionary,

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41. Sections 99-107 and the three lists in Schedule 7 of the Government of India Act 1935. See Annexure C.
42. Section 6 of the Government of India Act, 1935.
43. Sections 200-218 dealt with the Federal Court.

retrograde, injurious and fatal to the vital interests of British India vis-a-vis the Indian States". However, the League had no objection to try the provincial scheme for what it was worth in spite of the most objectionable features contained therein.[44] The Indian National Congress objected to the federation because of the presence of Indian States which could continue to retain their feudal set up. In his presidential address to the Indian National Congress 50th Session, Pandit Jawaharlal Nehru held that "the present federation that is being thrust upon us is a federation in bondage and under the control, politically and socially of the most backward elements in the country".[45] While the dispute between the League and the Congress continued, the Second World War broke out in 1939 and the Governor-General announced the postponement indefinitely of the establishment of the federation.

EVENTS DURING THE WAR

1.22 As a protest against the Governor-General's unilateral declaration of India's involvement in the war, the Congress Ministries which had been formed in seven Provinces resigned and the Governor-General took over control of the Governments. While the Governor-General continued his efforts to pacify the Indian leaders and to secure support for the war measures, the Congress reiterated its demand for freedom, and the Muslim

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44. Resolution of the All India Muslim League, 11-12 April, 1936, Gwyer and Appadorai, Speeches and Documents on the Indian Constitution, (1921-1947) Vol.I, (Oxford) (1957), p.385.

45. Ibid, p.387.

League came out with its demand for a separate Muslim majority state of Pakistan. With the initial success of Japan in the war a settlement to Indian problem became a matter of urgent necessity. Hence the British Government sent Sir Stafford Cripps, Lord Prvy Seal of the War Cabinet, with proposals[46] for negotiations with Indian leaders. These proposals envisaged the creation of an Indian Union which would be a Dominion within the British Empire like other dominions. A Constitution making body would be brought into existence at the end of the war with provision for the participation by the Indian States. Provinces and States which did not wish to participate could keep out. The British Government would be willing to sign a treaty with the Constitution making body regarding the details of the transfer. The British Government's special responsibilities for protecting the minorities and for the prosecution of the war would be continued. The Congress rejected the proposals as it thought it would encourage the separatist tendencies at the very inception.[47] Muslim League rejected the proposals because it did not adequately concede the demand for a separate state.[48] Since the Cripp's proposals broke down the Congress revived its civil disobedience and non-cooperation movements and in August 1942 passed the famous "Quit India" Resolution. But the British suppressed the movement and maintained its authority during the war period.

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46. For the details of the Cripp's mission proposals, see, Gwyer and Appadorai, op. cit., Vol.II, pp.520-24.
47. Resolution of the Working Committee of the Indian National Congress, 2nd April 1942, ibid, pp.524-525.
48. Resolution of the Working Committee of the Muslim League, 2nd April 1942, ibid, pp.520-628.

1.23 In June 1945 certain proposals were mooted on behalf of the British Government which came to be styled as the Wavell Plan named after the Viceroy Viscount Wavell. These proposals aimed at the Viceroy's Council being composed entirely of Indians except for defence and the Governor-General. These proposals failed because of the disagreement regarding the composition of the executive council.

1.24 In 1945, when the war came to an end and the Labour Government headed by Atlee assumed power in England, fresh attempts were made to solve the Indian problem.

1.25 In February 1946, the Secretary of State announced the sending out to India of a mission of Cabinet Ministers[49] to explore in India in consultation with the Viceroy and the political leaders the avenues of settlement of the question of India's freedom. As no agreement could be finally reached between the Indian National Congress, the Cabinet mission put forward finally its own proposals[50] on 16th May 1946. It recommended the establishment of a Constitution on the following lines:[51]

> (1) There should be a Union of India, embracing both British India and the States which should deal with the following subjects: Foreign Affairs, Defence, and Communications; and should have the powers necessary to raise the finances required for the above subjects.

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49. consisting of Lord Pethick Lawrence, Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade and Mr. A.V. Alexander, First Lord of Admiralty.
50. See, Gwyer and Appadorai, op. cit., pp.577-584.
51. Ibid, pp.580-581.

(2) The Union should have an Executive and a Legislature constituted from British Indian and States' representatives. Any question raising a major communal issue in the Legislature should require for its decision a majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting.

(3) All subjects other than the Union subjects and all residuary powers should vest in the Provinces.

(4) The States will retain all subjects and powers other than those ceded to the Union.

(5) Provinces should be free to form groups with Executives and Legislatures, and each group could determine the Provincial subjects to be taken in common.

(6) The Constitutions of the Union and of the groups should contain a provision whereby any Province could by a majority vote of its Legislative Assembly call for a reconsideration of the terms of the Constitution after an initial period of ten years and at ten-yearly intervals thereafter.

THE CONSTITUENT ASSEMBLY

1.26 A constitution making machinery and a Constituent Assembly composed of representatives of the Provinces and Indian States was to be brought into existence, in accordance with the Cabinet Mission Proposals. Elections to the Constituent Assembly took place and the Muslim League joined the elections. However, a difference with the Congress crept up regarding the interpretation of the grouping sections in the Cabinet Mission Proposals. The Muslim League had hoped that the grouping provisions contained the germ of a separate state of Pakistan. When the Congress' stand on the grouping

would in effect thwart this hope, the League proclaimed its intention of boycotting the Constituent Assembly. A clarification issued by the British Government favourable to the League's stand did not improve matters. This statement of December 6, 1946,[52] also said that the constitution framed by the Assembly would not be enforced on the people who were not represented therein. This was taken as indicative of the British Government's willingness to constitute two Constituent Assemblies. So when the Constituent Assembly met on 9th December 1946 the Muslim members boycotted it and the League demanded its dissolution.

1.27 On 20th February 1947 the British Government declared that their rule in India would be ended by June 1948 and if there was no agreement in India about the transfer of power they would decide to whom the power in India should be transferred.[53] Meanwhile, Mountbatten replaced Wavell as Governor-General and Viceroy. According to Mountbatten's plan[54] partition of India was agreed upon. On 26th July 1947 the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The British Parliament passed the Indian Independence Act which was to come into force from 15th August 1947. This Act set up two separate Dominions,

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52. Gwyer and Appadorai, op. cit., Vol.II, pp.660-61.
53. Statement by Atlee, Prime Minister on February 20, 1947. Gwyer and Appadorai, op. cit., Vol.II, pp.667-69.
54. Broadcast message by Mountbatten on June 3, 1947. Gwyer and Appadorai, op. cit., Vol.II, pp.675-77.

India and Pakistan, provided for the abolition of British sovereignty over the territories of the Dominions, declared that dominion legislatures would be sovereign and provided that the Constituent Assemblies already set up would function also as the legislatures for the respective dominions.

1.28 The Constituent Assembly for India which had its first meeting on 9th December 1946 became a sovereign body only on the passing of the Indian Independence Act. The Objectives Resolution introduced into the Constituent Assembly on 13th December 1946 by Pandit Jawaharlal Nehru, stated in a nutshell its aims and purposes. It said among other things that

> "This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;
>
> (2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and
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> ...territories (of the Indian Union) whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom;"[55]

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55. C.A.D. Vol.I, p.59.

1.29 The Constituent Assembly appointed a number of committees. They were the Union Powers Committee, the Union Constitutional Committee, the Provincial Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights, the Committee on Chief Commissioners Provinces, the Committee on Financial Relations Between Union and States, and the Advisory Committee on Tribal Areas. Based on the reports of these Committees the scheme for the drafting of the new Constitution was accepted. The Drafting Committee was appointed on August 29, 1947. The draft prepared by the Drafting Committee was discussed in the Constituent Assembly and finally passed on 24th November 1949. It is proposed to note some developments regarding the drafting and acceptance of the provisions governing the distribution of powers.

PROVISIONS GOVERNING THE DISTRIBUTION OF POWERS

1.30 Since the Cabinet Mission proposals which formed the basis for the working of the Constituent Assembly envisaged a federal set up with defence, communication and foreign affairs allocated to the federation, initial attempts were to spell out the full implications of these powers. The Objectives Resolution spoke of the inherent, implied, and resulting powers of the Union which betrayed the anxiety to make the Union as powerful as possible within the frame-work of the Cabinet Mission Plan. Thus the Union Powers Committee set up on January 25, 1947, received a number of memoranda from its members like K.M. Munshi and Alladi Krishnaswamy Ayyar regarding the scope of the Union powers. In its report to the Assembly

on April 28, 1947, it pointed out the possibility of the revision of the Union powers in the light of the ultimate decision that might be taken in regard to partition. The Union Constitution Committee set up on April 30, 1947, initially accepted the proposal of Gopalaswamy Ayyangar and Alladi Krishnaswamy Ayyar to have three lists as in the case of the Government of India Act 1935. After the announcement on June 3, 1947, regarding the partition, a joint meeting of the Union Constitution Committee and Provincial Constitution Committee on June 5, 1947, noted that the limitations of the Cabinet Mission's proposal regarding the power of the Centre no longer survived. At its meeting on June 6, the Union Powers Committee decided that there should be a federation with a strong centre, there should be three lists of legislative powers with the residue to the centre, and that the Indian States should be on a par with the Provinces regarding the federal legislative lists.

1.31 The position regarding Indian States was still uncertain as the process of integration was not yet over. So in the initial draft, Article 217, which dealt with the distribution of powers, was made applicable only to the Governor's Provinces and the Chief Commissioner's Provinces (States specified respectively in Parts I and II of Schedule I). The distribution of powers between the Federal Centre and the Indian States had to be settled on the basis of negotiations depending upon the preparedness of the native States to surrender more powers than those specified in the Cabinet Mission proposals.

1.32 Article 217[56] of the Draft Constitution prepared by the Drafting Committee provided for the distribution of powers in three lists as in the case of the Government of India Act 1935 and Article 223[57] provided for the residuary powers of legislati including taxation. Alladi Krishnaswami Ayyar however thought that since it had been decided to vest the residuary powers

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56. 217(1) Notwithstanding anything in the two next succeeding clauses, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in the next succeeding clause, Parliament and, subject to the preceding clause, the Legislature of any State for the time being specified in Part I of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to the two preceding clauses, the Legislature of any State for the time being specified in Part I of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included for the time being in Part I or Part III of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.

B. Shiva Rao (Ed.), The Framing of India's Constitution Select Documents, Vol. III, pp.598-99.

57. 223(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.

B. Shiva Rao, op. cit., p.600.

in the Centre, there was no longer the necessity to follow the three-fold division as in the case of the Government of India Act. It may be recalled that the Joint Select Committee which reported on the proposals for the reforms introduced in the 1935 Act had observed that if it were possible to allocate the residuary powers either to the federation or to the units it would have been possible to manage with only one list of subject.[58] Alladi proposed a draft[59] which began with the exclusive powers of legislation of the States followed by the Concurrent powers and then by the Union powers.

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58. Para 55, The Report of the Joint Committee on Indian Constitutional Reform, Vol.I.

59. "I would, therefore suggest for the consideration of the Constituent Assembly the following article as a substitute for articles 217 and 223(1) in the draft.

"(1) The Legislature of the States in Part I, Schedule I, shall have exclusive power to make laws for the State or for any part thereof in relation to matters falling within the classes of subjects specified in List I (Corresponding to Provincial Legislative List).

"(2) The Legislature of any of the States in Part I, Schedule I, shall in addition to the powers under clause (1) have power to make laws for the State or any part thereof in relation to matters falling within the classes of subjects specified in List II, provided, however, that the Union Parliament shall also have power to make laws in relation to the same matters within the entire area of the Union or any part thereof, and an Act of the Legislature of the State shall have effect in and for the State as long as and as far only as it is not repugnant to any Act of the Union Parliament.

"(3) In addition to the powers conferred by the previous sub-section, the Union Parliament may make laws for the peace, order and good government of the Union or any part thereof in relation to all matters not falling within the classes of subjects enumerated in List I and in particular and without prejudice to the generality of the foregoing, the Union Parliament shall have exclusive power to make laws in relation to all matters falling within the classes of subjects enumerated in List III.

(contd...28).

1.33 In support of his revised draft Alladi stated in his note as follows:-

"(i)nasmuch as it is agreed that the residuary power is to vest in the Centre (Union Parliament), the various enumerated items (i)n the Union List are merely illustrative of the general residuary power vested in the Centre.

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(f.n. 59 contd.)

"(4)(a) The Union Parliament shall have power to make laws for the peace, order and good government of the States in Part II, Schedule I.

(b) Subject to the general powers of Parliament under sub-section (1), the Legislature of the States in Part II, Schedule I, shall have the power to make laws in relation to matters coming within the following classes of subjects:

Provided, however, that any law passed by that unit shall have effect in and for that unit so long and as far only as it is not repugnant to any law of the Union Parliament.

(This provision is necessary, if the recommendations of the adhoc Committee on Chief Commissioners' Provinces in this regard are accepted).

"(5) The power to legislate either of the Union Parliament or the Legislature of any State shall extend to all matters essential to the effective exercise of the legislative authority vested in the particular legislature.

"(6) Where a law of a State is inconsistent with a law of the Union Parliament or to any existing law with respect to any of the matters enumerated in List I or (List II), the law of the Parliament or as the case may be the existing law shall prevail and the law of the State shall to the extent to repugnancy be void".

(This follows the Australian and American provisions Without embarking upon an examination of each section and each clause, a court may easily come to the conclusion that an Act taken as a whole is repugnant to another law).

If it is felt necessary, special provision may be inserted in regard to laws in respect of matters in the Concurrent List on the lines of article 231(2) though I think such a provision may not be necessary in view of the overriding power of the Central Legislature".

1. Shiva Rao, op. cit., pp.676-77.

> The proper plan, therefore, is to define the powers of the States or Provincial units in the first instance, then deal with the concurrent power and lastly deal with the power of the Centre or the Union Parliament while at the same time making out a comprehensive list of the powers vested in the Centre by way of illustration to the general power. The plan adopted in section 100 of the Government of India Act was to some extent accounted for by the fact that there was no agreement then among political parties as regards the location of residuary power and it was left for the Governor-General to decide by which Legislature the residuary power was to be exercised in any particular place in cases not covered by any of the Lists. There is no such problem facing us now. A canvassing of the meaning and import of individual items in the Central List has become of much less importance now than under the provisions of the Government of India Act.
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> The repetition of "notwithstanding" in every clause of section 100 has been the subject of prolonged and unnecessary arguments in courts".[60]

However, the majority of the members of the drafting Committee thought that the question was merely one of form and preferred not to disturb the wording suggested in the draft.[61]

1.34 K. Santhanam, A. Ananthasayanam Ayyangar, T.T. Krishnamachari and Smt. G. Durga Bai gave notice of an amendment that Alladi's draft be adopted in preference to the one in the draft Constitution. B.N. Rao, the Constitutional Adviser, thought that Alladi's draft did not provide for the

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60. Ibid, pp.675-76.
61. Note to Draft Article 217, see ibid, pp.598-99.

predominance of the Union power in case of a conflict between an item in the Union field and an item in the State field. Under the draft Constitution the words "notwithstanding anything in two succeeding clauses" clearly provided for such a contingency and absence of these words in Alladi's draft would lead to ambiguity and would make provincial list the dominant one. This amendment proposed by Santhanam and others was not moved in the Assembly.

1.35 However, on 13th June 1949, Professor Shibenlal Saxena moved in the Constituent Assembly an amendment exactly similar to the one earlier suggested by Alladi and pointed out how it would be more logical than the one already adopted by the Assembly. He was, however, unsuccessful.[62]

1.36 While discussing the passage of entry 91[63] of the draft Constitution, Hukam Singh and Naziruddin Ahmad pointed out the redundancy involved in enumerating items 1 to 90 in List I when by the residuary entry 91 it was proposed to confer on the Union all the powers not mentioned in Lists II and III.[64]

1.37 Hukam Singh wanted the word 'other' in entry 91 to be deleted. Naziruddin Ahmad wanted entries 1 to 90 to be deleted and article 217 redrafted on logical lines. "All complications could be avoided and matters simplified by

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62. C.A.D. Vol. IX, pp.795-797.
63. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.
64. C.A.D. Vol. IX, pp.854-855.

drafting Article 217 to say that all matters enumerated in List II must belong to States, and all matters enumerated in List III are assigned to the centre and the States concurrently and that every other conceivable subject must come within the purview of the centre".[65]

1.38 The assembly upheld the view that it was too late to raise the question of the deletion of the entries 1 to 90 as they had already been passed by the Assembly. Professor Shibenlal Saxena thought that entry 91 would strengthen the centre. Dr. Ambedkar defended the enumeration of items 1 to 90 along with the mention of the residuary power in item 91 on the ground that such a step was necessary to give detailed information to the States which were anxious to know the extent of the power of the centre and which would not be satisfied by a "symbolic phrase" residuary powers. He said that such enumeration was made in the Canadian Constitution as well as in the Government of India Act.[66] The amendments moved by Hukam Singh and Naziruddin Ahmad were not adopted.

1.39 In Union of India v. H.S. Dhillon[67] discussed later under the chapter on 'Residuary Powers', the Supreme Court pointed out that entries 1 to 96 in the Union List are mere illustrations of the residuary entry 97 and that the

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65. C.A.D. Vol.IX, p.855.
66. Though the reference to the Government of India Act did not bear an exact analogy as the residuary power was not allotted either to the federation or to the provinces but was to be allocated in the discretion of the Governor-General.
67. A.I.R. 1972 S.C. 1061.

enumerations may be of some assistance in interpreting the extent of State's powers. The result of this case would seem to suggest that it would have been better if the drafting of Article 217 had been modified as suggested by Alladi Krishnaswami Ayyar and Shibanlal Saxena and of the entries in the Union List as suggested by Hukam Singh and Naziruddin Ahmad.

## CHAPTER II

## CONFLICTS BETWEEN THE EXCLUSIVE FIELDS

### CREATION, ARRANGEMENT AND RECONCILIATION OF THE FIELDS

**Creation of exclusive fields**

2.1 The Constitution creates an exclusive field of legislation for the Union Parliament and an exclusive field for the Legislature of each State. Fields are created by enumeration of topics or heads of legislation. The Union List (List I in the Seventh Schedule) contains 97 entries belonging to the exclusive Union field. The exclusive field of State Legislature is comprised of 66 entries mentioned in List II in the Seventh Schedule. In addition, there are 47 entries in the Concurrent List in respect of which both the Union Parliament and the State Legislatures are competent to legislate. Article 245 of the Constitution confers territorial competence on the Legislatures. The Union Parliament may make laws for the whole or any part of the territory of India. The Legislature of a State may make laws for the whole or any part of the State. The Union Parliament may also make laws which are extra-territorial in operation. Under article 246[1] the exclusive fields of legislation are

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1. 246 (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(contd.....34).

given to the respective legislatures, that is, to the Union Parliament with regard to items in the Union List, and State Legislatures with regard to the items in the State List.

2.2 In addition to article 246, there are provisions which create exclusive fields in favour of the Union. Thus article 252[2] of the Constitution empowers the Parliament to legislate exclusively on the topics of legislation mentioned in the State List when so authorised by resolutions passed in

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(f.n. 1 contd.)

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

2. 252 (1) If it appears to the Legislature of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

the House or Houses of Legislature of the State concerned.[3] An exclusive field in favour of the Union is also created by article 253.[4] According to this article for implementing any treaty, agreement or convention with another country or for the implementation of a decision made at an international conference, association or other body, the Union Parliament has exclusive legislative competence even though it would necessitate legislation with regard to matters in the exclusive State field.

Overlapping of fields

2.3 Although an attempt has been made in the Constitution to demarcate the fields as exclusive, it has not been possible in practice to allocate legislative competence in such a way as to prevent overlapping. There are three main ways in which the overlapping may occur.

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3. See the Prize Competition Act 1955 and sections 5(2) and 5A of the Estate Duty Act, 1953. For other instances see the North Eastern Hill University Act 1973 (24 of 1973) enacted by the Union Parliament in pursuance of resolution under article 252(1) passed by the Legislatures of the States of Meghalaya and Nagaland, and the Urban Land (Ceiling and Regulation) Act, 1976 based on resolution passed by the Legislatures of the States of Andhra Pradesh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Maharashtra, Orissa, Punjab, Tripura, Uttar Pradesh and West Bengal.

4. 253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Firstly, a subject of legislation of wide scope may be divided between the Union and the State fields; and it would be impossible to prevent overlapping by a clean-cut division. Thus the legislative power with regard to trade and commerce is divided amongst three fields. Trade and commerce with foreign countries, import and export across custom frontiers and definition of custom frontiers are given to the Union Parliament.[5] Inter-State trade and commerce is also allocated to the exclusive Union field.[6] Trade and commerce within the State is given to the State Legislature and is placed in the exclusive State field.[7] However, trade and commerce in the products of controlled industries, food-stuffs and certain other articles is allotted to the concurrent field.[8] In view of such a division, the scope of trade and commerce power given to each field has to be determined by the courts.

2.4 Secondly, in certain cases exclusive field given to the States is described as comprised of matters not specified in List I. Entry 13 of List II speaks of "...and other means of communication not specified in List I" whereas the Union List specifies railways,[9] highways declared by or under law made by Parliament to be national highways,[10] and shipping and

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5. Entry 41 of List I of Schedule 7.
6. Entry 42 of List I of Schedule 7.
7. Entry 26 of List II of Schedule 7.
8. Entry 33 of List III, Schedule 7.
9. Entry 22 of List I, Schedule 7.
10. Entry 23 of List I of Schedule 7.

navigation on inland waterways declared by law to be national highways.[11] Entry 32 of List II refers to incorporation, regulation and winding up of corporations other than those specified in List I whereas entries 43 and 44 of List I refer respectively to the incorporation, regulation and winding up of trading corporations including banking, insurance and financial corporations but not including co-operative societies, and the incorporation, regulation and winding up of corporation, whether trading or not with objects not confined to one State but not including universities. Entry 63 of List II refers to rates of stamp duty in respect of documents other than those specified in the provisions of List I, and entry 91 of List I refers to rates of stamp duty in respect of bills of exchange, cheques, promisory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures; proxies and receipts.

2.5 Thirdly, in several cases, the exclusive field in favour of the States is made subject to an exclusive field, carved out of it and reserved in favour of the Union. In some of these cases, the scope of the Union field is made to depend on a declaration given by Parliament. Obviously this device is adopted to promote uniform regulation under Parliamentary enactment of matters which would in national interest demand such treatment. This would give flexibility to the division

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11. Entry 24 of List I of Schedule 7.

though it savours of centralisation. Education including universities, though given to the exclusive sphere of State legislation, is made subject to the following entries of the Union List:

> 63- The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.
>
> 64- Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
>
> 65- Union agencies and institutions for-
>
> (a) professional, vocational or technical training, including the training of police officers; or
>
> (b) the promotion of special studies or research; or
>
> (c) scientific or technical assistance in the investigation or detection of crime.
>
> 66- Co-ordination and determination of standards in institutions for higher education or research and technical institutions.

Education is also made subject to the following entry in the Concurrent List:

> "25. Vocational and technical training of labour".

2.6 Regulation of mines and mineral development in entry 23 of List II is made subject to entry 54 of the Union List. According to entry 54 regulation of mines and mineral development to the extent to which such regulation and development

under the control of Union is declared by Parliament by law to be expedient in the public interest is an exclusive Union field. Similarly "industries" given to State field under entry 24 of List II is made subject to entry 7- industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war, and entry 52- industries the control of which by the Union is declared by Parliament by law be expedient in the public interest of List I.[12]

2.7 In all these cases where an exclusive State field is made subject to an exclusive Union field or part of the exclusive State field may be transferred to exclusive Union field by a declaration of Parliament by law or by the Government under such a law, an overlapping of the fields is inevitable and the process of distribution of powers has really to be completed by the courts. The Supreme Court has held that in such cases the State field is pro tanto reduced which would take away the legislative competence of the State.[13]

Hierarchical arrangement of jurisdiction

2.8 The three legislative fields are arranged hierarchically. The exclusive Union field has precedence over the concurrent and exclusive State fields. This is achieved in two ways. The concurrent and State fields are made subject to Union field.[14]

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12. For further examples the following entries may be consulted. Entries 17 of List I and 56 of List II, entries 22 of List II and 34 of List I and entries 33 of List II and 60 of List I and entry 54 of List II and entry 92A of List I.
13. Hingir-Rampur Coal Co. v. State of Orissa, A.I.R. 1961 S.C. 459 and State of Orissa v. M.A. Tulloch & Co., A.I.R. 1964 S.C. 1284.
14. Sub-articles (2) and (3) of Article 246.

It is provided that exclusive Union field is given to the Union Parliament "notwithstanding anything" in the concurrent and State fields.[15] The concurrent field in its turn will override the State field but, as has been pointed out, it is subject to Union field.[16] And the exclusive State field is subject to both the Union and the concurrent fields. The implication of this type of arrangement of the jurisdictions is that, in case of a conflict, a Union law in the exclusive field will prevail over a law in the concurrent or State fields, and a law in the concurrent field will prevail over a State law in the State field.[17]

Reconciliation of conflict

2.9 In order to resolve conflicts of legislation between the exclusive fields, the first step is the proper ascertainment of the field and, the second one, the characterisation of the legislation to know to what field the law relates.

Ascertainment of the field

2.10 It has been held that the entries in the Lists are only legislative heads or fields of legislation. They demarcate the area over which the appropriate legislature has competence. The widest amplitude should be given to the language of the entries.[18] If, on an interpretation of the true scope of the entry, the

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15. Article 246(1).
16. Article 246(2).
17. Article 246(1) is comparable to the supremacy clauses in the U.S.A. Constitution (Art. VI) and the Australian Constitution (covering clause 5).
18. Harakchand v. Union of India, A.I.R. 1970 S.C. 1453.

conflict or ambiguity, could be removed the problem is simple. Thus in Diamond Sugar Mills v. State of U.P.[19] the scope of "local area" in entry 52 of List II ("52- Taxes on the entry of goods into a local area for consumption, use or sale therein") had to be determined. The U.P. Government had imposed a tax on the entry of sugarcane into sugar factories. Interpreting the term "local area", it was held that a factory premise could not be treated as "local area" which meant an area administered by a local authority.

2.11 In State of Madras v. Gannon Dunkerley & Co. Limited[20] the scope of "sale of goods" in entry 48 ("48- Taxes on the sale of the goods and on advertisement") of List II of the Seventh Schedule to the Government of India Act 1935, had to be considered. The proposal in the Madras General Sales Tax (Amendment) Act, 1947 to levy sales tax on the materials used in the execution of a works contract, treating the use of materials as a sale of goods by the contractor, was challenged as ultra vires the power of the Provincial Legislature. It was held that agreement to sell movables for a price and the passing of property pursuant to that agreement were essential ingredients of 'sale of goods' in entry 48. In a works contract, which was an entire and indivisible one, there was no sale of goods as such. The result was that the Provincial Legislature had no power to levy sales tax on the price of the materials used in a works contract.

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19. A.I.R. 1961 S.C. 652.
20. A.I.R. 1958 S.C. 560.

Thus the proper delimitation of the fields by itself may very often solve an apparent problem of conflict.

Reconciliation of overlapping entries

2.12 As has been noted above, in allocating subjects of legislation, clean-cut, water-tight divisions are not possible and hence overlapping is bound to occur. In such cases a reconciliation between the entries must be effected having recourse to the other entries in the Lists and the context and the scheme of the Act. For example, in In re C.P. Motor Spirit Act[21] the question was whether the C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, which levied from every retail dealer a tax on the sale of motor spirits and lubricants at the rate of 5% on the value of such sales, was ultra vires the Provincial Legislature. Entry 48 of List II, "Taxes on the sale of goods and on advertisement", seemed to allow the Provincial Legislature to pass the law. At the same time, the terms 'duties of excise' in entry 45 of the Federal List, "Duties of Excise on tobacco and other goods manufactured or produced in India....", could include at least a tax on the first sale of an article after its manufacture or production. So if each legislative power was given its widest meaning, there was a common territory shared between them and an overlapping of the jurisdictions was the inevitable result. Gwyer C.J. quoted the following passage from Citizens Insurance Company v. Parsons[22]:

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21. A.I.R. 1939 F.C. 1.
22. (1882) 7 A.C. 96.

> "It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them".[23]

In order to give effect to the Provincial power and establish harmony between the entries it was held that "duties of excise" should be read in a restricted sense. The Central Legislature would have power to impose duties on excisable articles before they became part of the general stock of the Province, i.e, at the stage of manufacture or production, and a Provincial Legislature would have exclusive power to impose a tax on sales thereafter.[24] It was pointed out that in reaching this result Parliament should be presumed to know the Indian legislative practice of levying excise duty only at the stage of manufacture or production. Sulaiman J. held that a tax on retail sales to consumers would not in substance be an excise duty. Jaykar J. in his concurring judgment observed:

> "Item 45 (List I) may be said to contain a special power to levy an excise duty at all stages. As an exception to this, a portion of the power is cut out and allocated to the Province under item 48 (List II). It operates as an exception to the general power conferred by item 45".[25]

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23. A.I.R. 1939 F.C. 1 at p.5.
24. Ibid, at p.11.
25. Ibid, at p.40-41.

Thus reading a general power in a restricted sense in favour of a special power is a method of achieving harmony to avoid conflict of entries. This is only an instance of the principle of harmonious construction by the application of the maxim "generalia specialibus non derogant".

2.13 In Governor-General in Council v. Province of Madras[26] the Governor-General in an original suit before the Federal Court contended that Madras General Sales Tax Act, 1939 (Act IX of 1939), in so far as it imposed a sales tax on the first sale of goods manufactured or produced in India, had contravened the exclusive field "duties of excise" given by entry No.45. The suggestion to read entry 48 of the Provincial List, "Taxes on the sale of goods", subject to entry 45 of List I in view of section 100 of the Government of India Act, 1935 did not prevail in the Federal Court. On appeal to the Privy Council, speaking for the Board, Lord Simonds approved of the decision of the Federal Court in Province of Madras v. Boddu Paidanna & Sons[27] and held that a duty of excise was primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. A sales tax was levied on the vendor in respect of sales. Though they might seem to overlap, they were distinct in law. By giving a less wide meaning to the entry in the Federal List a reconciliation was possible. So the contention of the Governor-General failed and the validity of the Madras Act was upheld by the Privy Council.

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26. A.I.R. 1945 P.C. 98.
27. A.I.R. 1942 F.C. 33.

2.14 The principle of reconciliation of the entries by reading the entries in a restricted sense in the light of other entries may be further noticed with regard to the interpretation of entry No.24 "Industry" in the State List. In Tika Ramji v. State of U.P.[28] Bhagawati J. speaking for the Supreme Court observed that industry in the wide sense of the term would be capable of comprising three different aspects: (1) raw materials which were an integral part of the industrial process, (2) the process of manufacture or production and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in entry 27, "Production, supply and distribution of goods subject to the provisions of entry 33 of List III" of the State List. The process of manufacture or production would be comprised in State List entry 24, "Industries subject to the provisions of entries 7 and 52 of List I" except where the industry was a controlled industry when it would fall within the Union List entry 52 "Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". The products of the industry would also be comprised in the State List entry 27 except where they were the products of a controlled industry which would fall within the Concurrent List entry 33.[29] Thus by

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28. A.I.R. 1956 S.C. 676.
29. Entry 33: Trade and commerce in, and the production, supply and distribution of-
    (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
    (b) foodstuffs, including edible oilseeds and oils;
    (c) cattle fodder, including oilcakes and other concentrates;
    (d) raw cotton, whether ginned or unginned, and cotton seed &
    (e) raw jute.

confining the meaning of the term 'industry' to the process of manufacture or production and leaving the raw materials and the products of industry to other entries a reconciliation has been effected.

2.15 The term 'industry' widely interpreted would include "gas and gas-works" specifically provided for in entry 25 of List II. Hence in Calcutta Gas Co. (Proprietory) Ltd. v. State of West Bengal[30] Subba Rao J. held that gas and gas-works would be excluded from the term industry in entry 24 of List II. Since 'industry' had the same meaning in entries 24 of List II and 52 of List I, the declaration in the Industries (Development and Regulation) Act, 1951 did not effect a transfer to the Union's sphere of the gas industry for regulation and development under the Union.

Reconciliation of the fields when a part of the exclusive State sphere is transferred to the Union

2.16 As has been noticed earlier, a part of the exclusive State field may be transferred to the exclusive Union field as a result of resolutions passed by the State Legislatures under article 252, by the exercise of treaty making power under article 253, the subjection of entries in the State List to related entries in the Union List, or by declaration by Parliament that it was expedient in public interest that the matter is regulated by the Union law. It has been held that in all such cases there is a deprivation of the exclusive

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30. A.I.R. 1962 S.C. 1044.

field of the State in favour of the Union, and any legislation of the State in the field so transferred would thereafter become invalid even if the Union did not exercise its powers and pass any legislation to regulate the matter.[31] The status of a State law in the transferred field has been described by N. Rajagopala Ayyangar J. in State of Orissa v. M.A. Tulloch & Co.[32] to be one of virtual repeal by supersedure by the Parliamentary enactment.[33] The effect of transfer of State field to the Union field in pursuance of resolution under article 252 has been described as one of 'surrendering' the field.[34] Once the field is transferred, any existing State law would be impliedly repealed as in the case of transfer of State field by a declaration by Parliament.

2.17 There seems to be a confusion regarding the principle that should be invoked to settle conflicts in the transferred field. This has arisen because of the use by the courts of language appropriate in the resolution of conflicts in the concurrent field to cases of the type under discussion. These are considered later on while discussing conflicts in the concurrent field.[35]

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31. Hingir Rampur Coal Co. v. State of Orissa, A.I.R. 1961 S.C. 459; R.M.D.C. (Mysore) Pvt. Ltd. v. State of Mysore, A.I.R. 1962 S.C. 594; Gujarat University v. Shri Krishna, A.I.R. 1963 S.C. 703; State of Orissa v. M.A. Tulloch & Co., A.I.R. 1964 S.C. 1284; Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823. For a recent application of this principle see Chanan Mal v. State of Haryana, A.I.R. 1975 Punj & Haryana, 102.
32. A.I.R. 1964 S.C. 1284.
33. Ibid, at p.1293.
34. R.M.D.C. (Mysore) Pvt. Ltd. v. State of Mysore, A.I.R. 1962 S.C. 594, per Kapur J. at p.599.
35. Infra, Chapter IX.

INCIDENTAL POWER

Entries to be interpreted to include ancillary powers

2.18 The entries in the Lists, being fields for the operation of legislative powers for the governance of the country, should be construed liberally. A grant of power necessarily implies that it carries along with it the power to do all that is necessary to realise that power. Though the Government of India Act, 1935 and the Constitution of India, 1950 do not contain any reference to the incidental or ancillary power, as in the case of the American Constitution, such power has been conceded to the legislatures by the interpretation of the courts. Gwyer C.J. of the Federal Court of India observed: "none of the items in the list is to be read in a narrow or restricted sense, ... each general word should be allowed to extend to all ancillary or subsidiary matters which can fairly or reasonably be said to be comprehended in it".[36]

Mortgage of land was held to be included as an incidental and ancillary subject in the legislative head of land in entry 21 of the Provincial Legislative List in the Government of India Act, 1935.[37] The corresponding entry in the

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36. United Provinces v. Atiqa Begum, A.I.R. 1941 F.C. 16 at p.25. In this case legislative validation of illegal executive orders remitting rent though not specifically mentioned in any of the Lists was held to be subsidiary or ancillary to the power of legislating on the particular subject (In this case, entry 21- Land etc. of List II) in respect of which the executive orders might have been issued.
37. Megh Raj v. Allah Rakhia, A.I.R. 1947 P.C. 72.

Constitution, entry 18 of List II in the Seventh Schedule, has been held to comprehend legislation for agrarian reform[38] and town planning.[39] In Indu Bhusan v. Rama Sundari[40] it was argued that the words 'regulation of house accommodation' in cantonment areas provided for in entry 3 of the Union List should be confined to legislation for the allotment of house accommodation. Rejecting this argument it was held that the power to regulate was a power to direct and control and "will include within it all aspects as to who is to make the constructions, under what condition the construction can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised".[41]

Specifically enumerated power cannot be treated as incidental power

2.19 The detailed enumeration of subjects in the three Lists may sometimes affect the treating of a particular subject as incidental to another subject. Thus the taxing powers of the Union and the States having been specifically enumerated in the Union and State Lists respectively, a taxing power

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38. Sri Ram Ram Narain v. State of Bombay, A.I.R. 1959 S.C.459, where the validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 was upheld.
39. Maneklal Chhotalal v. M.G. Makwana, A.I.R. 1967 S.C. 1373, where the validity of the Bombay Town Planning Act, 1954 as amended by Gujarat Act 52 of 1963 was upheld.
40. A.I.R. 1970 S.C. 228.
41. Ibid, at p.232.

cannot be allowed as an incidental power of another legislative power though in the absence of a specific enumeration, it could have been so conceded.[42] When the State Legislatures surrendered to the Union Parliament under article 252 of the Constitution, the power of legislating with respect to betting and gambling,[43] the power to tax on betting and gambling given to the States under entry 62 of List II did not pass to the Union, though in the absence of a specific entry it would have been held to have passed as ancillary power.[44]

2.20 If a matter cannot be fairly and reasonably be said to be comprehended in the given topic of legislation it will not be allowed as an incidental one. Bhagawati J. held that the requisition of immovable property could not be allowed as an incidental power to compulsorily acquire land (in entry 9 of List II) nor to rights in or over land included in entry 21 of List II nor to transfer of property within entry 8 of List III in the Government of India Act, 1935.[45]

2.21 In State of Bihar v. Kameswar Singh[46] the Attorney General had raised a contention that the Bihar Land Reforms Act, 1950 was a legislation with respect to land under entry 18

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42. M.P.V. Sundramier & Co. v. State of Andhra Pradesh, A.I.R. 1958 S.C. 468.
43. Entry 34 of List II.
44. R.M.D.C. (Mysore) Pvt. Ltd. v. State of Mysore, A.I.R. 1962 S.C. 594.
45. Tan Bug v. Collector of Bombay, A.I.R. 1946 Bom.216. In the Constitution of India requisition is specifically mentioned vide entry 42 of List III in the Seventh Schedule.
46. A.I.R. 1952 S.C. 252.

of the State List, and a legislation under that entry should include all ancillary matters including acquisition of land. This contention was repelled by the court. Das J. observed:

> "There is no doubt that 'land' in Entry 18 in List II, has been construed in a very wide way but if 'land' or land tenure' in that entry is held to cover acquisition of land also, then Entry 36 of List II will have to be held as wholly redundant, so far as acquisition of land is concerned...to give a meaning and content to each of the two legislative heads under Entry 18 and Entry 36 in List II, the former should be read as a legislative category or head comprising land and land tenure and all matters connected therewith other than acquisition of land which should be read as covered by Entry 36 in List II".[47]

Limits of incidental power

2.22 The rule that an entry conferring legislative power should be interpreted broadly to include all ancillary and incidental matters cannot be stretched to any extent. In R.C. Cooper v. Union of India[48] (The Bank Nationalisation Case) it was argued that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 affected also the non-banking business (miscellaneous services, strictly not within banking, but customarily performed by banks to attract business) of the acquired banks. The non-banking business

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47. Ibid, at p.283. See also observations to the same effect by Venkatarama Ayyar J. in Amar Singhji v. State of Rajasthan, A.I.R. 1955 S.C. 504 at p.520, and by Shah J. in R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564 at p.591.

48. A.I.R. 1970 S.C. 564.

was outside the scope of entry 45 Banking in the Union List, and of matters incidental thereto, and hence beyond the legislative competence of the Parliament. Accepting this argument Shah J. in his majority judgment[49] observed as follows:

> "To include within the connotation of the expression "Banking" in Entry 45 of List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in rewriting the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. But the field of banking cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II".[50]

2.23 The limits of the doctrine of incidental power is illustrated also by certain Sales Tax cases. Section 11(2) of the Hyderabad General Sales Tax Act, 1950, (14 of 1950), had provided that, despite judicial verdicts, every person who had

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49. Others joining him in the majority judgment were S.M.Sikri, J.M. Shelat, V. Bhargava, G.K. Mitter, C.A. Vaidialingam, K.S. Hegde, A.N. Grover, P. Jaganmohan Reddy and I.D. Dua, JJ. A.N. Ray J. (as he then was) held in his dissenting judgment that the non-banking business also would come within the scope of entry 45 Banking.
50. Ibid, at p.590. This interpretation of "Banking" did not contribute to the invalidating of the Act as it was held that there was no evidence to show that the banks in question were carrying on non-banking business before the date of acquisition.

collected tax otherwise than in accordance with the Act should pay it over to Government and that, in case of default, the recovery should be effected as though it were arrears of land revenue. Declining to allow this as part of the incidental and ancillary power to levy sales tax, Wanchoo J. pointed out that the incidental and ancillary powers had to be exercised in aid of the main topic of legislation which in the case on hand was levying of sales tax. All powers necessary for levy and collection of the tax concerned, and for the prevention of evasion of tax were comprised in the legislative entry as ancillary or incidental powers. But it could not be stretched to the extent of claiming an amount not exigible as tax under the law as though it were a tax.[51]

2.24 Section 42(3) of the Madras General Sales Tax Act, 1959 had authorised the Check Post Officer to seize and confiscate goods under transport not covered by a bill of sale or delivery note. Refusing to treat this as part of the ancillary power, J.C. Shah J. pointed out that such power could not be said to be fairly and reasonably comprehended as ancillary to the power to levy a sales tax. Even an innocent person carrying his own goods as personal baggage from one

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51. R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad, A.I.R. 1964 S.C. 922 at 924. See also Kantilal Babulal & Bros. v. H.C. Patel, A.I.R. 1968 S.C. 445 (S.12A (4) of the Bombay Sales Tax Act, 1946 under which amounts illegally collected by the dealers on certain inter-State sales were claimed by the Government as incidental to the power to levy sales tax was invalid), and Asoka Marketing Limited v. State of Bihar, A.I.R. 1971 S.C. 946 where the Supreme Court held that a provision in the Bihar Sales Tax Act, 1959, claiming erroneously collected amount as incidental to the power to levy sales tax, was invalid.

State to another could come under the confiscation rule for failure to produce a bill of sale or delivery note.[52]

2.25 The important scope of the doctrine of ancillary powers in connection with the doctrines of pith and substance, of incidental encroachment, and of unoccupied field, is considered later.

CHARACTERISATION OF LEGISLATION

Doctrine of pith and substance

2.26 The first step in the resolution of conflicts in the exclusive spheres of legislation is, as stated above, the determination of the scope of the fields created by the entries and, in cases of overlapping, the reconciliation of the fields by harmonious interpretation. It is possible that, even after the scope of the fields has thus been fixed, there could still arise conflicts because in actual legislation it will be impossible to confine the legislative provisions to any one exclusive field. Very often, in order to bring out a workable legislative scheme in a federal polity, many provisions which would appear to relate to matters in the exclusive fields given to another legislature may be necessary. In such instances, if the supremacy of the Federal jurisdiction granted by article 246 of the Constitution is literally adopted it would result in a large-scale curtailment of the State fields. Such

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52. Check Post Officer, Coimbatore v. K.P. Abdulla & Brothers, A.I.R. 1971 S.C. 792.

an approach would be contrary to the federal spirit of the Constitution. The power to legislate has been given as the power to legislate "with respect to" the topic concerned. So in the case of a legislation appearing to touch also the forbidden field it would be necessary to find out "with respect to" what field the legislation in question has been made. In a sense the legislation is "with respect to" a matter enumerated in a List if in its essential character it is in regard to a matter enumerated in that List. It is immaterial if its incidental or ancillary provisions touch the exclusive field allotted to the other legislature. This is called the doctrine of pith and substance and the doctrine of incidental encroachment.[53]

2.27 In Subramanyan v. Muttuswami[54] the Federal Court had to consider, on appeal from Madras, the validity of the Madras Agriculturists Relief Act, 1938, (Act 4 of 1938), which had scaled down the debts payable by agriculturists. A creditor who had advanced money to an agriculturist on a promissory note contended that the Act was invalid to the extent it affected debts on promissory notes as legislation with respect to promissory notes belonged under entry 28 of List I to the exclusive competence of the Federal Legislature. Gwyer C.J. though he decided the case on the basis that there was no

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53. In Canada these are called the aspect doctrine and the doctrine of trenching. See Bora Laskin, Canadian Constitutional Law, 3rd Edn., (1969), Ch.III, pp.85-144.
54. A.I.R. 1941 F.C. 47.

encroachment into the federal sphere as the debts evidenced by the promissory notes in question had passed to amounts due on decrees which could be dealt with by the Provincial Legislature under its exclusive or concurrent powers made the following observations:

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance", or its "true nature and character" for the purpose of determining whether it is legislation with respect to matters in this list or in that".[55]

The accidental circumstance of having used negotiable instruments or promissory notes in most cases for evidencing the debts in question could not make the Act in question one with respect to negotiable instruments or promissory notes.

2.28 In Prafullakumar v. Bank of Commerce, Khulna[56] Lord Porter,[57] delivering the opinion of the Privy Council, approved of the above dictum as correctly laying down the

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55. Ibid, at p.51.
56. A.I.R. 1947 P.C. 60.
57. Other members on the Board being Lords Wright and Uthwatt, Sir Madhavan Nair and Sir John Beaumont.

grounds on which the rule of pith and substance was founded. It was also held that the rule was applicable in the interpretation of the Government of India Act as it applied to the Canadian Constitution. This principle has been adopted and followed in a large number of subsequent cases.[58]

Pith and substance and the non-obstante clauses

2.29 The rule of pith and substance with its implication that incidental encroachment was permissible had some difficulty of being accepted initially. In view of the subjection of the Provincial field to the federal and concurrent fields and the use of the non-obstante clause in establishing the federal supremacy, it was thought that the doctrine of pith and substance and the allied principles of interpretation followed in Canada were not applicable in India. In Sadanand Jha v. Aman Khan,[59] a Full Bench of the Patna High Court[60] held that section 11 of the Bihar Money Lenders Act, 1938, (Act 3 of 1938), was void to the extent it affected though incidentally

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58. Ralla Ram v. Province of East Punjab, A.I.R. 1949 F.C.81; Kishori Shetty v. The King, A.I.R. 1950 F.C.69; State of Bombay v. F.N. Bulsara, A.I.R. 1951 S.C. 318; D.N.Banerji v. P.R. Mukherji, A.I.R. 1953 S.C. 58; Amar Singhji v. State of Rajasthan, A.I.R. 1955 S.C. 504; A.S. Krishna v. State of Madras, A.I.R. 1957 S.C. 297; State of Rajasthan v. G. Chawla, A.I.R. 1959 S.C. 544; Attiabari Tea Co. v. State of Assam, A.I.R. 1961 S.C. 231; Khyerbari Tea Co. v. State of Assam, A.I.R. 1965 S.C. 925; Katra Education Society v. State of U.P., A.I.R. 1966 S.C. 1307; Assistant Commissioner Urban Land Tax, Madras v. Buckingham and Carnatic Co. Ltd., A.I.R. 1970 S.C. 169; Second Gift Tax Officer, Mangalore v. D.H. Nazareth, A.I.R. 1970 S.C. 999; Baijnath v. State of Bihar, A.I.R. 1970 S.C. 1436; Ramtanu Co-operative Housing Society v. State of Maharashtra, A.I.R. 1970 S.C. 1771; Kannan Devan Hill Produce Co. v. State of Kerala, A.I.R. 1972 S.C. 2301; Sita Ram v. State of Rajasthan, A.I.R. 1974 S.C. 1373; Mangalore Ganesh Beedi Works v. Union of India, A.I.R. 1974 S.C. 1832; K.S.E. Board v. Indian Aluminium Co., A.I.R. 1976 S.C. 1031.

59. A.I.R. 1939 Pat. 55.

60. Wort, Dhavle and Manohar Lall, JJ.

the provisions of existing Indian law, namely, section 2 of Usury Laws Repeal Act, 1855. Dhavle J. expressly stated that the principle of pith and substance, applied by the Privy Council in Gallagher v. Lynn,[61] would not apply to the Government of India Act.[62]

2.30 In the same strain, in his dissenting judgment in Subramanyan v. Muttuswami,[63] Sulaiman J. of the Federal Court held that the Madras Debt Relief Act, 1938 though in pith and substance related only to topics in the Provincial List could not be saved in so far as it conflicted with existing Indian law, viz., Negotiable Instruments Act. He held that the Canadian doctrines should be imported wholesale and not piecemeal. If the interpretation of "with respect to" led to the Canadian doctrines of pith and substance and incidental encroachment, there was no reason to stop at that and not to come to the next doctrine of occupied field. Since the Negotiable Instruments Act was there as existing Indian law, the Madras Act would not be held valid though only incidentally trenching the field occupied by the existing Indian law.

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61. (1937) A.C. 863.
62. Section 11 held invalid was re-enacted as section 7 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, (Act 7 of 1939), passed in accordance with section 107 of the Government of India Act, 1935, that is with the assent of the Governor-General. The validity of the re-enacted provision and the lower court judgment based thereon were upheld in Jagdish Jha v. Aman Khan, A.I.R. 1940 F.C. 3.
63. A.I.R. 1941 F.C. 47.

2.31 If the doctrine of pith and substance was not applied in interpreting the Government of India Act, 1935, it would have meant that the federal supremacy had to be literally followed ignoring the spirit of provincial autonomy envisaged in the federal set up. The States would have found it practically impossible to embark upon legislation even on matters constitutionally committed to their charge without attracting invalidity on account of incidental trespass into the exclusive federal domain. So in order to give reasonable scope to provincial autonomy it was only proper that a literal and rigid stand was not accepted.

2.32 The acceptance of the doctrine of pith and substance has therefore the effect of softening down the rigours of the non-obstante clause, and of saving much State legislation from attack for want of competence which a literal application of the clause would have denied to the State Legislatures.

Scope of the doctrine

2.33 The doctrine of pith and substance is a doctrine capable of application to determine the vires of a legislative act when there are limitations on the legislative power. Such limitations may arise from division of powers or from other limitations envisaged in the Constitution such as fundamental rights or freedom of trade and commerce. In all such situations a literal adherence to the limitation might frustrate the grant of power by an undue insistence that the legislation in all its details and aspects should be within the prescribed limits. If the legislation is in its essential

features within the scope of the power granted, and exceeds the limit only in respect of unimportant and incidental matters, the validity of the legislation may be upheld. Thus the Bombay Lotteries and Prizes Competition (Control and Tax) Act, 1948 was challenged as interfering with the freedom of trade and commerce. It was held that in pith and substance, the Act related to betting and gambling and not to trade and commerce to attract justification on the yard-stick of reasonableness and public interest laid down in articles 19(6) and 304 of the Constitution.[64]

2.34 The main ground of challenge to the validity of the Constitution Seventeenth Amendment Act, which further abridged the fundamental right to property, was that it curtailed the powers of the High Court under article 226 which, under the proviso to clause (b) of article 368, could have been passed only with the concurrence of not less than half the number of States as specified therein. Applying the doctrine, the Supreme Court held[65] that the pith and substance of Seventeenth Amendment Act was to amend the fundamental right which could be done without the concurrence of the States and the effect on the jurisdiction of the High Courts was only incidental and indirect. In the present discussion we are concerned only with the application of the doctrine for the resolution of conflicts between the entries in the lists.

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64. State of Bombay v. R.M.D. Chamarbaugwala, A.I.R. 1957 S.C. 699.
65. Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845.

2.35 In view of the hierarchical arrangements of the legislative jurisdictions this doctrine is applicable to the resolution of conflicts between entries in the exclusive Union field and the concurrent field, the concurrent field and the exclusive State field, and the exclusive Union field and the State field.

Nature and criteria of the connection

2.36 Since the power of legislation is conferred "with respect to" the various subject matters indicated, there arises a question as to the extent of connection that must be established before a law may be held to be "with respect to" that matter. While it is clear that a remote or fanciful connection is not enough, difficulties are bound to arise when the doctrine is applied in practice. Latham C.J. observed in Bank of New South Wales v. The Commonwealth[66]:

> "A power to make laws 'with respect to' a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter: for example, income-tax laws apply to clergymen and to hotel-keepers as members of the public; but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or banking".[67]

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66. (1948) 76 C.L.R. 1 at p.186.
67. As quoted with approval by M. Hidayatullah J. (as he then was) in State of Rajasthan v. G. Chawla, A.I.R. 1959 S.C. 544.

While no single criterion may be forthcoming to establish the connection required by the pith and substance doctrine judicial dicta and practice afford some guidance. Sulaiman J. has said that looking at the legislation as a whole it must substantially be with respect to matters in the list.[68]

"View of the act as a whole" and "end and purpose of the legislation" have been relied upon by the Supreme Court in State of Rajasthan v. G. Chawla.[69]

2.37 Seeking the pith and substance of the legislation gives scope for purposive interpretation of the statute in question. This also means that the judges have sufficient latitude to introduce their value preferences into the doctrinal mould. This is well illustrated by the Northern Ireland Case Gallaghar v. Lynn.[70] The Parliament of Northern Ireland had no power to make laws "in respect of trade with any place out of that part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of powers of taxation given to the said Parliament or by regulation made for the sole purpose of preventing contagious diseases....". The Milk Products Act, 1934 made it an offence to sell milk for human consumption in Northern Ireland without a licence. The effect of this was to disable non-Northern Ireland producers

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68. Subramanyan v. Muttuswami, A.I.R. 1941 F.C. 47 at 54.
69. A.I.R. 1959 S.C. 544 at 547.
70. (1937) A.C. 863.

from lawfully selling milk in Northern Ireland market and to affect external trade. If the Act was construed as in respect of external trade it was beyond the competence of the Northern Ireland Parliament. The Privy Council held the Act valid since in pith and substance it was a law relating to public health and it affected external trade only incidentally. It has however been claimed that the primary purpose of the Northern Ireland Act was not the protection of public health but the protection of domestic producers of milk.[71] It is also interesting to compare this decision of the Privy Council with an American decision[72] where on almost similar facts the court held that the legislation was primarily concerned with the local protection of trade and commerce and not with public health.

APPLICATION OF NON-OBSTANTE CLAUSE

2.38 After the legislation has been characterised and allocated to the proper field what remains would only be the problem of incidental encroachment. If the incidentally encroaching legislation is not met with inconsistent legislation in the encroaching field there will be no problem. Sometimes, legislation in pith and substance in the State field but encroaching incidentally into the Union field may come into conflict with legislation in pith and substance in the Union field whether incidentally encroaching into States

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71. Harry Calvert, Gallagher v. Lynn Re-examined A Legislative Fraud, (1972) Public Law, pp.11-29.
72. Dean Milk Co. v. City of Madison, 340 U.S. 349; (1951) 95 L.Ed. 329.

sphere or not. In such situations, if the two provisions cannot be given effect to, the conflict is resolved by invoking the non-obstante clause according to which the Union field will prevail over the State field.

2.39 Sometimes, it has been argued that an incidental encroachment into the Union field is permissible only if the field is unoccupied. On this basis Sulaiman J. held that sections 8 and 9 of the Madras Agriculturists Relief Act, 1938, which incidentally encroached into the exclusive federal field occupied by existing Indian law relating to promissory notes, to be void.[73] It is submitted that there is no need to drag in the doctrine of occupied field[74] to resolve conflicts of this type. The hierarchical arrangement of the jurisdictions and the use of the non-obstante clause are conclusive against the application of the doctrine of occupied field to resolve conflicts of the above mentioned type.

2.40 In Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta,[75] where the validity of the Wealth Tax Act, 1957 was in issue, a conflict was alleged to exist between entry 86[76] of List I and entry 49[77] of List II. Shah J. held that if there was such

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73. Subramanyan v. Muttuswami, A.I.R. 1941 F.C. 47 at pp.62-64.
74. This doctrine of occupied field, considered more fully while discussing conflicts in the concurrent field, is properly applicable only to conflicts in the concurrent field.
75. A.I.R. 1969 S.C. 59.
76. 86- Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
77. 49- Taxes on lands and buildings.

a conflict which was not capable of reconciliation, the power of Parliament to legislate in respect of a matter which was exclusively entrusted to it must supersede pro tanto the exercise of power of the State Legislature.[78]

2.41 In Indubhushan v. Rama Sundari[79] it was argued that the power of regulating house accommodation (including the control of rents)[80] in cantonment areas, referred to in entry 3 of List I, should narrowly be construed as applicable to accommodation required for military purposes only, as otherwise, it would attract the general power of legislating in respect of land lord-tenant relationship under entry 18[81] of List II or entries 6[82] and 7[83] of List III. Rejecting this Bhargava J. made the following observation which shows the effect of the primacy given to the exclusive Union field by the non-obstante clause:

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78. A.I.R. 1969 S.C. 59 at p.62.

79. A.I.R. 1970 S.C. 228.

80. 3- Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

81. 18- Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

82. 6- Transfer of property other than agricultural land; registration of deeds and documents.

83. 7- Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

"Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature, or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures".[84]

2.42 The non-obstante clause should however not be invoked in the beginning. As Gwyer C.J. said, effort should always be made to reconcile the conflicting jurisdictions by having recourse to the context and scheme of the Act and by reading entries together and by interpreting, and where necessary, modifying, the language of the one by that of the other. "If indeed such a reconciliation is proved impossible, then, and only then, will the non-obstante clause operate and the federal power prevail for the clause ought to be regarded as the last resource, witness to the imperfections of human expression and the fallibility of legal draftsmanship[85]".

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84. A.I.R. 1970 S.C. 228 at p.235. See also remarks to the same effect by Alagiriswami J. in K.S.E. Board v. Indian Aluminium Co., A.I.R. 1976 S.C. 1031 at pp.1036-37.
85. Per Gwyer C.J. in In re C.P. Motor Spirit Act, A.I.R. 1939 F.C. 1 at p.8.

## CHAPTER III

## COLOURABLE LEGISLATION

SCOPE OF THE DOCTRINE

3.1 Legislation passed by a legislature in excess of its powers allowed by the Constitution could be struck down as ultra-vires. However, we have seen that if the legislation is in pith and substance within the scope of its allotted field, and the exceeding of the power is only in regard to incidental matters, the legislation will not be held to be invalid. In addition to questions of excess of power openly exercised, there may arise questions of excess of power covertly exercised. A legislature may ostensibly be functioning within its limits. Nevertheless, it would be attempting to achieve something which it has no power to achieve. This attempt to do indirectly what it cannot do directly[1] because of the limitations on legislative competence is described as colourable legislation.

3.2 It would be clear at once that the temptation for colourable legislation can arise only if there are limitations on the legislative power. In the case of a Parliament, like

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1. Among the literature on the meaning and logical status in constitutionalism of the maxim "What cannot be done directly cannot be done indirectly" see D.K. Singh in (1966) 29 M.L.R. pp.273-278. The maxim is an instance of the application of the principle of "good faith" and is part of the body of logical principles whose existence is presupposed by any system of law.

the British Parliament, described as omnipotent with no limitations whatsoever arising from an entrenched Constitution, there can be colourful but never a case of colourable legislation. Limitations on the legislative powers arising from constitutional provisions are generally of four types.

1) The Constitution may have adopted the doctrine of separation of powers which might mean that the legislature should not exercise essential judicial or executive functions. If, for example, under the guise of exercising a legislative power, an attempt is made to exercise judicial power, it would be a covert attempt to overcome one of the limitations imposed on the legislature by the Constitution.

2) Very often, a Constitution may include a Bill or Charter of Fundamental Rights which would mean so many limitations on the legislative competence of the legislature. Covert or concealed attempt to overcome the limit so imposed by a Bill of Rights may attract the principle of colourable legislation.

3) In the case of federal constitutions, when exclusive legislative competence is allocated between the federal and the regional legislatures, attempts by one to legislate in a covert fashion in the exclusive field allotted to the other would be another instance of colourable legislation.

4) In addition to the three types mentioned above, there have been instances of colourable legislation where the legislatures have attempted to overstep the limits under the guise of exercising ancillary power.

3.3 If the legislature has competence to achieve what has been achieved by the legislation in issue, no question of colourable legislation will arise.[2]

LEGISLATIVE ATTEMPT TO EXERCISE JUDICIAL POWER

3.4 Though the Constitution of India is not based on a rigid doctrine of separation of powers as is found in the United States of America, it is clear that the Constitution envisages that the functions of the three great departments of the State, namely, the executive, legislature and judiciary should generally be exercised separately. Functional separation is better provided for as between the legislature and the judiciary than as between the legislature and the executive. It is true that the judicial power has not been vested in the Supreme Court as in the U.S.A. or Australia. But the detailed provisions of the Constitution regarding the higher judiciary, and particularly those governing its independence, amply bring out intention of the Constitution that the judicial power should be exercised subject to certain basic conditions.

Colourable legislation and the equal protection clause

3.5 There have been some instances where the Supreme Court has struck down legislation applying to a particular

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2. A.B. Abdul Kadir v. State of Kerala, A.I.R. 1976 S.C. 182; Jalan Trading Co. v. Mill Mazdoor Sabha, A.I.R. 1967 S.C. 691; Shankara Narayana v. State of Mysore, A.I.R. 1966 S.C. 1571; Harikrishna Bhargav v. Union of India, A.I.R. 1966 S.C.619; Karimbil Kunhikoman v. State of Kerala, A.I.R. 1962 S.C.723; G.Nageswara Rao v. A.P. State Road Transport Corporation, A.I.R. 1959 S.C. 308; K.C. Gajapati Narayan Deo v. State of Orissa, A.I.R. 1953 S.C. 375 discussed infra.

person or case on the ground of discrimination under article 14. Though in the first of such cases namely, Chiranjit Lal v. Union of India[3] the legislation was upheld on the ground that even a single instance depending upon peculiar circumstances could offer the basis for a reasonable classification for the purpose of article 14, in Ameerunnissa Begum v. Mahboob Begum[4], the Supreme Court struck down as offending article 14, an Act of the Hyderabad Legislature, the Waliuddowla Succession Act, 1950, which had deprived two ladies and their children of their alleged rights to succession under the Muslim law. Speaking for the Supreme Court, B.K. Mukherjea J.[5] observed:

> "The continuance of a dispute even for a long period of time between two sets of rival claimants to the property of a private person is not a circumstance of such unusual nature as would invest a case with special or exceptional features and make it a class by itself justifying its differentiation from all other cases of succession disputes. As appears from the Preamble to the Act, the only ground for depriving the two ladies and their children of the benefits of the ordinary law is the fact that there was an adverse report against them made by the State Legal Adviser.

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3. A.I.R. 1951 S.C. 41. This decision cannot be considered authoritative on this point. The dissenting judgment of Patanjali Sastri J. is unanswerable. The majority decision was rendered ineffective by the immediately subsequent decision in Dwarakadas v. Sholapur Spinning and Weaving Co., A.I.R. 1954 S.C. 119.
4. A.I.R. 1953 S.C. 91.
5. Others on the Bench were Patanjali Sastri C.J., Chandrasekhara Aiyar, Bose and Ghulam Hassan, JJ.

> This ground in itself is arbitrary and unreasonable. The dispute regarding the Succession to the estate of the Nawab was a legal dispute pure and simple and without the determination of the points in issue by a properly constituted judicial tribunal a legislation based on the report of a non-judicial authority and made applicable to specific individuals who are deprived thereby of valuable rights which are enjoyed by all other persons occupying the same position as themselves, does, in our opinion, plainly come within the constitutional inhibition of Article 14.
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> The analogy of Private Acts of the British Parliament...is not at all helpful. The British Parliament enjoys legislative omnipotence and there are no constitutional limitations on its authority or power".[6]

3.6 The reference to non-determination of the points in issue by a properly constituted judicial tribunal and the reference to British private Acts show that it was the covert attempt on the part of the legislature to exercise judicial power that prompted the court to hold the legislation to be unreasonable and offending under article 14.

3.7 In Ram Prasad v. State of Bihar[7], the validity of the Bihar Sathi Lands Restoration (Act 1950) (34 of 1950) was in question. This Act was passed on the basis of a recommendation of the Congress Working Committee. The Act cancelled the settlements made in favour of a person of the lands involved

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6. Ibid, at p.94.
7. A.I.R. 1953 S.C. 215.

in that legislation and held by the State under the Administration of the Court of Wards. Sarjoo Pershad J., one of the judges of the Division Bench in the High Court, had expressed considerable doubts as to whether a legislation of that type, which was in "form and substance nothing but a decree of a Court"[8], was within the competence of a legislature and warranted by the Constitution. The Supreme Court struck down the Act as violating article 14 as in the Ameerunnissa Begum Case[9] and B.K. Mukherjea J. observed as follows:

> "It cannot be disputed that the legislation in the present case has singled out two individuals and one solitary transaction entered into between them and another party, namely the Bettiah Wards Estate and has declared the transaction to be a nullity on the ground that it is contrary to the provisions of law, although there has been no adjudication on this point by any judicial tribunal. It is not necessary for our present purpose to embark upon a discussion as to how far the doctrine of separation of powers has been recognised in our Constitution and whether the legislature can arrogate to itself the power of the judiciary and proceed to decide disputes between private parties by making a declaration of the rights of one against the other".[10]

Patanjali Sastri C.J. in his concurring judgment observed:

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8. Ram Prasad v. State of Bihar, A.I.R. 1952 Pat. 194 at p.199
9. See ante n.4.
10. Ibid, at p.219.

"This is purely a dispute between private parties and a matter for determination by duly constituted Courts to which is entrusted in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witness and soforth. This is the protection which the law guarantees equally to all persons, and our Constitution prohibits by Art. 14 every State from denying such protection to any one. The appellants before us have been denied this protection"[11]

3.8 The above excerpts provide a basis for suggesting that it was the colourable attempt on the part of the legislature to exercise judicial power that invited invalidation of the legislation under article 14. This solution would avoid the difficulty of reconciliation of the three cases on the principle of equal protection. In Ameerunnissa Begum v. Mahboob Begum[12], the court held that the object of the Act as stated in the Preamble "of ending protracted litigation" was not sufficient to make the case a class by itself to be differentiated from other cases of succession. In the Ram Prasad Case[13] the court said that it had singled out two individuals and one solitary transaction alleged to be contrary to law for special treatment. However, this would seem to be in accord with the Court's doctrine in Chiranjit Lal v. Union of India[14], of "a case being a class". The real trouble with the

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11. Ibid, at p.217.
12. A.I.R. 1953 S.C. 91.
13. Ram Prasad v. State of Bihar, A.I.R. 1953 S.C. 215.
14. A.I.R. 1951 S.C. 41.

court's doctrine of equality is that the test of reasonable classification based on "intelligible differentia" and "nexus to the object of the Act" do not afford any guarantee of equal treatment if the object of the legislation is unequal. The object of the legislation if accepted, on the basis of the above test, the law, it is submitted, seems to be sustainable in all the above three cases.

Colourable legislation and the validation and overriding of judicial verdicts

3.9 When a legislature nullifies the decision of a court by passing new legislation, the question has been raised whether it does not amount to an attempt to exercise judicial power. It has been held that when the legislature retrospectively validates what has been declared invalid by a court of law, and the basis of the earlier judicial decision is changed, and there is no restriction preventing the legislative power from doing it, there is no interference with the exercise of judicial power.

3.10 In Shri Prithvi Cotton Mills v. Broach Borough Municipality[15] Hidayatullah C.J. stated the position in the following terms:

> "Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's

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15. A.I.R. 1970 S.C. 192.

decision must always bind unless the condition on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances".[16]

It is therefore well accepted that when the basis of the decision is validly changed by the legislature there is no case of an exercise of judicial power by the legislature.[17]

3.11 If however, the legislative attempt at validation merely says, without changing the basis of law, that the judicial verdict shall not apply, that would be declared an attempt to exercise the judicial power, and therefore, invalid. Thus in the Municipal Corporation of the City of Ahmedabad v. New Shrock Spinning and Weaving Co. Limited[18], the validity of section 152-A of the Bombay Provincial Municipal Corporation (Gujarat Amendment and Validating Provisions) Ordinance 1969 was in question. This section authorised the Municipal Corporation to withhold refund of the illegally collected taxes till reassessment and determination of tax notwithstanding the judgment of any court to the contrary. Criticising this provision, K.S. Hegde, J. observed:

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16. Ibid, at p.195.
17. Tirath Ram Rajindra Nath v. State of U.P., A.I.R. 1973 S.C. 405; M/s. Hiralal Ratan Lal v. The Sales Tax Officer, Section III, A.I.R. 1973 S.C. 1034; Government of A.P. v. Hindustan Machine Tools Limited, A.I.R. 1975 S.C. 2037. For some of the earlier High Court cases see, Potti Sarvaiah v. Warvara Narsing Rao, A.I.R. 1955 Hyd. 257; Gulab Rao v. Pandurang, A.I.R. 1957 Bom. 266 (F.B.); M/s. Mohanlal Hargovindas v. State of M.P., A.I.R. 1962 M.P. 245. Paragraphs 9 to 13 of the judgment of this case contains a useful review of the earlier cases.
18. A.I.R. 1970 S.C. 1292.

"Prima facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The legislatures under our Constitution have within the prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of those powers, the legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decision given by courts".[19]

3.12 In Amalgamated Coalfields Limited v. Janapada Sabha, Chhindwara[20] the Supreme Court held that the levy of certain cess on coal was invalid as it was imposed without the previous sanction of the Government as required by law. The Madhya Pradesh Koyala Upkar (Manyatakaran) Adhiniyam (M.P. Coal Cess Validation Act 1964), (18 of 1964) was passed to validate the levy declared illegal by the Court. But the provisions did not indicate the nature of the amendment made in the Act nor did they say that the notification issued without the sanction of the State Government must be deemed to have been validly issued in terms of the amended law. When the question of validity was taken to the Supreme Court in Janapada Sabha Chhindwara v. Central Provinces Syndicate Limited[21], J.C. Shah J.[22] said that

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19. Ibid, at p.1296.
20. A.I.R. 1964 S.C. 1013.
21. A.I.R. 1971 S.C. 57.
22. Other judges on the Bench were K.S. Hegde, A.N. Grover and I.D. Dua.

it was not for the court to supply the omission, and held that what the legislature did was simply to overrule the decision of the court without changing the basis of the decision. It was pointed out that in the face of article 141 which made the Supreme Court judgment binding on all the courts in the territory of India, the legislature could not say that a declaration of law by the court was erroneous, invalid or ineffective either as a precedent or between the parties.[23]

3.13 Another illustration of the courts striking down legislation as an inroad into the judicial power is provided by the decision in State of Tamil Nadu v. M. Rayappa Gounder.[24] In this case, the Madras Government attempted to reassess certain theatre owners in respect of escaped entertainment tax. The Madras High Court held that the Madras Entertainment Tax Act 1939 did not authorise a reassessment. Thereupon the Madras Entertainment Tax (Amendment) Act 1966 (20 of 1966) was passed to validate the reassessment. This Act having been struck down by the High Court the matter was taken in appeal to the Supreme Court by the State of Tamil Nadu by special leave. In the Supreme Court, K.S. Hegde J.[25] referred to section 7 of the Act which validated the assessment and observed:

> "The effect of this provision is to overrule the decision of the Madras High Court and not to change the law retrospectively. What the provision

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23. Ibid, at p.61.
24. A.I.R. 1971 S.C. 231.
25. Others on the Bench were J.C. Shah and A.N. Grover, JJ.

says is that notwithstanding any judgment of the court, the reassessment invalidly made must be deemed to be valid. The legislature has no power to enact such a provision".[26]

Colourable legislation by the exercise of judicial power by the constituent power

3.14 That the legislative power cannot in the guise of passing legislation exercise judicial power may now be taken as a settled doctrine. Hence in order to validate something declared invalid by the judgment of a court of law, the legislature should change retrospectively the law that was the basis of the judgment and such a change is not now construed as an encroachment on the judicial power.[27] The constitutional disability on the part of the legislatures to exercise judicial power also extends to the constituent power. In Smt. Indira Nehru Gandhi v. Raj Narain,[28] the validity of sub-articles (4) and (5) of Article 329A[29] was in question. These provisions were as follow:

"(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith shall apply or shall be

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26. Ibid, at p.233.
27. It might be remarked by the cynic that this view installs form in the place of substance. But this is not so. To reformulate an initial base acceptable to common-sense and the common people there must exist a fairly presentable factual situation.
28. A.I.R. 1975 S.C. 2299.
29. Introduced by Section 4 of the Constitution Thirtyninth Amendment Act 1975, with effect from 10-8-1975.

deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void, or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirtyninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4)".

3.15 The effect of these provisions was to make the pre-existing Parliamentary law inapplicable to the election disputes regarding the Prime Minister's election. The election was never to be held void with reference to any ground existing in such law and in spite of the pronouncement of any court to that effect. Any order of the court holding the election to be void was itself to be void and pending appeals had to be disposed of on that basis.

3.16 It was clear that what was attempted was the validation of election by use of constituent power, without any change in the law and in the face of judicial

pronouncement.[30] And if the legislative power had attempted such validation without changing the law which formed the basis of the judgment, it would have been held to be a colourable legislation attempting to exercise judicial power. The important question raised was whether the constituent power was so prevented from exercising judicial power. The decision of the court shows that the constituent power cannot exercise judicial power in an arbitrary way without certain functional restrictions.

3.17 A.N. Ray C.J. held that at the level of the constituent power, the powers could not be differentiated into legislative, executive and judicial powers and that the constituent power was sovereign. If the constituent power was itself disposing of an election dispute it should do so by applying the law or norms. Holding against the attempted validation of the election by the constituent power His Lordship observed as follows:-

> "Clause 4 of Article 329-A in the present case in validating the election has passed a declaratory judgment and not a law. The legislative judgment in Clause 4 is an exercise of judicial power. The constituent power can exercise judicial power but it has to apply law.

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30. The Allahabad High Court had held that the election to the Lok Sabha of Smt. Indira Gandhi, Prime Minister, from Rai Bareily Constituency in 1971 to be void on account of certain corrupt practices under the Representation of Peoples Act 1951. An appeal and a cross appeal from this judgment were pending in the Supreme Court when the Constitution (Thirtyninth Amendment) Act, 1975 was passed.

"The validation of the election is not by applying legal norms. Nor can it be said that the validation of election in Clause 4 is by norms set up by the constituent power.

"Clause 5 in Article 329-A states that an appeal against any order of any court referred to in clause 4 pending, before the commencement of the Constitution (Thirtyninth Amendment) Act, 1975, before the Supreme Court, shall be disposed of in conformity with the provisions of Clause 4. The appeal cannot be disposed of in conformity with the provisions of clause 4 inasmuch as the validation of the election cannot rest on clause 4".[31]

The result was that the election of the Prime Minister was upheld on the merits of the case and in the light of the legislative changes in the law governing elections, made with retrospective effect and protected by the Ninth Schedule.

3.18 H.R. Khanna J. referred to the Supreme Court cases holding the exercise of judicial power by the legislature invalid[32] and quoted from American Jurisprudence to show the

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31. Ibid, at p.2321.

32. See Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, A.I.R. 1970 S.C. 192; Janapada Sabha Chhindwara v. The Central Provinces Syndicate Limited, A.I.R. 1971 S.C. 57; Municipal Corporation of the City of Ahmedabad etc. v. New Shrock Spinning & Weaving Co. Ltd. A.I.R. 1970 S.C. 1292 and State of Tamil Nadu v. M. Rayappa Gounder, A.I.R. 1971 S.C. 231.

prevailing position in the United States of America.[33]

3.19 The attempted validation of the election making the previous law inapplicable and without creating new law to govern the case, but simply on the basis of the declaration in clause (4) violated "the principle of free and fair elections which is an essential postulate to democracy and which in its turn is a part of the basic structure of the Constitution" which the Supreme Court was bound to protect in view of the

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33. The passage quoted from the American Jurisprudence, Vol.46, pp.318-19 was the following:-

> "The general rule is that the legislature may not destroy, annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the court, but is also forbidden to affect the inherent attributes of a judgment. That the statute is under the guise of an act affecting remedies does not alter the rule. It is worthy of notice, however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment found to be legal, or making legal that which the judgment found to be illegal".
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> "10.- Judgment as to public right.
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> "With respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by the judgment of the court, it may be annulled by subsequent legislation". (Ibid, p.2347).

judgment in Kesavananda Bharathi Case.[34] Clause (4) was struck down as a result.[35]

3.20 K.K. Mathew J. stressed the Blackstonian distinction[36] between the law and the particular command which was accepted by the Privy Council[37] and several writers on jurisprudence. He held:

> "I cannot regard the resolution of an election dispute by the amending body as law; it is either a judicial sentence or legislative judgment like the Bill of Attainder".[38]

3.21 He also pointed out that the amending body did not ascertain the facts of the case (which should have been collected not by employing legislative process but by employing judicial process) and also did not change the law which formed the basis of the judgment given by the High Court.[39]

3.22 The amending power (the pro-sovereign) could not act arbitrarily by picking and choosing particular cases for its

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34. A.I.R. 1973 S.C. 1461.
35. Ibid, at p.2355.
36. Blackstone: Commentaries, Vol.I, p.44.
37. Liyanage v. The Queen, (1967) 1 A.C. 259.
38. Ibid, at p.2377.
39. "If clause (4) was an exercise in legislative validation without changing the law which made the election invalid, when there ought to have been an exercise of judicial power of ascertaining the adjudicative facts and applying the law, the clause would damage the democratic structure of the Constitution, as the Constitution visualises the resolution of an election dispute by a petition presented to an authority exercising judicial power...." (at p.2376).

disposal ignoring the legislative and judicial processes. If the adjudicative facts regarding the election dispute had to be gathered through the judicial process and a decision given by applying the law, what the amending power could do to settle a dispute was to authorise the judicial and legislative processes to dispose of the election dispute. The amendment in the present case without these formalities would "damage or destroy an essential feature of démocracy as established by the Constitution namely, the resolution of election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people"[40].

3.23 M.H. Beg J. held that it was a basic constitutional principle that in the purported exercise of law-making power, legislatures were precluded from exercising essential judicial functions by withdrawing a particular case pending in the court for legislative disposal[41]. According to the majority view in Kesavananda Bharathi Case[42], the supremacy of the Constitution and the separation of powers were part of the basic structure of the Constitution[43].

3.24 The principle of separation of functions was not new but was embedded in our own best traditions and dictated by commonsense[44]. That the judicial and law making functions

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40. Ibid, at p.2383.
41. Ibid, at p.2395.
42. A.I.R. 1973 S.C. 1461.
43. Ibid, at p.2428.
44. Ibid, at p.2431.

were not meant to be interchangeable and had to be differentiated in any constitutionally prescribed sphere of operation of powers including that of the constituent power seemed to be beyond any shadow of doubt.[45] Because the Constitutional power necessarily carried with it the power to constitute judicial authorities it did not follow by implication that the Parliament acting in its constituent capacity could exercise the judicial power itself directly without vesting it in itself first by an amendment of the Constitution. Though this appeared to be a procedural matter, as a matter of interpretation of the Constitution and from the point of view of correct theory and principle, it was highly important.[46] To make a declaration of the rights of the parties to a dispute without first performing a judicial function was not included in the "Constituent Power" or any other law making power.[47] In the result, His Lordship held that article 329-A(4) was invalid and the case on hand had to be considered on merits under the election law applicable.[48]

3.25 Y.V. Chandrachud J. striking down clauses (4) and (5) observed as follows:

> "In the instant case the Parliament has withdrawn the application of all laws whatsoever to the disputed election and has taken upon itself to decide that the election is valid. Clause (5) commands the

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45. Ibid, at p.2432.
46. Ibid, at p.2435.
47. Ibid, at p.2499.
48. Ibid, at p.2458.

> Supreme Court to dispose of the appeal and the cross-appeal in conformity with the provisions of clause (4) of Article 329-A, that is, in conformity with the "judgment" delivered by the Parliament. The "separation of powers does not mean the equal balance of powers", says Harold Laski, but the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution (sic) of powers but which provides a system of salutary checks and balances.
>
> I find it contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers- legislative, executive and judicial "Whatever pleases the emperor has the force of law" is not an article of democratic faith. The basis of our Constitution is a well-planned legal order, the presuppositions of which are accepted by the people as determining the methods by which the functions of the government will be discharged and the power of the State shall be used".[49]

3.26 Colourable exercise of the judicial power by the amending power therefore is not envisaged by our Constitution. It may seem novel that the principle of separation of powers has been made applicable to the constituent power. But in accordance with the modern concept of sovereign power—if the amending power can be called that—not as despotic but as broadly limited by "rule of law", such a notion is acceptable.

3.27 It is well-known that the rules identifying sovereign and prescribing its composition and the manner and form of

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49. Ibid, at p.2472.

law-making by the sovereign constitute limitations.[50]

3.28 In the light of the contribution made by the principle of the separation of powers to the realisation of a well developed notion of rule of law, our Supreme Court has added a new dimension to the limitations on the sovereign power, namely, the sovereign power cannot directly exercise the functions of the constituted organs, the legislature, the judiciary and the executive. The constituent power should constitute these organs and leave them to function at their respective levels. This is a contribution to the development of constitutionalism in general of which our Supreme Court and Indian legal theory can justly be proud.

ATTEMPTS TO OVERCOME THE LIMITS IMPOSED BY THE FUNDAMENTAL RIGHTS

3.29 The legislative powers of the legislatures are subject to the provisions of the Constitution. The restriction imposed on the legislative power by the fundamental rights and other provisions[51] constitute a second type of limitation on legislative competence. A legislature may defy the limitations openly, but in such an instance the law would be struck down as ultra-vires the legislature. But attempts may be made to overcome the limits in a concealed way. In that case, the doctrine

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50. See particularly the judgment of K.K. Mathew, J. at pp.2390-91.

51. For example, the provisions governing the freedom of trade and commerce.

of colourable legislation would be attracted.[52]

Confiscatory legislation

3.30 In State of Bihar v. Kameswar Singh[53], certain provisions of the Bihar Land Reforms Act, 1950 (30 of 1950) had to be scrutinised as they were attacked as instances of colourable exercise of legislative power. This Act was passed in exercise of the legislative power conferred by entry 42 of List III which as then existed was as follows:-

> "42. Principles on which compensation for property acquired or requisitioned for purposes of the Union or of State or any other public purpose is to be determined and the form and the manner in which such compensation is to be given".

Section 4(b) of the Act provided for the acquisition by the State, along with the estates, of all the arrears of rent due to the owners of the estate, and, then, for the payment of 50% of such arrears to the expropriated owners. Mahajan J. referred to certain Australian[54] decisions and held it as

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52. Thus in M.R. Balaji v. State of Mysore, A.I.R. 1963 S.C. 649, the Mysore Government's order reserving 68% of the seats in educational institutions for the socially and educationally backward classes of citizens under article 15(4) of the Constitution was struck down as a 'fraud on the Constitution'. Any reservation in excess of 50% was a communal distribution, under the guise of making the reservation, and is forbidden by the Constitution.

53. A.I.R. 1952 S.C. 252.

54. South Australia v. The Commonwealth, 65 CLR 373 and Madden v. Nelson & Fort Sheppard Railway Co., (1899) A.C. 626. Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Proprietary Ltd., 61 CLR 735.

accepted law that a Parliament with limited powers could not do indirectly what it could not do directly, and that in the case of legislation by such a Parliament it was necessary for the courts to examine the legislations with some strictness to detect disguised or colourable trespass of constitutional provisions. Section 4(b) in the guise of laying down a principle of compensation was a device to acquire property without compensation.

3.31 Similarly section 23(f), which provided for deductions varying from 4 to 12½% from the compensation towards cost of works beneficial to the ryots, was not really concerned with any principle for the payment of compensation, but had the effect of non-payment of compensation and was therefore "unconstitutional legislation" made colourably valid under exercise of legislative power under entry 42 of List III.[55]

3.32 B.K. Mukherji J. agreed with Mahajan J. regarding the invalidity of section 23(f). As regards section 4(b) he thought that acquisition of money and other choses in action under the power of 'Eminent Domain' was not contemplated. Though the court was not concerned with the justice or propriety of the principles upon which the assessment of compensation was to be made under a particular legislation, nor with the justice or otherwise of the form or manner in which such compensation was to be given, entry 42 did not envisage a

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55. Ibid, at p.277.

legislation which did not provide for any compensation at all. "Taking up of whole and returning a half means nothing more or less than taking half without any return and this is naked confiscation, no matter, whatever specious form it may be clothed, or disguised"[56]. Section 4(b) therefore in reality did not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent, nor did it say anything relating to the form of payment, though apparently, it purported to determine both, and was a fraud on the constitution, and made the legislation colourable and hence void and inoperative. Though the court was not concerned with the benafides or malafides of the legislature it was really concerned with the question of competence.

3.33 Chandrasekhara Aiyar J. in his concurring judgment held that stripped of their veils or vestments, the provisions in the Act about 'arrears of rent' and the 'cost of works of benefit' amounted to naked confiscation[57].

3.34 The legislation, which under the guise of legislating for acquisition was attempting to perpetrate confiscation in effect, had exceeded the limits of legislative powers and was therefore unconstitutional[58].

3.35 Patanjali Sastri C.J. and S.R. Das J. however, held in their partly dissenting judgments that the provisions in

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56. Ibid, at p.280.
57. Ibid, at p.296.
58. See also Dwarakadas v. Sholapur Spinning and Weaving Co., A.I.R. 1954 S.C. 119.

question related to the payment of compensation under article 31(2), and that its validity could not be gone into by the courts in view of the protection afforded in article 31(4).[59]

3.36 Section 73 of the Kerala Land Reforms Act, 1964 (as amended by Act 35 of 1969) which provided for the discharge of substantial portions of the arrears of rent was invalidated as the measure partook the character of forfeiture or confiscation of the discharged arrears.[60]

Vagaries of the doctrine

3.37 In K.C. Gajapati Narayan Deo v. State of Orissa[61] the validity of the Orissa Agricultural Income Tax Amendment Act, 1950 was assailed as a colourable piece of legislation. Under

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59. S.R. Das J. observed as follows:-
"Again, take the case of the acquisition of non-income-yielding properties. Why, I ask, is it called a fraud on the Constitution to take such property? Does the Constitution prohibit the acquisition of such property? Obviously it does not. Where, then, is the fraud? The answer that comes to my mind is that it is fraud because the Act provides for compensation only on basis of income and, therefore, properties which are at present non-income-yielding but which have very rich potentialities are acquired without any compensation at all. Similar answer becomes obvious in connection with the deduction of 4 to 12½ per cent of the gross assets under the head "Works of Benefit to the Rayats". On ultimate analysis, therefore, the Act is really attacked on the ground that it fails to do what is required by the Constitution to do, namely, to provide for compensation for the acquisition of the properties and is, therefore, 'ultra vires'. This, to my mind, is the same argument as to the absence of just compensation in a different form and expressed in a picturesque and attractive language". (Ibid, at p.292).
60. Kunjukutty Sahib v. State of Kerala, A.I.R. 1972 S.C. 2097., see the judgment of I.D. Dua J. at p.2103.
61. A.I.R. 1953 S.C. 375.

the Orissa Estate Abolition Act, 1952 compensation for estates taken over had to be calculated on the basis of net income and in computing the net income the agricultural income tax had to be deducted. The impugned Act had greatly increased the rates of agricultural income tax.[62] It was challenged that this was a device to reduce the net income and, therefore, the compensation payable. The Act had therefore to be struck down on the analogy of the decision in State of Bihar v. Kameswar Singh.[63] B.K. Mukherjea J.[64] speaking for the Supreme Court examined the scope of colourable legislation in the light of the principles laid down in Canadian,[65] and Australian[66] Constitutional law cases,

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62. For the actual increase see n. 69 infra.
63. A.I.R. 1952 S.C. 252.
64. Others on the Bench were Patanjali Sastri, C.J. S.R. Das, Ghulam Hassan and Bhagawati, JJ.
65. Union Colliery Co. of British Columbia Ltd. v. Bryden, 1899 A.C. 580. In this case section 4 of the British Columbian Coal Mines Regulation Act 1890 prohibited the employment of Chinese men in underground coal mines. It was held that the Act was not really aimed at the regulation of coal mine but was in truth a device to deprive the Chinese naturalise or not (naturalisation of aliens being within the exclusive authority of the Dominion Parliament) of ordinary rights of inhabitants of the British Columbia and in effect to prohibit their continued residence in that Province.

    (2) In Re Insurance Act of Canada, 1932 A.C. 41, the Privy Council held that sections 11 and 12 of the Canadian Insurance Act which required foreign insurers to be license invalid since under the guise of legislation as to aliens and immigration (both within the exclusive dominion authority) the Dominion Legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority.
66. Moran v. Dy. Commissioner of Taxation for New South Wales, 1940 A.C. 838. In this case the allegation was that a Commonwealth Financial Assistance Scheme contemplated in the Commonwealth legislation was a colourable device to overcome the prohibition against discriminatory taxation. Though this was not accepted by the Privy Council it was conceded that such instances might arise.

and observed as follows:-

> "...the doctrine of colourable legislation does not involve any question of 'bonafides' or 'malafides' on the part of the legislature. The whole doctrine resolves itself into the question of competence of a particular legislature to enact a particular law.... If the Constitution of a State distributes the legislative powers among the different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute, or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality, it transgressed these powers, the transgression being veiled by what appears, on proper examination to be a mere pretence or disguise".[67]

3.38 It was held that the Orissa Act was certainly a legislative measure coming within entry 46 of List II- Taxation of agricultural income. Though the rates were increased, it did not affect the competence of the legislature. The liability for paying agricultural income tax was an existing liability

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67. Ibid, at p.379.

when the Orissa Estates Abolition Act came into force. The impugned Act was therefore an agricultural income tax legislation within the competence of the State Legislature and deduction of agricultural income tax was certainly a relevant item of deduction in the computation of net income of estate and was not as unrelated as in the case of section 23 of the Bihar Act. Even assuming that the purpose of the State Act was to accomplish an ulterior purpose namely, to inflate the deductions for the purpose of reducing the compensation payable to as small a figure as possible, it could not be regarded as colourable legislation unless the ulterior purpose which it was intended to serve was something which lay beyond the powers of the legislature to legislate upon. "The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do anything directly, then the mere fact that it attempted to do it in the indirect or disguised manner, cannot make the Act invalid"[68].

3.39 If as a result of the deductions which were not based on something which was unrelated to facts, the compensation would be reduced, it was within the legislative power to achieve that objective and its motives could not be questioned. The legislation was therefore held not to be a colourable one.

3.40 It is submitted that the reasoning of the court is somewhat weak. Though it may be conceded that the State

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68. Ibid, at p.381.

legislature is competent to levy agricultural income-tax at an exhorbitant rate,[69] whether by the exercise of such a power, it should be allowed to reach a result which could not have been achieved in the exercise of another power, deserves serious consideration. It is agreed that the legislature had no power to pass confiscatory legislation in the guise of paying compensation. The agricultural income tax in question could have been sustained only when considered in isolation as a taxing measure. But when it is considered along with the Estate Abolition Act the result achieved with respect to the latter seems to have been clearly colourable one. Instead of facing this question squarely, the Court avoided it by saying that when the legislature is competent to do a thing directly, there is no objection to its doing it in an indirect or disguised manner. But if the effect of such indirect doing is to achieve in another field indirectly what it cannot do directly, due consideration should be given to that consequence. May be, that in the conflict between the right of the expropriated estate owners to receive compensation and the right of the state to promote reform legislation cheaply, the Judges preferred the latter. A doctrine of "resultant colourable legislation" whereby, if by the exercise of one power within limits, what could not have been openly achieved with regard to another

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69. In this case the rate of 4 annas in the rupee with the highest slab at Rs.20,000/- originally proposed was later on changed to 12 annas and 6 paise in the rupee for the highest slab resulting in greatly enhanced tax for incomes above Rs.15,000/-.

power is achieved, that could be held to come under the prohibition of colourable legislation ought to have been accepted by the Court. The case discussed below is a clear instance where the court really adopted a stand similar to the one advocated here.

3.41 Sometimes confiscatory results have been achieved by clever changes in law. Thus in Jayvantsinghji v. State of Gujarat[70] the validity of the Bombay Land Tenure Abolition Laws (Amendment) Act, 1958 was in question. Tenants under Taluqdars whose estates were abolished could get occupancy rights by paying six times the assessment in the case of permanent tenants, and 20 to 200 times in the case of non-permanent tenants. By the amendment Act of 1958 the government converted retrospectively the non-permanent tenants to the category of permanent tenants. The burden of proving that a particular tenant was not a permanent one was fixed on the ex-Taluqdar. The procedure under which he could discharge this burden was not a fair one. The effect of this legislation was to take away substantially the right of the ex-Taluqdar to get any price for his rights. Striking down the enactment S.K.Das J. for the majority[71] held that Act did not fall within the entries in List II or List III of the Seventh Schedule to the Constitution, and was a piece of colourable legislation.

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70. A.I.R. 1962 S.C. 821.
71. For himself and B.P. Sinha C.J. N. Rajagopala Iyengar J. delivered a separate concurring judgment. Mutholkar and A.K. Sarkar JJ. held that the impugned Act governed the relationship between Landlord and tenant and was within the competence of the State Legislature under entry 18 of List II, Land....

3.42 This case also shows that a device to overcome a Constitutional limitation (in this case of the right to compensation under the fundamental right of property) may also be invalidated on the ground of lack of power in terms of the entries in the Lists of the Seventh Schedule to the Constitution.

Compensation and colourable legislation

3.43 The attitude of the Supreme Court in holding legislation colourable because of the failure to pay compensation has not been very consistent and was responsible for several constitutional amendments. As noted above, some provisions of the Bihar Land Reforms Act were struck down as colourable legislation because under the guise of providing for compensation the law provided rules which were really confiscatory in character. In Bhairebendra Narayan Bhup v. State of Assam[72] a challenge to the Assam State Acquisition of Zamindaris Act 1951 (which was protected by article 31(4) as also by article 31-A) as colourable legislation on the ground of illusory or no compensation was repelled by the Supreme Court. It was held that there was legislative competence. The substance of the charge was inadequacy of compensation which could not be raised in view of the protection given by article 31-A.

3.44 To overcome the decision of the Court in State of West Bengal v. Bella Banerji[73] that compensation meant a just equivalent, the Constitution Fourth Amendment purported to

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72. A.I.R. 1956 S.C. 503.
73. A.I.R. 1954 S.C. 170.

make the question of compensation non-justiciable. Even after this amendment, the court gave expression to its doctrine that while the final quantum of compensation given might not be judicially scrutinised, if the compensation was based on irrelevant principles which led to illusory payment, or non-payment of compensation, that would be treated as a fraud on power and the offending provisions struck down.[74]

3.45 Even after the Twentyfifth Amendment which substituted 'amount' for 'compensation' the Court does not seem to have given up its doctrine of colourable legislation with regard to compensation. Thus in Kesavananda Bharathi v. State of Kerala,[75] though the court accepted the validity of the Twentyfourth Amendment, a majority of the judges have shown willingness to review the question of compensation on the ground that it should not be illusory or arbitrary.[76]

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74. State of Madras v. D. Nawasivaya Mudaliyar, A.I.R. 1965 S.C. 190; Vajravelu v. Special Deputy Collector, A.I.R. 1965 S.C. 1017; Union of India v. Metal Corporation, A.I.R. 1967 S.C. 637; R.C. Cooper v. Union of India (Bank Nationalisation Case), A.I.R. 1970 S.C. 564. The court had however, by its decision in the case of State of Gujarat v. Shantilal Mangaldas, A.I.R. 1969 S.C. 634, indicated that it had given up its doctrine of illusory compensation but reverted to it in the Bank Nationalisation Case.

75. A.I.R. 1973 S.C. 1461.

76. Thus Sikri C.J.: "...the person whose property has been acquired shall be given an amount in lieu thereof, which ...is not arbitrary, illusory or shocking to the judicial conscience or the conscience of mankind", p.1554.

Shelat and Grover JJ:- "the amount...should have a reasonable relationship with such property (and)...should neither be illusory nor fixed arbitrarily", p.1610.

Hegde and Mukherjea JJ:- "The question whether the "amount" in question has been fixed arbitrarily or the same is illusory or the principles laid down for the determination of the same are relevant to the subject matter of

(contd...99).

3.46 Applying this principle of illusory compensation as one of the grounds in Chanan Mal v. State of Haryana[77], the Punjab and Haryana High Court struck down the Haryana Minerals (Vesting of Rights) Act, 1973 (14 of 1973). A person who had purchased a piece of land for mining salt petre for Rs.1,30,000/ got only about Rs.5,000/- spread over a period of 10 years as compensation. The court held that this amount was illusory and hence violative of article 31(2).

3.47 The vitality of the doctrine of colourable legislation with regard to compensation shows the difficulty of allowing power to be used without a modicum of good faith, and seems to be an ample justification for the doctrine of colourable legislation itself.

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(f.n. 76 contd.)

acquisition or requisition at about the time when the property in question is acquired or requisitioned are open to judicial review", p.1648.

P. Jaganmohan Reddy J:- "Once the Court is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or (sic) illusory or where the principles upon which it is fixed are found to bear reasonable relationship to the value of the property acquired, the Court cannot go into the question of the adequacy of the amount so fixed or determined on the basis of such principles", p.1776.

Chandrachud J:- "...Courts have power to question such a law (providing for acquisition) if (i) the amount fixed is illusory; or (ii) the principles, if any, are stated for determining the amount are wholly irrelevant for fixation of the amount....", p.2055.

77. A.I.R. 1975 Punj. 102.

Colourable use of taxing power

3.48 Taxing power, generally used for augmenting the resources of the Government, may be used as a cloak for confiscatory measures. In such instances, though they are rare, the court may strike down the law invoking the doctrine of colourable legislation. In K.T. Moopil Nayar v. State of Kerala,[78] the validity of Travancore Cochin Land Tax Act, 1955 (15 of 1955) as amended by the Travancore Cochin Land Tax Act Amendment Act, 1957 (10 of 1957) which imposed a tax at the rate of Rs.2/- per acre for private forests was in question. The law was attacked on the grounds that it was violative of articles 14 and 19(1)(f) of the Constitution and was a device to confiscate private property without compensation. The government contended that being a taxing measure under article 265, articles 14, 19 and 31 had no application. The Supreme Court held the law invalid by a majority. There were three grounds for the holding, one of absence of classification,[79] another of presence of unreasonable restrictions[80] and third of confiscatory character amounting to colourable device. Sinha C.J. in his

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78. A.I.R. 1961 S.C. 552.
79. Because the Act obliged everyone to pay the tax without reference to income actual or potential, and hence lacked classification and violated equality clauses.
80. The Act also imposed unreasonable restrictions on the right to property guaranteed by article 19(f) in as much as the tax liability was imposed without notice, without procedure for rectification of errors, with no procedure for obtaining opinion of civil courts on questions of law and with no duty on the assessing authority to act judicially.

majority judgment pointed out how the Act was confiscatory in character. He stated that, for example, a person who owned 25000 acres of private forests and got an annual income of Rs.3,100/- had to pay Rs.54,000/- as tax and that when an assessee of this type was unable to pay tax his property would be sold in auction which ultimately would have to be purchased by the government. According to the majority view it was therefore clear that the Act was confiscatory in character. Sarkar J. in his dissenting judgment held that the Act was not expropriatory nor the tax imposed really excessive, and, since the legislature had competence, no question of colourable legislation arose.

3.49 It has to be remembered that the majority holding on the point of colourable legislation in the K.T. Moopil Nayar Case is only one of the three alternative grounds and that if the majority had not found the Act to be violative of articles 14 and 19 it is doubtful whether the Act would have been struck down solely on the ground of the expropriatory character of the tax since, as pointed out by the dissenting judge, an argument about the excessive rate of the tax can hardly be raised in the face of clear legislative competence. This view is strengthened by the next case in which colourable use of taxing power was alleged. In Jagannath Baksh Singh v. State of U.P.[81], the U.P. Large Land Holding Tax Act 1957 (XXXI of 1957) which imposed a tax, based on annual valuation,

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81. A.I.R. 1962 S.C. 1563.

on landholdings in excess of 30 acres was challenged as a colourable piece of legislation as well as violative of articles 14 and 19(1)(f) of the Constitution. Speaking for the Supreme Court, P.B. Gajendragadker J.[82] held that the Act did not violate articles 14 and 19(1)(f). Nor was the tax imposed, on the facts of the case, unreasonably high. Referring to the decision in K.T. Moopil Nayar, His Lordship observed as follows:-

> "This decision illustrates how a taxing statute though ostensibly passed in exercise of legislative power conferred on the legislature can be struck down as being colourable exercise of the said power. In other words, the conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy because the reasonableness of the extent of the levy is always a matter within the competence of the legislature. Such a conclusion can be reached where in passing the Act, the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts, that is a separate and independent ground for striking down the Act. There is no doubt that the decision in K.T. Moopil Nair, A.I.R. 1961 S.C. 552 is not an authority for the proposition that in testing the validity of a taxing statute, the Court can embark upon an enquiry whether the tax imposed by the statute is unreasonably high and whether it should have been fixed at a lower level".[83]

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82. Other judges on the Bench were A.K. Sarkar, K.C. Das Gupta, N. Rajagopala Ayyangar and J.R. Mudholkar.

83. Ibid at p.1572.

Therefore the chances of a court striking down a taxing measure as colourable on the ground that the rates of tax are unreasonably high and hence confiscatory are really remote. But a statute may, under the guise of a taxing measure, violate the equality provisions by unequal incidence, or have an unreasonable operation by leaving the question of machinery and procedure for the collection of tax to the unrestricted discretion of government. Such a statute is liable to be struck down as colourable tax legislation.

ATTEMPT TO OVERCOME THE LIMITATION ARISING FROM THE DIVISION OF POWERS

3.50 It has been noted earlier that the Constitution of India divides the legislative competence between the Union and the States and that any attempt by a legislature to overcome in a concealed way the limitation imposed would be held as colourable legislation. The taxing power has been divided amongst the exclusive fields of the legislation between the Union and the States.[84] In addition, the Union is given power to levy fees in respect of matters mentioned in the Union List[85] and the States are given power to levy fees in respect of the matters of the State List.[86] The Concurrent List also envisages the imposition of fees in respect of matters in the Concurrent List.[87] Since taxing power is limited, the States sometimes attempt to levy a tax by ostensibly imposing a fee.

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84. Vide entries 82-92A and entry 97 of List I and entries 45-63 of State List.
85. Entry 96 of List I.
86. Entry 66 of List II.
87. Entry 47 of List III.

Such attempts to overcome the limitation arising from the division of powers constitute the colourable exercise of legislative power.

Distinction between tax and fee

3.51 Article 366(28) defines taxation as follows:

> "taxation includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly".

This is a broad definition which would cover every type of impost by the State including fees. Though there is no generic difference between tax and a fee, in the context of certain specific provisions of the Constitution, it must be held that a difference has been made. Thus, the entries in the Lists, as noted above, confer separate taxing power and the power to levy fees. Articles 110 and 199 of the Constitution exclude from the definition of money bills, bills imposing payment of fees for licenses or fees for services rendered.

3.52 In Commissioner, Hindu Religious Endowment v. L.T. Swamiar,[88] the first case before the Supreme Court regarding the distinction between the tax and fee, the validity of section 76 of Madras Hindu Religious and Charitable Endowment Act 1951 (19 of 1951) which levied a contribution "in respect of services rendered by the government" at 5% of the income of Maths etc. was in question. On behalf of the appellant it was argued that the contribution was a fee and not a tax. A

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88. A.I.R. 1954 S.C. 282.

distinction between these two was clearly envisaged by the Constitution. The respondent contended that the levy, which was not a payment for services voluntarily received, was a tax. The Supreme Court upheld the defendant's plea. Speaking for a unanimous Bench[89] B.K. Mukherjea J. adopted the following definition of tax given by Latham C.J. of the Australian High Court in Mathews v. Chicory Marketing Board:[90]

> "a tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered".[91]

A fee has been held to be a reward for specific services. In other words, there is a quid pro quo in fees which is absent in the case of a tax. As a corollary, it follows that in the case of a fee there should be a reasonable correlation between the expenditure incurred by the State in providing the service and the money collected by way of fees for such service.

3.53 In the case on hand, since there was a total absence of correlation between the payment demanded and the expenditure incurred, it was held that the levy in question was a tax. This principle has been followed in subsequent cases and attempted levy of fees for want of correlation has been held to be a tax.[92]

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89. Others on the Bench were Mahajan C.J., S.R. Das, Bose, Ghulam Hassan, Bhagawati and Venketarama Ayyar JJ.
90. 60 C.L.R. 263.
91. Ibid at p.276.
92. See for example, Corporation of Calcutta v. Liberty Cinema, A.I.R. 1965 S.C. 1107; Nagar Mahapalika, Varanasi v. Durga Das Battacharya, A.I.R. 1968 S.C. 1119; The Indian Mica and Micanite Industries Ltd. v. State of Bihar, A.I.R. 1971 S.C. 1182; The Govt. of A.P. v. H.M.T., A.I.R. 1975 S.C. 2037. State of Maharashtra v. The Salvation Army, A.I.R. 1975 S.C. 846.

Compulsion

3.54 Both in the collection of tax and in the levy of fees compulsion may be present and therefore the element of compulsion cannot be made a distinguishing factor. B.K. Mukherjea J. observed in Commissioner of H.R.E. v. L.T.Swamiar[93]:

> "we think that a careful examination would reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This therefore cannot be made the sole or even a material criterion for distinguishing a tax from fees".[94]

In Sudhindra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore[95] J.C. Shah J. also observed that "a levy in the nature of a fee does not cease to be of that character because there is an element of compulsion or coersiveness present in it"[96].

3.55 If the element of compulsion, which would at first sight appear to be a more appropriate characteristic of the taxing power, is denied in the case of fee, the operation of schemes stipulating payment for certain services as fees, may become difficult. Thus in the case of levies on Maths etc. by the Religious Endowment Commissioners which have been upheld as fees[97], if the institutions were allowed the option not to

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93. A.I.R. 1954 S.C. 282.
94. Ibid at p. 95.
95. A.I.R. 1963 S.C. 966.
96. Ibid at p.975.
97. Ratilal v. State of Bombay, A.I.R.1954 S.C.388; Sri Jagannath v. State of Orissa, A.I.R.1954 S.C.400; Sudhindra Tirtha Swamiar v. Commissioner for the Hindu Religious and Charitable Endowments, Mysore, A.I.R.1963 S.C. 966.

pay the levies and not come under the statutory schemes, the uniform regulatory supervision by the State may be frustrated. But it is a moot point if the taxing power of the State should not be used for this purpose if permissible, or the regulatory schemes worked not on a payment basis but by defraying the expenses from the consolidated fund as part of the general expenditure incurred on governmental functions.

Credit to a separate fund

3.56 Since a quid pro quo is a sine qua non of a fee, often, at least for easier proof to establish the correlation between the expenditure incurred and the fee collected, the amount collected is credited to a separate account. In any case, it would be desirable if the money collected by way of fee is kept separately and not merged in the consolidated fund of the State. In Commissioner for H.R.E. v. L.T. Swamiar[98] Mukherjea J. holding the levy under the Madras Hindu Religious and Charitable Endowment Act, 1951 to be a tax observed as follows:

> "But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not earmarked or specified for defraying the expenses government has to incur in performing the services. All the collections go to the consolidated fund....That in itself might not be conclusive, but in this case there is a total absence of any correlation between the expenses incurred by the government and the amount raised by contribution under

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98. A.I.R. 1954 S.C. 282.

the provisions of section 76 and in those circumstances the theory of a return, or counter-payment or quid pro quo cannot have any application to this case".[99]

3.57 Therefore in subsequent similar cases,[100] the levies were credited to a separate fund earmarked for rendering the services in question, and the courts definitely considered this as one of the elements in establishing the correlation between the expenses and the fees. In Hingir-Rampur Coal Co. Ltd. v. State of Orissa[101] the levy of a cess not exceeding 5% of the value of the minerals at the pit's mouth under section 4 of the Orissa Mining Areas Development Fund Act, 1952 was constituted into a separate fund, and Gajendragadker J. took this as one of the factors for characterising the levy as a fee. Wanchoo J. in his dissenting judgment held that the levy in question was really an excise duty under entry 84 of List I. It was not permissible to convert a tax into a fee by the device of creating a special fund and then saying that the tax was for certain services to be rendered by using the amount in the fund. By fixing a very wide scope for the service, what was really a tax could be levied as a fee without limit.

3.58 However, the fact that a levy is credited into the consolidated fund is no indication that the levy in question

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99. Ibid at p.296.
100. Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388, and Shri Jagannath v. State of Orissa, A.I.R. 1954 S.C. 400.
101. A.I.R. 1961 S.C. 459.

is clearly a tax. Thus in State of Rajasthan v. Sajjanlal Panjawat[102] it was contended that levy of fee not exceeding Rs.5/- along with the application for registration of public trusts under the Rajasthan Registration of Public Trusts Act, 1959 (42 of 1959) and the Rules issued thereunder, should be held to be a tax as the Rules had provided that the fee should be credited to the Consolidated Fund. The High Court accepted this contention and held that to treat the levy in question as a fee there should have been a provision to the effect that its proceeds should not be credited to the consolidated fund, but should be kept separately for the up-keep of the machinery for registration. On appeal to the Supreme Court, Jaganmohan Reddy J.[103] held that the mere fact that the amount was paid into the consolidated fund was not decisive of the character of levy. In this case, since the expenditure of the department in charge of the public trusts, namely, Devastan Department, was greatly in excess of the amount collected, as evidenced by the uncontroverted averment of the Commissioner of that Department, the levy was held to be a fee.

3.59 It would however, appear from article 266 of the Constitution, that only revenues received by the government, loans and loan-repayments should be credited to the consolidated fund of the State. A fee for services rendered does not seem to come within these categories and may have to be

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102. A.I.R. 1975 S.C. 706.
103. Other judges on the Bench were S.N. Dwivedi and P.K. Goswamy.

credited to the Public Account of the State under article 266(2) of the Constitution.

Graded levy not material

3.60 In some of the cases that came up before the court the levy of the fees was on a graded basis which is generally done in the case of a tax. In Sri Jagannath Ramanuj Das v. State of Orissa,[104] commenting on the graded levy prescribed in the Orissa Hindu Endowment Act, 1939, B.K. Mukherjea J. said "the fact that the amount of levy is graded according to the capacity of the payers though it gives it the appearance of an income tax, is not by any means a decisive test".[105] In Hingir-Rampur Coal Co. Ltd. v. State of Orissa[106] the levy of cess not exceeding 5% of the value of the minerals at the pit's mouth was upheld as fee.

3.61 In S.T. Swamiar v. Commissioner of H.R. & C.E., Mysore[107] J.C. Shah J. held that a levy would not be regarded as a tax merely because of the absence of uniformity in its incidence. It was also held in that case that there was no restriction on the legislative powers to levy a fee retrospectively.

Nature of the service

Provision for no service

3.62 Since a fee is a payment for some special service rendered it is clear that, if the statute does not provide

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104. A.I.R. 1954 S.C. 400.
105. Ibid at p.403.
106. A.I.R. 1961 S.C. 459.
107. A.I.R. 1963 S.C. 966.

a registered public trust, disputed its liability to pay this contribution on the ground of absence of quid pro quo. The Supreme Court, speaking through K.K. Mathew J.[135] noticed that the Act provided for supervision and control by the Charity Commissioner of all public trusts and that such control was a special service for the benefit of the public trust. At the end of March 1958 (certain contributions demanded from the Salvation Army was in respect of a period prior to 1958) 62% of the collections were spent on to the services and it could be held that there was proper quid pro quo. But by the end of March 1970 after meeting all the expenses, including capital expenses, there was surplus of 54 lakhs in the Trust Administration Fund. So the levy at 2% after 31st March, 1970 undoubtedly assumed the character of a tax as that merely augumented the income of the charity organisation. The contribution after March 1970 therefore was a tax without the authority of law.

3.76 When the Punjab Agricultural Marketing Board and the Market Committees (created by the Punjab Agricultural Produce Markets Act, 1961, Punjab Act 23 of 1961) had substantial surplus incomes, the Punjab Agricultural Produce (Amendment) Act 1974, (13 of 1974) enhanced the fees leviable by these bodies from Rs.1.50 to Rs.2.25 for every hundred rupees. This enhancement was to enable these bodies to recoup

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135. The other judges on the Bench were P.N. Bhagawati and N.L. Untwalia.

the contributions made by them, as per directions of the State government, to Guru Govind Singh Medical College at Faridkot. Striking down the Amending Act, Tuli J. observed: "This enhancement is nothing but a colourable exercise of power to levy fee with a view to raise funds for extraneous purposes".[136] Here it is clear that even if the increase was not for meeting unauthorised expenditure, it would not have passed the test of 'fees' in view of the substantial surplus income of the bodies in question.

Nature of court fees

3.77 In the Secretary, Government of Madras, Home Department v. Zenith Lamps and Electricals Ltd.[137] the validity of the fee levied under rule 1 of the High Court Fees Rules 1956 and the provisions of the Madras Court Fees and Suit Valuation Act, 1955 (Madras Act XIV of 1955) was in issue. It was contended that the fees levied exceeded the cost of administration of civil justice and the levy of ad valorem fee was in effect a tax beyond the competence of the State legislature. The Madras High Court allowed the petition. On appeal by the State to the Supreme Court, Sikri C.J.[138] speaking for the Supreme Court pointed out that the fees taken in the court, unless specifically mentioned in entry 77 of List I and entry 3 of List II would have fallen under the general entries relating to fees, viz., entries 96 of List I and 66 of List II. The specific

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136. M/s. Hamman Dall & General Mills, Hissar v. The State of Haryana & Others, A.I.R. 1976 P & H. 1 at 20.
137. A.I.R. 1973 S.C. 724.
138. Others on the Bench were A.N.Ray, D.G. Palekar, M.H. Beg and S.N. Dwivedi JJ.

exclusion of court fees from these latter entries showed that they were of the same kind as other fees but related to the particular topic of administration of justice and courts. The history of court fees in India showed that it was levied sometimes with the object of restricting litigations, and sometimes with the object of increasing revenue. It was not permissible to levy fees for increasing the general revenues of the State. In the case on hand, there was not enough material to judge how the court fees collected compared with the expenses on administration of justice. From the supplementary affidavit submitted by the State it could not be said that the State was making a profit in the administration of justice; but the affidavit in question could not be accepted without giving an opportunity to the respondent to file affidavits in reply. It was for the State to establish that what was levied was court fees properly so called; and, if there was any enhancement, the State must justify the enhancement.[139]

3.78 The appeal was therefore allowed and the case remanded to the High Court for disposal after giving an opportunity to the petitioners to file affidavits in reply.

3.79 This case shows that the ultimate decision would depend upon the proportion between the amounts realised by way of court fees. The stand of the Government regarding these matters through its affidavits, it will be very difficult for a complaining party to disprove. In any case, the administration of justice seems to be one of the principal functions of

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139. Ibid at p.734.

the sovereign State which it should meet out of its taxation, and the levy of court fee seems to be a survival from the bygone days when the State used to tax litigation and cannot now be properly considered as fees.

Licence fees for liquor trade

3.80 The nature of the payments collected by the State for permitting liquor trade has been considered by the Supreme Court in some cases. In Shinde Brothers v. Deputy Commissioner[140] it was held that the shop rent collected by public auction for securing the exclusive privilege of selling toddy or arrack from certain shops could not be treated as an excise duty for the purpose of levying a health cess under the Mysore Health Cess Act, 1962. A three-judge Bench of the Supreme Court held in Nashiwar v. State of M.P.[141] held that the rental collected from liquor venders was neither a tax, nor an excise duty, but consideration for the grant of a privilege by the government.

3.81 Following the decision in the Nashiwar Case, in Har Shankar v. Deputy Excise and Taxation Commissioner[142] the Supreme Court rendered a decision which may have far-reaching repercussions on the tax-fee distinction. Having bid at liquor licence auctions for fabulous amounts under the Punjab Excise Act, 1914 and the Rules issued thereunder, the appellants

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140. A.I.R. 1967 S.C. 1512.
141. A.I.R. 1975 S.C. 360. The Judges on the Bench were A.N. Ray C.J., and K.K. Mathew and N.L. Untwalia, JJ.
142. A.I.R. 1975 S.C. 1121.

approached the Punjab and Haryana High Court and challenged the levy of the licence fees. The High Court held that what was involved was contractual rights which could not be adjudicated in a writ petition. On appeal to the Supreme Court it was held that though the petition could be disposed of on the ground taken by the High Court, namely, involvement of contractual rights, having gone into the merits of the case, the Court preferred to dispose of the case on merit. Y.V. Chandrachud J. speaking for the Supreme Court,[143] reviewed the case-law governing the grant of liquor licence and held that the liquor trade was of such a nature that it could totally be prohibited in the case of citizens. And when so prohibited all the rights of manufacture, possession, sale etc. in regard to liquor belonged to the State. It was open to the State to part with those rights for a consideration. The licence fees collected at auction were therefore neither fees in the strict sense nor excise duty or other tax but the price of the privilege of dealing in liquor. The State could validly sell the privileges through auction and collect the price.

3.82 This decision introduces a third category in the State's levies which is neither tax nor fee but what has been described as "sale price of the privileges". The privilege in this instance is created in favour of the State because liquor trade being obnoxious in character could be totally prohibited

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143. Others on the Bench were A.N. Ray, C.J., K.K. Mathew, M. Alagiriswamy and A.C. Gupta, JJ.

in the case of citizens. It seems an irony that what is inherently harmful to the citizen, when prohibited and sold in the form of a State privilege for a price, becomes less harmful to the citizens. The logic of this decision could be extended to all licence-fees for regulatory activities because every kind of regulation might involve some kind of restriction on the citizens. It can be stated to the extent of restriction on citizen it becomes a state privilege which could in turn be sold back to the citizen for a price. The States are bound to welcome this decision as it provides them with a new method of collecting money neither by tax nor by fees, but by the sale of privileges.

Tax-fee distinction, a suggestion

3.83 The tax-fee distinction developed by the courts in India is not free from difficulty. It has been held that even if the element of compulsion is there it could be classified as a tax. It seems that the presence or absence of compulsion should be the principal distinguishing factor between tax and fee. Any compelled levy should be classified as a tax. Fee should be taken to be the price of the service voluntarily asked for and rendered, and if the quid pro quo element is lacking it should be struck down as a colourable attempt to levy a tax under the guise of a fee. The present trend under which if a quid pro quo is proved even compelled levies could be classified as fees seems to be without any constitutional basis and it needlessly increases the State's competence to levy tax under the guise of fees. The decision in Har Shankar

v. Deputy Excise and Taxation Commissioner[144] may prove to be a case that has importance for the future development of the law governing the tax-fee distinction; it makes a third category, namely, the sale price of privileges and, if the idea of price is introduced, it is clear that a question of compulsion in the sale of the service cannot arise. It is therefore submitted that the courts should revise its characterisation of fees and hold all compelled levies to be tax to be dealt with on that basis.

ATTEMPT TO OVERSTEP THE LIMIT UNDER THE GUISE OF ANCILLARY POWERS

3.84 It is a settled doctrine that the power to legislate on a specified topic includes the power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein.[145] But the incidental and ancillary powers are to be exercised in aid of the main power. Any attempt by the legislature to achieve under the guise of ancillary powers that which it cannot achieve in exercise of the main powers would be categorised as colourable exercise of legislative power.

3.85 In R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad,[146] it may be recalled[147] that certain provisions of the Hyderabad General Sales Tax Act, 1950 (14 of 1950) were

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144. A.I.R. 1975 S.C. 1121.
145. See para 2.18 ante.
146. A.I.R. 1964 S.C. 922.
147. See para 2.23 ante.

struck down on the ground that the scope of the ancillary power did not extend to the State retaining as sales tax what was not leviable under the law as such tax. In his judgment for a unanimous Bench[148] Wanchoo J. observed:

> "If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of entry 54 of List II nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. We are therefore of the opinion that section 11(2) is not within the competence of the State Legislature under entry 54 of List II".[149]

3.86 It may also be recalled that on similar grounds section 42(3)(i) of the Madras Sales Tax Act, 1959 which authorised confiscation of the goods was struck down in Checkpost Officer, Coimbatore v. M/s. K.P. Abdulla & Bros.[150]

3.87 Sub-sections (3), (4) and (5) of section 20-A of the Bihar Sales Tax Act, 1959 (19 of 1959), as introduced by Act 20 of 1962, compelled a dealer, who had deliberately or

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148. Others on the Bench were P.B. Gajendragadker C.J., K.C. Das Gupta, J.C. Shah, N. Rajagopala Ayyangar JJ.
149. Ibid at p.924-925.
150. A.I.R. 1971 S.C. 792. See para 2.24 ante.

erroneously recovered an amount from the purchaser on a representation that he was entitled to recover it to recoup himself for the payment of a tax, to pay over that amount to the State, though it could also be claimed as a refund by the purchaser in certain circumstances subject to some limitations. When the question of validity of this section, which had been upheld in the High Court, came up before the Supreme Court, J.C. Shah J.[151] held that though a dealer could pass on to a purchaser, as incidental to sales tax legislation, the amount he had to pay to the government as sales tax, the government could not under the guise of such incidental power levy as tax that which was really not a tax. Allowing the appeal His Lordship observed:

> "....in effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect".[152]

3.88 Instances of the type considered above will not appear to be instances of the legislature acting ultra-vires. What brings them under the principle of colourable legislation is the attempt to disguise them as exercise of ancillary powers when in fact they were beyond the scope of such ancillary powers.

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151. Asoka Marketing Limited v. State of Bihar, A.I.R. 1971 S.C. 946 (Other judges were M.Hidayatullah C.J., K.S. Hegde, A.N. Grover, A.N. Ray and I.D. Dua JJ.).
152. Ibid at p.951.

## CHAPTER IV

## INDUSTRY AND MINING

TRANSFER OF FIELD AND PARLIAMENTARY DECLARATION

4.1 The legislative jurisdiction with regard to industries and mining has been distributed between the Union and the States as per entries 23 and 54 of the State and Union Lists respectively. These entries are as follows:-

> "23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union".
>
> "54. Regulation of mines and mineral development to the extent which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest".

The powers regarding industry are similarly distributed between the States and the Union by entries 24 of List II and entries 7 and 52 of List I. These entries are as follows:-

> 24. Industries subject to the provisions of (entries 7 and 52) of List I.
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> 7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
>
> 52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

4.2 Thus the Constitution does not finally distribute the powers in regard to industry and mining but leaves it to be decided by Parliament. The Industries (Development and

Regulation) Act, 1951 (65 of 1951) and the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957) have declared that the development and control of certain industries and mines should be under the control of the Union. In addition, certain other central enactments have declared various industries the control of which by the Union is expedient in public interest.[1] Such industries are usually referred to as controlled industries.

Consequences of declaration by Parliament

4.3 As noticed earlier[2], the result of the Supreme Court's decisions in Hingir-Rampur Coal Co. v. State of Orissa[3] and State of Orissa v. M.A. Tulloch & Co.[4], is that the declaration by Parliament would transfer the legislative field in respect of industries covered by the declaration to the Union field and would effect for the future an implied repeal of any existing State law in the field. So it is clear that in respect of a controlled industry the State legislature has, after the declaration by Parliament, no legislative competence even if the Union Parliament has not enacted any legislation to occupy the field previously occupied by the State legislation.

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1. The Coffee Act, 1942 (Central Act VII of 1942), the Rubber Act, 1947 (Central Act XXIV of 1947), the Indian Power Alcohol Act, 1948 (Central Act XXII of 1948), the Central Silk Board Act, 1948 (Central Act LXI of 1948), the Tea Act, 1953 (Central Act XXIX of 1953), the Coir Industry Act, 1953 (Central Act 45 of 1953), the Rice-Milling Industry (Regulation) Act, 1958 (Central Act 21 of 1958), and the Cardamom Act, 1965 (Central Act 42 of 1965).
2. See para 2.16 ante.
3. A.I.R. 1961 S.C. 459.
4. A.I.R. 1964 S.C. 1284.

Power to acquire a controlled industrial undertaking

4.4 A question has been raised whether a State legislature would be competent to acquire an industrial undertaking in respect of which industry the declaration has been made by the Union Parliament. Some writers have stated that the Union Parliament alone, and not the State legislature, would be competent to make laws with respect to the acquisition of an industrial undertaking pertaining to a controlled industry.[5] This argument is developed on the following lines.

4.5 The power of acquisition and requisitioning of property is given in entry 42 of the Concurrent List and is therefore available to both the Union and State legislatures subject of course, to the rules governing the paramountcy of Union legislation in the concurrent field. Article 298 of the Constitution lays down that the executive power of the Union and of each State extends to the carrying on of any trade or business and to the acquisition, holding, and disposal of property and the making of contracts for the purpose subject to the qualifications mentioned therein. However, article 298 cannot be interpreted to mean that the Parliament or a State legislature can enact a law acquiring any property for any purpose. The Union can acquire property only for Union purpose

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5. For example, see R.S. Gae, Power to Acquire Property, (1971) 13 J.I.L.I. 189. Similar views have been expressed by the same author in a book published by him. See R.S.Gae, The Bank Nationalisation Case and the Constitution, (1971), p.53.

and the States for the State's purpose and these purposes are determined with reference to the legislative entries in view of the fact that the executive power follows the legislative power.[6] Acquisition of a controlled industry would therefore be within the Union purpose referrable to entry 52 of List I and the State legislatures have no competence for passing a law for the acquisition of a controlled industry.

4.6 Section 20[7] of the Industries (Development and Regulation) Act 1951 also forbids any State government or local authority from taking over the management or control (in effect requisition) of any industry covered by the declaration that the control should be vested in Parliament. Therefore the same thing would seem to apply to acquisition too.

4.7 The above view has also found expression in some judicial decisions. In Chanan Mal v. State of Haryana[8], the Punjab and Haryana High Court struck down the Haryana Minerals (Vesting of Rights) Act 1973 (14 of 1973) as beyond legislative competence of the State legislature. This Act was passed for the purpose of conservation, proper development and uniform

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6. Article 73 and article 162 of the Constitution.
7. "20. General Prohibition of taking over Management or control of industrial undertakings. After the commencement of this Act it shall not be competent for any State Government or a local authority to take over the management or control of any industrial undertaking under any law for the time being in force which authorises any such Government or local authority so to do".
8. A.I.R. 1975 P & H. 102.

exploitation on scientific lines of the minerals in the State of Haryana and had vested in the State the rights to minerals and had provided for the payment of "amounts" to the previous owners of such minerals. The argument of the State government in support of the legislation was that the Act did not relate to the regulation of mines and minerals development to which entries 23 of the State List and 54 of the Union List related. It was a measure relatable to entry 18 of the State List namely, the legislation with respect to land. This view was challenged on the ground that the declaration furnished by Union government in the Mines and Minerals (Development and Regulation) Act, 1957 took the whole field of legislation with regard to mines and minerals development from the State field and transferred it to the Union field. As a result of such transfer of the field it was no longer competent for the State Government to acquire the mines. Balraj Tuli and Bhopinder Singh Dhillon JJ. constituting the Bench relied on the decision in State of West Bengal v. Union of India[9], in support of the view that once the legislation was made by Parliament with regard to the regulation of mines and mineral development, it had the power to acquire land wherein such mines and minerals existed and the State government had no power to acquire the same. They particularly relied on the following passage in Chief Justice Sinha's judgment in that case.

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9. A.I.R. 1963 S.C. 1241.

"Power to legislate for regulation and development of mines and minerals under control of the Union would by necessary implication include the power to acquire mines and minerals".[10]

4.8 They also held that the legislation in question did not relate to land as contended by the State government but related to mines and minerals referred in entries 23 and 54 of the State and Union Lists respectively. The High Court judgment also held that, in the light of the Supreme Court decision in Hingir-Rampur Coal Co.[11], and M.A. Tulloch & Co.[12], and the provisions of the Mines and Minerals (Development and Regulation) Act, 1957, it was clear that the whole field governing the whole of mines and minerals development was transferred from the State to the Union legislative field. Hence the State Act was struck down.[13]

A criticism of the above view

4.9 The above view that acquisition of an industrial undertaking belonging to a controlled industry by State legislation is invalid does not seem to be correct. When the entries in the legislative lists speak of regulation and development in the case of mines (entry 54) and control of industries (entry 52) what is intended seems to be the police

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10. Ibid at pp.1265-66.
11. A.I.R. 1961 S.C. 459.
12. A.I.R. 1964 S.C. 1284.
13. The illusory nature of the amount paid on the acquisition of the mines formed another independent ground for the striking down of the Act.

power regulations and not the acquisition under eminent domain. It is one of the accepted principles of interpretation of the entries that when a particular subject is specifically mentioned in the list it should not be allowed as an incidental power to any other entry.[14] It is well-known that taxing powers which are specifically mentioned are not allowed as ancillary power of the general legislative entries. Thus a tax on land specifically mentioned in entry 49 of List II will not be read as incidental to the power to legislate with respect to land under entry 18 of List II. It has also been held that the power of acquisition and requisition of land will not be allowed as incidental to the power to legislate with respect to the entry 18.[15] Therefore, since acquisition and requisition are specifically mentioned in entry 42 of the Concurrent List it would not be permissible to read the power to acquire an industry or a mine as incidental to the relevant entries in the State and the Union Lists.[16]

4.10 Support for the view canvassed here seems to be available also from the decision of the Supreme Court in Paresh Chandra Chatterjee v. State of Assam.[17] Under the Assam

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14. See paras 2.19-20 ante.
15. State of Bihar v. Kameswar Singh, A.I.R. 1952 S.C. 252 at 283.
16. See in this connection, Rajahmundry Electric Supply Corporation Ltd. v. The State of Andhra, A.I.R. 1954 S.C. 251, where the Supreme Court rejected the argument that the legislative power under an entry would include the incidental power of acquiring the property of any commercial or industrial undertaking (electricity undertaking in that case).
17. A.I.R. 1962 S.C. 167.

Land Acquisition and Requisition Act, 1948 the Government of Assam requisitioned certain lands pertaining to a tea estate. It was argued that tea industry was within the exclusive legislative power of Parliament in view of the declaration in the Tea Act, 1953 as per entry 52 of List I and hence the State Act was ultra vires to the extent it provided for the acquisition or requisition of tea estate or lands appertaining to it. Subba Rao J.[18] who was generally soft towards the States in Union-State questions, did not accept this contention. He pointed out that section 15(1)(b) of the Tea Act provided for the contingency of a part of the land on which tea was planted being compulsorily acquired under the provisions of the Land Acquisition Act or of any other law for the time being in force. In such an event, the owner of the tea estate was authorised to apply to the Tea Board for permission to plant tea to the same extent on fresh land. The Tea Act therefore not only did not prohibit the acquisition of any land on which tea was grown but in express terms provided for replacement of the area acquired by other land for the purpose of tea plantation. Hence the validity of the Assam Act was upheld. If the legislative power for the control of tea industry carried with it to the Union field the power of acquiring a tea estate, obviously, the State Act in the above case should have been declared ultra vires.

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18. Other Judges on the Bench were P.B. Gajendragadker, M. Hidayattullah, J.C. Shah and Reghubar Dayal, JJ.

4.11 In the same strain, the Supreme Court held in Kannan Devan Hills Produce Co. v. State of Kerala[19] that the Kannan Devan Hills (Resumption of Lands) Act, 1971 (5 of 1971) passed by the Kerala legislature could not be declared invalid because of conflict with the provisions of the Tea Act, 1953. The Act in question had provided for the acquisition by the State Government of the lands in possession of the plantation company which had not been really utilised for plantation purposes. As in Paresh Chandra Chatterjee's Case it was argued that tea industry being a controlled industry in view of the declaration in the Tea Act, and the legislative power thereof having passed to the Union field by virtue of entry 52 of List I, acquisition of the said lands by the State was beyond its competence. Speaking for the Supreme Court, Sikri C.J.[20] held that even after the particular industry was transferred to the Union sphere that "would not prevent the State from legislating on subjects other than that particular industry"[21]. In the present case, the Kerala Act was referrable to entry 18 of List II (land) and entry 42 of List III (acquisition and requisition) and the exercise of power under these entries could not be denied on the ground that it had some effect on an industry controlled under entry 52 of List I. The effect was not the same thing as subject-matter. If a State Act otherwise valid had affected a matter in List I it did not

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19. A.I.R. 1972 S.C. 2301.
20. Other Judges on the Bench were J.M. Shelat, A.N. Ray, I.D. Dua and H.R. Khanna.
21. Ibid at p.2308.

cease to be a legislation with respect to an entry in List II or List III.[22] Legislation by the State had not made the control of the industry by Union impossible. There was no prohibition in the Tea Act against voluntary sale or compulsory acquisition nor was it established that there was any repugnancy between the provisions of the Tea Act and the Kerala Act in question.

4.12 As a result of the above two holdings of the Supreme Court, it seems that the fact that an industry has become a controlled industry would not prevent the State from exercising their independent powers conferred by the legislative lists even if the exercise of such power has an effect on the controlled industry. It follows therefore, that States are not precluded from exercising the powers under entry 42 of the Concurrent List (acquisition and requisition) in respect of the property of a controlled industry in the absence of paramount Union legislation which would invalidate the State legislation on the principle of repugnancy.

4.13 It is also doubtful if the passage from the West Bengal Case[23] quoted earlier and relied on by the Punjab High Court, really supports the view for which it was cited. It was decided in that case that the Union Government had the power to acquire a coal bearing area belonging to the State of West Bengal. The majority based the decision on entry 42 of List III and the absence of any prohibition in the Constitution

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22. Ibid.
23. See para 4.7 ante.

excepting State property from the power under that entry.[24] The minority judgment of K. Subba Rao J. held that entry 42 of List III did not cover State property. He also said "under the entry 'Regulation of mines' a law cannot be made for the acquisition of coal bearing lands themselves, particularly when there is a specific entry for acquisition"[25]. This decision can at best support the proposition that if the Union Government has legislated to acquire an industrial undertaking in respect of a controlled industry a State legislature cannot acquire it in the face of Union legislation. A question whether, in a case where the Union has merely issued the declaration regarding the control of the industry but has not proceeded to exercise the independent power of acquisition of that industry under entry 42 of the Concurrent List, a State is precluded from exercising its power of acquisition of the undertaking was not considered in the West Bengal case. It is submitted therefore that as has been held by the Supreme Court in the Bank Nationalisation Case[26], acquisition and requisition of an industrial undertaking is a matter coming within the concurrent field; and in the absence of inconsistent Union

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24. A.I.R. 1963 S.C. 1241 at p.1259.
25. Ibid at p.1276.
26. R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564. Shah J.'s judgment for the majority observed: "Power to legislate for acquisition of "property" in Entry 42, List III therefore includes the power to legislate for acquisition of an undertaking" (p.591). Ray J.'s dissenting judgment was also to the same effect on this point. See p.629.

legislation the States are not precluded from exercising their powers. Therefore it seems that the mere prohibition in section 20 of the Industrial Development and Regulation Act, prohibiting the States from requisitioning controlled industries is unconstitutional.

Undue restriction of State powers

4.14 The effect of a declaration transferring a part of the field from the State to the Union, sometimes would seem to unduly restrict the competence of the States on purely technical grounds. In Baijnath v. State of Bihar[27] the validity of the Bihar Government's measures in collecting increased rents and royalties in respect of minor minerals was in question. Section 10 of the Bihar Land Reforms Act, 1950 had vested estates in the State. Thereafter the State became the lessor of the mining leases. In 1957 the Mines and Minerals (Regulation and Development) Act, 1957 was passed. Section 2 of that Act contained a declaration that the development and regulation of all minerals under the Union auspices was expedient in public interest. Section 15 of that Act however, authorised the State government to make rules regarding the prospecting mining etc. of minor minerals. In 1965 the Bihar Land Reforms Act was amended adding a proviso to section 10(2) to the effect that the terms and conditions of existing leases would stand modified to be in accordance with the Bihar Minor

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27. A.I.R. 1970 S.C. 1436.

Minerals Concession Rules, 1964 framed under section 15 of the Central Act. Sub-rule (2) was added to rule 20 of the above rules, the effect of which was to make the Bihar Rules applicable to leases granted or renewed before the commencement of the rules but subsisting when they came into effect. The Bihar Government's attempt to collect rents and royalties under the new rules and the amended Bihar Act was challenged. The Bihar High Court[28] upheld the validity of the Bihar Government's measures. The Bihar Government was competent to introduce the proviso in question in exercise of its power under entry 23 of List II before the field of minerals was transferred to the Union Government. Even after such transfer the proviso in question merely incorporated by reference the Bihar Rules made under section 15 of the Central Act in regard to minor minerals and hence there was no objection to the State amendment. Even if this could not be done on the pith and substance theory, the Bihar Legislature could support its measure on entry 18 of List II dealing with land.

4.15 On appeal to the Supreme Court,[29] Hidayatullah C.J.[30] held that the declaration in the Central Act transferred the whole field relating to minor minerals to the jurisdiction of Parliament and no scope was left for the enactments of the second proviso to section 10 in the Land Reforms Act. The pith

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28. Baijnath v. State of Bihar, A.I.R. 1968 Pat. 50.
29. Baijnath v. State of Bihar, A.I.R. 1970 S.C. 1436.
30. Others on the Bench were J.M. Shelat, V. Bhargava, K.S. Hegde and A.N. Grover JJ.

and substance of the amendment to section 10 of the Land Reforms Act fell within entry 23 of State List although it incidentally touched entry 18, land, and not vice-versa as held by the High Court. Hence the amendment was invalid and entry 18 of State List was of no help. The State Government could not by virtue of its rule-making power delegated by section 15 of the Central Act, frame a rule to modify vested rights which could only be taken away by competent legislature. As no such Parliamentary law had been passed the second sub-rule to rule 20 of the Bihar Rules which provided for retrospective increase in the fees etc. was invalid.

4.16 Since minor minerals had been left to the States by section 15 of the Central Act, it is difficult to accept the Supreme Court's judgment. In view of this specific provision it is quite possible to argue that the minor minerals to that extent have not been transferred from entry 23 of the State List. The State amendment in that case, though apparently referrable to entry 18 of List II, but which on the pith and substance theory could not have been upheld on the basis of that entry, was clearly sustainable, as noted by the Supreme Court on entry 23. The mistake is in holding, in the face of a clear provision in the Central Act leaving minor minerals to the States regulation by rule-making, that the legislative power regarding regulation and development of minor minerals was also transferred to the Centre.

4.17 As a sequel to the decision of the Supreme Court in this case, the Parliament passed the Bihar Land Reforms Laws

(Regulating Mines and Minerals) Validation Act, 1969, which retrospectively validated by referential legislation the proviso to section 10(2) and sub-rule 20(2) earlier struck down by the Court. And a challenge to the validity of the validating Act of 1969 was repelled by the Supreme Court in Krishna Chandra v. Union of India.[31]

4.18 If the Supreme Court had correctly interpreted that the Mines and Minerals (Regulation and Development) Act, 1957 did not transfer the 'minor minerals' also to the Union sphere, the validation Act by the Parliament and subsequent litigation regarding it could have been avoided.

INTERPRETATION BY THE COURTS

Meaning of the term 'industry'

4.19 The meaning to be given to the term 'industry' in entries 24 of List II and 52 of List I had come up for decision in some cases. In Tika Ramji v. State of U.P.[32] the validity of the U.P. Sugar Cane (Regulation of Supply and Purchase) Act, 1953 (U.P. Act 24 of 1953) and certain rules and orders issued thereunder was challenged before the Supreme Court in Article 32 petitions. The Act was passed after the regulation of sugar industry was transferred to the Union field by the Industries (Development and Regulation) Act, 1951[33]

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31. A.I.R. 1975 S.C. 1389.
32. A.I.R. 1956 S.C. 676.
33. Sugar being item 25 in the First Schedule to the Act.

# CHAPTER V

## EDUCATION

DISTRIBUTION OF POWER

5.1 The power to legislate with respect to education has been given to the States as per entry 11 of the State List which reads as follows:

> "Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of the List III".

By entry 25 of List III vocational and technical training of labour has been given to the concurrent field. Entries 63 to 66 of List I have given to the exclusive Union field certain institutions and aspects of education. These are:-

> "63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.
>
> 64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
>
> 65. Union agencies and institutions for—
>
> (a) professional, vocational or technical training, including the training of police officers; or
> (b) the promotion of special studies or research; or
> (c) scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions".

Thus the subject of education is really spread over all the three Lists.

CONFLICT REGARDING THE POWER TO PRESCRIBE MEDIUM OF INSTRUCTION

5.2 Some interesting questions of conflict between the power of the State and the Union have come up. In Gujarat University v. Shri Krishna[1], a question as to how to reconcile entry 11 of List II with entry 66 of List I so far as the medium of instruction was concerned was raised. In pursuance of Gujarat University Act, 1949 as amended by Gujarat Act 4 of 1961 and the statutes issued thereunder, the University restricted admission to English medium courses in the colleges to those who had had their high school course in the English medium. The purpose of this restriction was to promote the development and study of Gujarati and Hindi and their use as a media of instruction and for examination[2]; but the effect of this restriction was that Gujarati and Hindi came to be prescribed as the exclusive media of instruction in the colleges (of course with the limited exception noted above). The question was whether the Gujarat University was statutorily right in so prescribing the medium of instruction, and whether

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1. A.I.R. 1963 S.C. 703.
2. Section 4(27) of the Gujarat University Act, 1949.

such a step would not come into conflict with the power of the Union under entry 66 of List I for the co-ordination and determination of standards in institutions for higher education etc. J.C. Shah J. delivering the judgment of the majority[3] held that on a true interpretation of the provision of the Gujarat University Act, it did not enable the University to prescribe any exclusive medium of instruction and therefore the statutes prescribing Hindi and Gujarati as exclusive media were void. Though this much of the decision was sufficient to dispose of the case on hand, the judgment also considered the impact of prescribing an exclusive medium of instruction for higher education on the legislative competence of the State and the Union Legislatures. Since this interpretation of the Lists is important for our subject a little more detailed study of it is called for.

Power to prescribe medium of instruction—majority judgment

5.3 The power to prescribe the medium of instruction was not specifically mentioned in any of the entries in the Lists. So, normally, it should belong to the States as an incident of the power of legislating on education under entry 11 of the State List. So far as primary and secondary education were concerned, the power of the States was not subject to any exceptions. But as regards education covered by entries 63 to 65 of the Union List, the power must be deemed to vest in

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3. Other judges with him were B.P. Sinha C.J., S.J. Imam, K.N. Wanchoo and N. Rajagopala Ayyangar JJ. K. Subba Rao J. delivered a dissenting judgment.

the Union along with the main power to legislate for education covered by those entries. The power to legislate in respect of medium of instruction, in so far as it had a direct bearing and impact on the legislative head of co-ordination and determinati of standards in institutions of higher education etc. covered by entry 66 of List I, should be held to vest in the Union by necessary intendment.

5.4 The conflict due to overlapping between entries 66 and 11 should be resolved by harmonious construction. When a legislative entry in the State List was made subject to a legislative entry in the Union List so much of the field as was covered by the Union head should be deemed to have been taken out of the State field.[4] The fact that the Union had not legislated in the exclusive field allotted to it would not give any power to the State legislatures to legislate in that field. Therefore, the validity of State legislation would depend upon whether it prejudicially affected the co-ordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. Turning down a suggestion that co-ordination merely meant evaluation, determination and fixation, it was held that measures to remove disparities resulting from the adoption of regional media, steps to prevent the falling of standards, and for equalising standards of higher education were all comprehended in that entry. The power to co-ordinate and determine

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4. Hingir-Rampur Coal Co. Ltd. v. State of Orissa, A.I.R. 1961 S.C. 459.

standards was a power to ensure maintenance or improvement of standards and not merely a power to evaluate. It was a power to harmonise or to secure relationship for concerted action.

5.5 The difficulty of laying down in the abstract what would be detrimental to the co-ordination and determination of standards, in so far as the medium of instruction was concerned, was recognised. It was a question to be decided in each case depending upon the impact of the State legislation on the performance of the Union function.

> "If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text-books and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by item No.11 of List II".[5]

The minority judgment

5.6 Subba Rao J. in his dissenting judgment held that in the case where an entry in a List is made subject to another entry in another List, the doctrine of pith and substance would be applicable to resolve any conflicts between the two entries. There was no other principle according to which the impact of the legislation under one entry could be independently considered for determining the question. If the

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5. Ibid at p.717.

impact of the State law on a Central subject was so heavy and devastating as to wipe out or appreciably abridge the Central field, then it might be a ground for holding that in pith and substance the law fell under the Union entry and not under the State entry.[6] Parliament was empowered under entry 66 of List I to legislate for the purpose of co-ordinating the standards fixed by the State. This did not involve the question of medium of instruction. If a very broad meaning was given to the term co-ordination, almost every aspect of education like books, professors, equipment, building, finance, medium of instruction etc. would come under the Union power and such an interpretation would deprive the State entry of its contents. The Constitution envisaged the replacement of English by regional languages as the media of instruction in the Universities and hence a law fixing standards for co-ordination under entry 66 of List I could not be held to displace the medium of instruction. Subba Rao J. therefore, found that the pith and substance of a law fixing the medium of instruction was in entry 11 of the State List and not in entry 66 of List I. Once, this was accepted, any incidental encroachment of such a law on entry 66 of List I would be permissible on the well-known principles of interpretation. In the result, Subba Rao J. held that the provisions in the Gujarat University Act and the statutes prescribing Hindi and Gujarati as exclusive media were valid.

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6. Ibid at p.721.

5.7 It is submitted that the minority judgment has not adequately taken into account the difficulty of maintaining high, uniform and all India standards in higher education, if the States were to indulge in an untimely switch over to regional media. The majority judgment has not held that the States have no power to legislate on the medium of instruction. It has adopted a flexible standard and has said that only if the State legislation would prejudicially affect the co-ordination of standards because of ill-prepared change over to regional media, entry 66 would be attracted. Further, Subba Rao J.'s holding that the pith and substance of medium of instruction always comes under the State List is only a begging of the question[7], and therefore does not seem to be acceptable.

Confusion in the majority judgment regarding principles for resolving conflicts

5.8 The result of the majority decision is that the power to coordinate and determine standards, how-so-ever difficult

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7. "This (the argument that if power is denied to the Parliament to prevent deterioration of standards resulting from switch over to regional media by States, the power of co-ordination given to Parliament would be practically wiped out) is another way of saying that the pith and substance of such legislation made by a State prohibiting the use of English falls not under the subject of "education" but under the entry "co-ordination". This argument, though appears to be attractive, is without legal or factual basis. If the pith and substance of the impugned law is covered by the entry "education", the question of effacing the Union entry does not arise at all. It is an argument of policy rather than a legal construction. The simple answer is that the Constituent Assembly did not think fit to entrust the subject of medium of instruction to Parliament, but relied upon the wisdom of the Legislatures to rise to the occasion, and enact suitable legislation". Ibid at p.723.

it may be in practice to fix its limits, is an exclusive one into which State legislation cannot enter. Regarding the effect of the existence of Union and State legislation on the subject of co-ordination and determination of standards, the majority judgment observed:

> "If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the state law by virtue of the first part of article 254(1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a State law trenching upon the Union field would still be invalid".[8]

This passage shows a certain confusion regarding the principles to be applied in settling a conflict between the exclusive fields. Doctrine of paramountcy operates in the concurrent field. It has no relevance in the exclusive field. Once it has been decided that the power to co-ordinate and determine standards in entry 66 of List I is an exclusive power, and the states cannot enter there on the plea of absence of Union legislation, there is no question of applying the doctrine of paramountcy, according to which Union legislation would have precedence over repugnant State legislation in the concurrent field. If there is any State legislation in the field it would be invalid due to lack of power. If the State law only incidentally affects the Union field it will be valid.

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8. Ibid at p.716.

If however an incidentally encroaching State law on medium of instruction comes into conflict with Union law for the co-ordination and determination of standards, the supremacy of the exclusive Union field provided for in the Constitution by article 246 would be sufficient to settle any conflict and the Union law would prevail. It is therefore submitted that this part of the judgment is clearly misleading and shows a confusion between questions of power, and questions of conflict of laws made under power.[9]

A problem of no-man's land

5.9 The overlapping between the State and Union fields, however, creates an interesting problem. As per the decision of the majority, which it is respectfully submitted to be correct, there cannot be a State law on the co-ordination and determination of standards of higher education. But then there should be Union legislation on all aspects of co-ordination and determination of standards, otherwise there will be a no-man's land in this area. To prevent such a gap, it is necessary that Parliament should pass legislation indicating

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9. A similar confusion is seen in Rajendra Kumar Nayak, Education : The Centre-State Legislative Relationship, in 14 J.I.L.I. (1972) 562, at p.567, where it is said: "The principle of unoccupied field will apply where the Centre has not legislated and the State legislation does not directly obstruct and create difficulties for the Centre to legislate under List I. Then it would be within the scope of State power, otherwise not".

positively the contents of the entry "co-ordination and determination of standards", and possibly delegate to the States, the power to frame rules to the extent diversity may be permitted.

To fulfil the "role of a guardian angel allotted to Parliament"[10] in the field of determination and maintenance of standards, the University Grants Commission Act, 1956 (3 of 1956) has been passed. Though this Commission has been empowered to take all steps for the promotion and co-ordination of University education and for the determination and maintenance of standards of teaching by framing suitable regulations[11], it does not seem to have entered actively in the area to cover all aspects of entry 66 of List I. By and large, it seems to have been content with the role of a grant distributor. If this body is made to play a more active role, a question of a gap in the legislative field regarding the co-ordination and determination of standards in higher education will not arise.

5.10 Another way to prevent any gaps in the matter of co-ordination and determination of standards in institution of higher education will be to treat by judicial interpretation the power as concurrent though mentioned as exclusive in the Constitution. The intimate connection that may exist between

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10. To borrow K. Subba Rao J.'s phrase. See A.I.R. 1963 S.C. 703 at p.722.
11. See section 12 and section 26.

Union and State legislation in this area, and the difficulty of settling in advance, and hence somewhat abstractly, the contents of co-ordination and determination of standards, may suggest such a treatment. Then the Union can enter the field to the extent necessary in the interests of all-India policy. The flexibility in the working of the concurrent power will ensure that unity prevails where necessary and diversity is allowed where desirable. However, taking into account the scheme of the Constitution it is better to treat the power to co-ordinate and determine standards as an exclusive one and to encourage the Union instrumentalities set up by Parliament, like the University Grants Commission, and others that may be set up in the future, to follow an active policy of laying down the all-India aspects of the matter and then delegate the remaining things to the States.

Other cases involving similar conflict

5.11 A question whether, the giving of more weightage marks for extra-curricular activities than for academic performance for the purpose of admission to professional colleges would not be bad as coming within the scope of entry 66 of List I was considered in Chitralekha v. State of Mysore.[12] K. Subba Rao J. delivering the judgment of the majority of the Bench held for the State rule on the ground that the impact of the State rule would not wipe out the Central power. The dissenting judgment of Mudholkar J. pointed out that the

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12. A.I.R. 1964 S.C. 1823.

criteria adopted by the State Government might result in the admission of less qualified, than better qualified, students which would adversely affect the standards and attract the Union power under entry 66 of List I.[13]

5.12 The prescription of an exclusive regional medium was held bad also in D.A.V. College Bhatinda v. State of Punjab[14], where Punjabi language in the gurumukhi script was involved.

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13. For a valid criticism that in Chitralekha the Supreme Court has diluted the ratio of the Gujarat University case, see M.P. Jain, Indian Constitutional Law, 2nd Edn. 1970, p.305.

14. A.I.R. 1971 S.C. 1731.

# CHAPTER VI

## TAXING POWERS

GENERAL CONSIDERATION

6.1 The taxing powers have been divided between the Union and the States in accordance with entries in Lists I and II of the Seventh Schedule. Thus entries 82 to 92A of the List I mention the taxes that may be imposed by the Union, and entries 45 to 63 of List II specify the taxes that may be imposed by the States. It is significant that no taxing powers have been mentioned in the Concurrent List. Hence theoretically, the taxing power of the Union and of the States being in the exclusive fields, there cannot be any conflict between them. However, as noticed earlier, conflicts might occur because of the overlapping of the fields or because the legislation in any particular case might appear to relate to entries in the different lists. In the first case the conflict may be resolved by the proper definition of the fields and, in the second case, by the application of the doctrine of characterisation or pith and substance.

6.2 Certain broad features of the taxing powers may be noticed before conflicts of the type mentioned above with respect to the actual entries are examined. Taxation is defined in article 366(28) to include the imposition of any tax or impost whether general or local or special. It has already been noticed[1] that this broad definition is capable of including

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1. Para 3.51 ante.

within its ambit any impost including a fee. However, the power to impose fees with reference to entries in the lists has been separately conferred in all the three Lists. Hence for the purpose of the present discussion fees with respect to matters in List I[2] and fees with respect to matters in List II[3] might also be included. But the distinction between tax and fee, and the possibility of levying a tax in the guise of a fee have already been considered under the heading of colourable legislation and, therefore, it is proposed to deal in this chapter only with the conflicts of the taxing powers proper.

6.3 As has already been stated, a specifically enumerated power cannot be treated as incidental power and, since the taxing powers have been specifically mentioned in the entries, a general legislative entry will not be held to include the power to impose a tax with respect to that entry[4]. So the power to legislate with respect to land under entry 18 of List II does not include a power to levy tax on land because it is separately provided for in entries 45 and 49 of List II. The power to legislate on betting and gambling under entry 34 of List II does not include, as seen earlier[5], the power to levy a tax on betting and gambling specifically mentioned in entry 62 of List II[6].

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2. Entry 96 of List I.
3. Entry 66 of List II.
4. See para 2.19 ante.
5. Ibid.
6. R.M.D.C. v. State of Mysore, A.I.R. 1962 S.C. 594.

6.4 As specifically stated in entry 97 of List I read with article 248 of the Constitution, the residuary power covers also residuary taxing powers. The scope of the residuary taxing powers for sustaining parliamentary legislation in respect of taxes not specifically enumerated in the Lists and sometimes for validating ultra vires taxes earlier imposed by the State legislatures will be noticed while discussing the scope of residuary powers.

SALES TAX AND OTHER TAXES

6.5 By entry 54 of the State List, the States have power to impose taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92-A of List I. By entries 92 and 92A of the Union List, the Parliament has power to impose taxes on the sale or purchase of newspapers and on advertisements published therein, and on goods other than newspapers where such sale or purchase takes place in the course of inter-State trade and commerce, respectively. This division of the power to levy sales tax has given rise to some very nice problems in conflict. In addition, entry 84 of the Union List which authorises the imposition by the Parliament of excise duties on goods has also been alleged to conflict with the power of the State to levy sales tax. Before dealing with these conflicts, a problem common to both the types may be referred to.

Meaning of sale

6.6 The question of levying a sales tax would arise only if there is a sale as understood by the law. Entry 48 in

List II Schedule Seven of the Government of India Act 1935, and entry 54 of List II, Schedule Seven of the Constitution speak of "sale of goods". Under section 4 of the Sale of Goods Act 1930 a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. A contract of sale of goods would therefore contain four essential elements, namely, competent parties, mutual assent, transfer of property, and price. If one or more of these elements are not present it would be difficult to categorise the transaction as sale. It would not be competent for a State legislature to treat what in fact is not a sale of goods as a sale of goods and to tax it on that basis. Hence, as we have already seen[7], in a building contract, which was entire and indivisible, there was no sale of goods, and the materials used for construction could not be treated as having been sold to attract the Madras General Sales Tax Act, 1939.[8]

6.7 Service of meals at a hotel to a visitor as part of the amenities incidental to the contract of service is not a sale. Even though the property in such food-stuffs may be said to pass from the hotlier to the consumer, there is no

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7. Para 2.11 ante.
8. State of Madras v. Gannon Dunkerly & Co., A.I.R. 1958 S.C. 560 at 571. See also, Government of Andhra Pradesh v. Guntur Tobaccos Ltd., A.I.R. 1965 S.C. 1396, and Commissioner of Sales Tax, Madhya Pradesh, Indore v. M.P. Electricity Board, Jabalpur, A.I.R. 1970 S.C. 732.

intention of sale and purchase. The transaction of service is one and indivisible and is not capable of being split into one for residence and one for meals.[9]

6.8 Since the sale is a contract, if the freedom of contract is limited to a vanishing point, there is no sale. Thus when a sugar factory in Bihar sent sugar to Madras in obedience to statutory orders from the Controller of Sugar, and there was no offer to purchase from Madras, the freedom of contract was not there and the transaction would not be characterised as a sale.[10] However, when the Iron and Steel Controller directed the delivery of goods with reference to a fixed base price and there was scope for contractual freedom to operate though in a restricted way in areas like the date of supply of the goods, and the manner of paying the price, it could not be said that the transaction was not a sale.[11] But if the ingredients of a sale are present the fact that profit-motive is not present is irrelevant. Thus a co-operative society supplying refreshments to its members fulfils the definition of sale though profit-motive is absent.[12]

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9. State of Himachal Pradesh v. Associated Hotels of India, A.I.R. 1972 S.C. 1131.
10. New India Sugar Mills v. Commissioner of Sales Tax, Bihar, A.I.R. 1963 S.C. 1207.
11. Indian Steel and Wire Products Ltd. v. State of Madras, A.I.R. 1968 S.C. 478.
12. Deputy Commercial Tax Officer, Saidapet v. Enfield India Ltd., A.I.R. 1968 S.C. 838.

6.9 A power to levy sales tax does not extend to the levy as tax of amounts not leviable as such under the law. Hence a provision in a State Sales Tax Act, according to which amounts collected as tax on transactions not liable to tax under the Act, should be paid to the government, unless refunded, was struck down as ultra vires entry 54 of List II.[13]

6.10 An agreement of hire purchase with option to purchase the goods hired contains not only a contract of bailment, but also an element of sale. This sale element is sufficient to sustain a sales tax.[14]

6.11 If the transaction is a sale, and the power of the State to levy a tax on sale is established, then the question of such power conflicting with certain powers given to the Union may arise for consideration.

Sales tax and excise duties

6.12 The power of the States to levy sales tax may seem to conflict with the power of the Union to impose excise duties.[15] As we have seen while dealing with the question of reconciliation of overlapping entries[16] the cases decided under the Government of India Act, 1935 by the Federal Court[17] and the

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13. Sales Tax Officer Special Circle, Ernakulam v. The Tata Oil Mills Co. Ltd., A.I.R. 1975 S.C. 1991., wherein section 22(3) of the Kerala General Sales Tax Act 1963 (15 of 1963) was struck down.
14. Instalment Supply (P) Ltd. v. Union of India, A.I.R. 1962 S.C. 53.
15. Entry 45 of List I under the Government of India Act, 1935 entry 84 of List I, Schedule 7 in the Constitution.
16. See paras 2.12 and 2.13 ante.
17. In Re C.P. Motor Spirit Act, A.I.R. 1939 F.C.1; Province of Madras v. Boddu Paidanna & Sons, A.I.R. 1942 F.C. 33.

Privy Council[18] had, by applying the principle of harmonious construction, restricted the power of the Federal Legislature to impose duties of excise at the stage of production or manufacture, and of the Provincial Legislatures, to impose a sales tax on the sales thereafter. These decisions have been approved by the Supreme Court as correctly laying down the characteristics of an excise duty.[19]

Thus by a process of reconciliation of the entries applying a well-known technique of interpretation, the apparent conflict between the power to levy sales tax on the one hand, and excise duties on the other, has been solved.

Intra-State sales tax and inter-State sales tax

6.13 It has been noticed that the power of levying a tax on sale or purchase in the course of inter-State trade and commerce belongs by entry 92A of the Union List to the Union Parliament. Therefore the power to levy a sales tax on intra-State sales belongs to the States. This is however, subject to certain limitations. A State cannot tax "an outside sale" and a sale or purchase in the course of import or export. In the case of goods declared by parliamentary law to be goods of special importance in inter-State trade and commerce, State taxation is further subject to the conditions prescribed by Parliament.

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18. Governor General in Council v. Province of Madras, A.I.R. 1945 P.C. 98.
19. The Amalgamated Coal Fields Ltd. v. Union of India reported sub. nom R.C. Jall v. Union of India, A.I.R. 1962 S.C. 1281.

The nexus theory and the prevention of multiple taxation

6.14 Though the legislative power of a State is territorially limited to that State or part thereof[20] when it comes to the question of taxing powers, a State gets competence on the basis of the doctrine of territorial nexus to tax events that have not taken place fully within its territorial limits. It is enough even if the territorial connection is partial if it is real and not illusory and the taxing liability is relevant to that connection.[21]

6.15 It has already been stated that a sale of goods consists of various ingredients like goods, agreement to sell, payment of price and delivery of goods. On the basis of the doctrine of territorial nexus, a State would be competent to levy a sales tax based on one or more of the above elements.[22] After sales tax was introduced in the Provinces under the powers conferred by the Government of India Act 1935, it became the fashion for many Provinces to levy on the basis of the territorial nexus theory, tax on sale not wholly concluded

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20. Section 99 of Government of India Act, 1935, article 245 of the Constitution of India, 1950.
21. Wallace Brothers & Co. Ltd. v. Commissioner of Income Tax, Bombay, A.I.R. 1948 P.C. 118. (The power of the Indian legislature to impose tax on income arising abroad to a non-resident foreign company); State of Bombay v. United Motors Limited, A.I.R. 1953 S.C. 252 (The power of the State to levy sales tax even when all the ingredients of the sale are not within the territory); State of Bombay v. R.M.D. Chamarbaugwala, A.I.R. 1957 S.C. 699 (The power of the State to tax on betting and gambling carried on from places outside the State).
22. Poppatlal Shah v. State of Madras, A.I.R. 1953 S.C. 274.

within the territory of the Provinces. Thus in the case of a sale where the goods are in one Province, the owner in another, buyer in a third Province, the contract is concluded in a fourth Province, the price is paid in the fifth Province and the goods are delivered in a sixth Province all the Provinces could levy a sales tax. When the Constitution was enacted, to prevent this evil of multiple taxation it was provided that only the State in which the goods were delivered for consumption should be allowed to levy a sales tax. This was achieved by article 286(1)(a) and the Explanation thereunder (as originally enacted).[23]

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23. 286(1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) outside the State; or
(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation:- For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce.

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirtyfirst day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent".

6.16 A State was prevented from levying a sales tax on 'outside sales', and a sale where the goods were delivered for consumption in a State was treated as an 'inside sale' with regard to that State and 'outside sale' with regard to all other States. In the interest of protecting the freedom of inter-State trade and commerce from restraints on account of the levy of unreasonable sales tax by the States it was provided in article 286(2) that, without the permission of the Parliament by law, no State should impose a sales tax on a sale or purchase in the course of inter-State trade or commerce. In State of Bombay v. United Motors[24] the majority[25] of the Bench of the Supreme Court held in connection with the Bombay Sales Tax Act, 1952 that, when, by the Explanation under article 286(1), an inter-State sale was deemed to be an intra-State sale, a State legislature was competent to levy a sales tax without lifting the ban by Parliament as provided for in clause (2) thereof. The minority judges[26] however held that the restriction imposed by clause (2) was an additional one, and it would not be permissible for a State to levy a sales tax on inter-State transaction only on the basis of the Explanation. In Bengal Immunity Company v. State of Bihar[27] the Supreme Court overruled the above view and held that even when the fiction introduced by the Explanation converted

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24. A.I.R. 1953 S.C. 252.
25. Patanjali Sastri C.J., B.K. Mukherjea, Ghulam Hasan JJ.
26. Bose and Bhagawati JJ.
27. A.I.R. 1955 S.C. 661.

an inter-State sale into an intra-State sale, without the sanction of the Parliament as contemplated in clause (2), a State was incompetent to levy sales tax on sale or purchase in the course of an inter-State transaction. Thereafter taking also into account the views of the Taxation Enquiry Commission[28] the Constitution was amended by the Sixth Amendment Act 1956 on 11-9-1956 substituting the new article 286[29] in place of the old one.[30] Section 4 of the Central Sales Tax Act, 1956

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28. See, Taxation Enquiry Commission Report, Vol.III, pp.54-55 extracted in K. Chaturvedi, Central Sales Tax Act, (1975), Calcutta, p.62.
29. Article 286(1) No law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

    (a) outside the State; or
    (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

    (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

    (3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

    It also introduced the new entry 92A in List I "Taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce". In entry 54 of List II the State power was made subject to the provisions of 92A of List I and clause (g) added in article 269(1) provided for the assignment to the States of the sales taxes levied on inter-State trade and commerce.
30. Section 4: When is a sale or purchase of goods said to take place outside a State- (1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

    (2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State-

(contd.....178).

(Act No.74 of 1956) in force from 21-12-1956, passed in pursuance of the Constitutional amendment has provided as to when a sale or purchase of goods should be held to have taken place outside a State.

Inter-State sales tax

6.17 Since the power to levy a tax on inter-State sales has been transferred to the Union by the Sixth Amendment, any conflict between the power of a State to levy a tax on intra-State sale and the power of the Parliament to levy sales tax on inter-State sale can be resolved only by a proper definition of what an inter-State sale is. Article 269(3) of the Constitution, as amended by the Sixth Amendment, has empowered the Parliament to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce. Article 286(2) of the Constitution empowers Parliament to formulate the principles for determining when a sale or purchase takes place in the course

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(f.n.30 contd.)

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation: Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

of import of goods into, or export of goods out of, the territory of India which are also immune from State taxation.

Sections 3[31] and 5[32] of the Central Sales Tax Act, 1956 (74 of 1956)

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31. Section 3: When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce- A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-

    (a) occasions the movement of goods from one State to another; or

    (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

    Explanation 1: Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

    Explanation 2: Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

32. Section 5: When is a sale or purchase of goods said to take place in the course of import or export-

    (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

    (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

have formulated the principles for determining when a sale takes place in the course of inter-State trade and in the course of export or import respectively. Broadly stated a sale is in the course of inter-State trade only if it occasions the inter-State movement of the goods, or if property in the goods passes in the course of the inter-State movement of the goods by the delivery of title deeds.

6.18 Since the phrases "in the course of inter-State trade and commerce" and "in the course of export or import" in sections 3 and 5 of the Central Sales Tax Act, 1956 and in the relevant sub-clauses of article 286 of the Constitution as originally enacted are analogous, the cases on the latter are considered to be helpful in understanding the meaning of the former.

6.19 The meaning of the phrase "in the course of export" in article 286(1)(b) (as originally enacted) had engaged the attention of the Supreme Court in State of Travancore-Cochin v. Bombay Company Limited.[33] The sales involved were export sales to foreign buyers on c.i.f. or f.o.b. terms. Holding the sales to be in the course of export, Patanjali Sastri C.J.[34] said:

> "A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the

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33. A.I.R. 1952 S.C. 366.

34. Others on the Bench were B.K. Mukherjea, S.R. Das, Bose and Ghulam Hasan JJ.

However, to avoid any possibility of conflict in this regard the Constitution itself has specified that professional tax levied for the benefit of the State, or of a local self-government unit, upto Rs.250/- from a person should not be held to be invalid as being a tax on income.[72] A tax on pension is not a tax on profession but on income and cannot be saved by the special provisions of article 277 if levy of the tax before the Constitution was illegal.[73]

Tax on land and building and taxes on the capital value of assets

6.35 By entry 86 of the Union List the Parliament has a power to levy tax on the capital value of assets exclusive of agricultural land of individuals and companies. This tax would seem to come into conflict with the State's power to levy the tax on land and buildings. This conflict is resolved by holding that a tax on land and building is a direct tax on the property as such, whereas a tax on the capital value of assets is on the aggregate value of all assets, wherein lands and buildings are only components. Therefore in a tax on the capital value the unit of taxation is the aggregate value.[74] A view seems to have been held that in a tax on capital value of assets the value of incumbrances should be excluded.[75]

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72. Article 276.
73. C. Rajagopalachari v. Corporation of Madras, A.I.R. 1964 S.C 1172.
74. Bansari Dass v. Wealth Tax Officer, A.I.R. 1955 S.C. 1387; Sudhir Chandra Nawan v. Wealth Tax Officer, Calcutta, A.I.R. 1969 S.C. 59; and Assistant Commissioner for Urban Land Tax Madras v. Buckingham & Carnatic Co., A.I.R. 1970 S.C. 169.
75. See the dissenting judgment of Sarkar J. in Gordhan Das v. Municipal Commissioner, Ahamedabad, A.I.R. 1963 S.C. 1742.

However as pointed out by the majority in Union of India v. H.S. Dhillon[76], discussed in the chapter on Residuary Powers, in a tax on the capital value of assets though there should be aggregation there need not be deduction of incumbrances. Similarly it is not incumbent on State legislature to provide for deduction of debits while levying a tax on land and building under entry 49 of List II. It is only in a wealth tax a provision is necessary for deducting the debits. Such a tax is sustainable on the residuary power.

6.36 Tax on land and building may be levied without reference to the use to which the building is put. An argument that lands and buildings occupied by factories should not be separately treated and taxed was rejected by the Supreme Court.[77]

Tax on income and tax on agricultural income

6.37 Entry 46 of List II provides for the levy of taxes on agricultural income. From the power to levy tax on income conferred on the Union by entry 82 of List I, agricultural income is specifically excluded. A tax on income is defined as including a tax in the nature of excess profit tax, and agricultural income, as defined for the purposes for the enactments relating to Indian income tax.[78] Income has been treated as any profit or gain which is actually received and therefore inclusive of a capital gain.[79]

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76. A.I.R. 1972 S.C. 1061. See para 7.43 et seq infra.
77. Government of A.P. v. Hindustan Machine Tools Ltd., A.I.R. 1975 S.C. 2037.
78. Articles 366(29) and 366(1) respectively of the Constitution.
79. Navin Chandra Mafatlal v. Commissioner of Income Tax, Bombay, A.I.R. 1955 S.C. 58.

6.38 Agricultural income has been defined in section 2(1) of the Indian Income Tax Act, 1961. It has been given a wide connotation, for example, including all income from forestry operations.[80] It has also been held that to determine the exact scope of agricultural income, the rules framed under the Income Tax Act should also be taken into account.[81] In view of the importance of the definition of the agricultural income from the State's point of view it has been specifically provided in the Constitution that no bill that attempts any change in the meaning of agricultural income as defined in the Income Tax enactments shall be introduced or moved in Parliament except on the recommendation of the President.[82]

OTHER MISCELLANEOUS TAXES

Excise duty and taxes on luxury

6.39 The power to levy excise duties on alcoholic liquors for human consumption, opium, hemp and other narcotic drugs and narcotics but excluding medicinal and toilet preparations containing these substances has been given to the States.[83] Excise duties in respect of other articles may be levied by the Union.[84] Thus an excise duty on tobacco is leviable by

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80. Income Tax Commissioner v. Benoy Kumar, A.I.R. 1957 S.C. 768.
81. Karimtharuvi Tea Estate Limited, Kottayam v. State of Kerala, A.I.R. 1963 S.C. 760 and Travancore Rubber and Tea Company Ltd. v. State of Kerala, A.I.R. 1964 S.C. 572.
82. Article 274 of the Constitution.
83. Entry 51 of List II.
84. Entry 84 of List I.

the Union. According to entry 62 of the State List, the States may levy a tax on luxuries. A question has been raised whether a licence fee for bringing, stocking and selling of tobacco would come under entry 84 of List I or entry 62 of List II. The Supreme Court held that since there was no nexus between production or manufacture and the tax, it will not come under entry 84. Though tobacco was not specifically stated as luxury in entry 62 of List II the term "luxury" should not be understood as something exclusively used by the rich. It denoted something which was superfluous and not indispensable to human life and which people took with a view to enjoy, amuse or entertain themselves. An expenditure on something which was in excess of what was required for economic and personal well-being would be expenditure on luxury although the expenditure might be incurred by a large number of people including those not economically well off. Judged on this basis tobacco was an article of luxury and the levy on tobacco would come under entry 62 of List II.[85]

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85. A.B. Abdul Kadir v. State of Kerala, A.I.R. 1976 S.C. 182.

## CHAPTER VII

## RESIDUARY POWER

### UNDER THE GOVERNMENT OF INDIA ACT 1935

**An ideal arrangement**

7.1 A logical scheme for the division of powers between the federal centre and the units is to have a list of enumerated powers given either to the centre or to the units, with the residue to the other. If a concurrent scheme of powers is also envisaged, in addition to the list of enumerated powers, a list of concurrent powers may also be necessary. However, such neat divisions are not obtained in practice. The prevailing political pulls and pressures, and the bargaining for power preceding the division, would all be reflected in the distribution of powers actually obtaining in the constitutions.

7.2 In the Government of India Act, as we have already seen[1], there were two exclusive lists, namely, a list of federal powers, a list of provincial powers, and a concurrent list with regard to which both the Provinces and the Federation had competence. The residuary powers, however, were not allocated either to the Federation or to the Provinces but was under Section 104 of the Government of India Act, 1935, reserved to be allocated by the Governor-General in his discretion to the Federation or to the Provinces.

7.3 It may be recalled[2] that in the Constituent Assembly, though the initial proposal was to have a federal centre of

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1. See paras 1.12, 1.13, 1.17, 1.18 and 1.20 ante.
2. See para 1.30 ante.

enumerated powers with residuary powers to the Provinces and States, after the decision for partition of India, it was decided to have a strong centre and as one of the steps for that purpose to allocate residuary powers to the Centre. This decision would have meant that there was no need to have the Union subjects enumerated in detail in List I. It would have been sufficient if the exclusive state powers and the concurrent powers were mentioned. The attempts to revise the drafts on this basis seems to have been given up at the insistence of Dr. Ambedker, who maintained that the States, which were about to join the Federation, wanted to know more about the Federal powers than a vague description that the Federation would have a residuary power.[3]

7.4 So we have in the Constitution a distribution of powers similar to the one in the Government of India Act with the difference that the residuary powers are now given to the Centre.

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3. See para 1.38 ante, and C.A.D. Vol.IX, p.856. Ambedkar said: "Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase "residuary powers". That is the reason why we had to undergo this labour, notwithstanding the fact that we had article 223". (Article 223 in the draft corresponds to article 248 in the Constitution).

**The function of the residuary power as disclosed in the cases**

7.5 The function of the residuary power in the matter of resolving conflicts between the Federal power and the State power has been different under the Government of India Act and under the Constitution. Under the Government of India Act, there was no compulsion to find a particular power either with the Federation or with the Provinces.

7.6 In Manikkasundara Bhattar v. R.S. Nayudu[4] the appellant was a devotee aggrieved by the entry of certain harijans in a temple, and the respondent, the executive officer and the trustee of the temple, who did not object to the alleged defilement of the temple. Since the Madras Temple Entry Authorisation and Indemnity Act, 1939, (22 of 1939), had indemnified the offence committed, if any, in entering the temple, the appellant was forced to challenge the validity the Act itself. His argument was developed on the following lines.

7.7 The entry that appeared to grant the power was entry 34 of List II. This was as follows:

> "34- Charities and charitable institutions; charitable and religious endowments".

The other entries that seemed relevant were:

> "List II, entry 33- The incorporation, regulation, and widening-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies."
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> "List II, entry 9- Trusts and Trustees".

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4. A.I.R. (34) 1947 F.C. 1.

The temple in question was obviously a religious institution. The only aspects of religion on which legislative power was conferred were 'religious endowment' in entry 34 and 'religious associations' in entry 33. Since some aspects of religion had been specifically mentioned in these entries, and religious institutions was not one of them, the Provincial Legislature was not competent to pass a law with respect to the religious institutions. In view of the specific grant of power with regard to some aspects of religion, religion as a whole would not also be within 'charities' in entry 34 of List II or 'trusts' in entry 9 of List III.

7.8 Spence C.J. however, held that entry 34 was wide enough to include such power. The reference to charitable institutions and charitable and religious endowments was only illustrative and not restrictive. If entry 34 in List II were limited to religious endowments, and entry 33 in List II to religious associations, and entry 9 in List III were not applicable to religious institutions, the power to legislate in respect of religious institutions would not be there in the Central and Provincial Legislatures, but in the residuary power under section 104. The Chief Justice thought that, when the Government of India Act, 1935 had considered legislation on several aspects of religious matters, it would not be correct to infer that the power to legislate on religious institutions was withheld by omission.[5] Pointing

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5. The undesirability of keeping religious charities and institutions outside social control, which the acceptance of the appellant's arguments would have meant, seems to have been in the mind of the judge, though not made explicit in the judgment.

out that the presence of section 104 in the Government of India Act 1935, regarding omitted subjects of legislation, would make it difficult for the principles governing the construction of the British North American Act directly applicable to the Government of India Act, the learned judge observed:[6]

> "In the Canadian Constitution Act, there is no provision in respect of omitted subjects of legislation. Every subject must be held to be either within the legislative powers of the Dominion Parliament or of the Provincial Legislatures. In the Constitution Act, S.104 has been inserted for the very purpose of enabling legislation to be enacted in respect of subjects omitted from the three Lists in Schedule VII. There is not therefore the same necessity for courts in India to find that a subject must be comprised within the entries in the Lists. But when there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the Lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred".

This shows that a resort to the residuary power should be made only after the power could not be found in an enumerated entry according to the normal principles of interpretation though there was not the same necessity as in Canada, in view of section 104, of finding the power either in the Federal or Provincial Lists.

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6. Ibid, at p.6.

7.9 The same attitude was revealed in a dictum of the Federal Court. In Subrahmanyan v. Muttuswami[7] the Advocate-General of India who appeared for the appellant argued before the Federal Court that the Madras Agriculturists Relief Act, 1938 (4 of 1938), which had scaled down debts of agriculturists dealt with matters outside all the Lists and could therefore be sustained only on the residuary power. In fact on a proper interpretation the Act in question would have fallen under List II or List III. Turning down the argument of the Advocate General, Sulaiman J. observed:

> "But resort to that residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non descript".[8]

7.10 In Basudeva v. Rex[9] the failure of the U.P. Government to obtain authorisation of the Governor General under section 104 of the Government of India Act 1935, proved fatal to the validity of the U.P. Prevention of Black Marketing (Temporary Powers) Act, 1948. This Act had authorised preventive detention to prevent blackmarketing. According to entry I of List I the Dominion Legislature[10] was empowered to provide for preventive detention for reasons of State connected with

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7. A.I.R. 1941 F.C. 47. See para 2.27 ante for facts of the case.
8. Ibid, at p.55.
9. A.I.R. 1949 All. 513.
10. as the Federal Legislature under the Government of India Act, 1935 modified and adapted by the Indian Independence Act, 1947 and the Indian Provisional Constitution Order, 1947 was called.

defence, external affairs or relations with acceding States. Under entry I of the Provincial List, Provincial Legislature might provide for preventive detention for reasons connected with maintenance of public order. The challenge was that the Act was beyond the competence of the Provincial Legislature. An attempt to sustain the validity of the Act by reference to the preamble which had recited that "It is expedient in the interest of the maintenance of public order to make the provision" was not accepted. It was insisted that to bring the Act within the first entry of List II the operative provisions of the Act should be in pith and substance within that entry. Prima facie, there was no connection between public order and black-marketing. That black-marketing might lead to food riots did not in reality establish any connection between black-marketing and maintenance of public order. The connection must be direct and clear as between cause and effect, and not remote and doubtful. Since the authorisation of the Governor-General under section 104(1) of the Government of India Act 1935 was not obtained, the U.P. Act was ultra-vires and the order of preventive detention of Basudeva contrary to section 491 of the Criminal Procedure Code warranted release on the habeas corpus petition.

7.11 An appeal was taken by the State to the Federal Court.[11] Patanjali Sastri J. speaking for the court held that black-marketing was "so remote in the chain of relation to

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11. Rex v. Basudeva, A.I.R. 1950 F.C. 67.

public order". The connection must be real and proximate, not far fetched or problematical. Preventive detention to prevent black-marketing was therefore not within the scope of entry 1 of List II. The appeal therefore failed. The learned judge made no reference to the residuary power as, in the absence of authorisation by the Governor-General under section 104 of the Government of India Act, 1935, there was no attempt to sustain the validity of the Act on the basis of the residuary power. If there was such authorisation, the Act would have been held to come under the residuary power.

7.12 Tan Bug v. Collector of Bombay[12] is another instance where a State Government's action in requisitioning property was held to be bad for want of authorisation under section 104. The premises on which the business of a Chinese restaurent was carried on was requisitioned by the Collector under Section 2(2)(xxiv) of the Defence of India Act, 1939 and rule 75(a) of the Defence of India Rules. Bhagawati J. held that requisition was neither specifically mentioned in, nor incidental to, any of the entries in the Lists.[13] The Central Legislature had no power to legislate with respect to the same in the absence of a suitable authorisation by the Governor-General in Council even though there was a proclamation of emergency by the Governor-General under section 102(1) of the Government of India Act.

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12. A.I.R. 1946 Bombay 216.
13. See para 2.20 ante.

a review of the provisions of the Act, Das J. held for a unanimous court[15] that the Act did not provide for the granting of licence or maintenance of works for generating or transmitting energy or for supply of electrical energy as one would expect to find in a law dealing with electricity. The Act did not also make any provision for the incorporation, regulation, or winding up of a trading corporation. On the contrary, it was abundantly clear from the long title, the preamble and the sections, that it was in pith and substance nothing but an Act proving for the acquisition of an electrical undertaking. His Lordship observed:

> "...although Parliament expressly entrusted the Provincial Legislature with power to make a law with respect to compulsory acquisition of land it did not straightaway grant any power, either to the Federal Legislature or the Provincial Legislature, to make a law with respect to compulsory acquisition of a commercial or industrial undertaking but left it to the discretion of the Governor-General to empower either of the Legislatures to enact such a law. There is no suggestion that the Governor-General had, in exercise of his discretionary powers under Section 104, authorised the Madras Legislature to enact the impugned Act and, therefore, the Act was, 'prima facie', beyond the legislative competency of the Madras Legislature".[16]

7.15 The case is important for this chapter because a serious attempt to read the power of compulsory acquisition of any property, land or commercial or industrial undertaking,

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15. Mahajan C.J., Mukherjea, Bose and Ghulam Hasan JJ. were the other members of the Bench.
16. Ibid at p.253.

as an ancillary or incidental power available under every entry of legislative power was made here. The Supreme Court did not uphold this argument on the ground that the power of compulsory acquisition of land given by entry 9 of the Provincial Legislative List would in that case be superfluous. Since the power of acquisition could not be read as incidental to an entry of legislation and since no power of acquisition had been conferred on the Federal Legislature by a specific entry, and since the only specific power of acquisition conferred on Provincial Legislature was in respect of the compulsory acquisition of land, there was no power either in the Federal or Provincial Legislature for the compulsory acquisition of industrial or commercial undertaking. As there was no authorisation under section 104, the Provincial Act was ultra vires, and hence the decision of the Madras High Court was reversed.[17]

The result of the scrutiny of the cases

7.16 From the above cases under the Government of India Act the following propositions may be held to have emerged.

Firstly, the presence of section 104 reserving residuary powers at the command of the Governor-General would

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17. The Madras Electricity Supply Undertakings (Acquisition) Act, 1954 (29 of 1954) retrospectively validated the Act of 1949 and the proceedings taken thereunder thus rendering the decision of the Supreme Court ineffective. In M/s. West Ramnad Electric Distribution Co. Ltd. v. The State of Madras, A.I.R. 1962 S.C. 1753, the Supreme Court upheld the validity of the 1954 Act.

make it unnecessary for the courts to strain to locate a legislative power either in the Federation or in the Provinces. Secondly, the usual rules regarding the interpretation of entries, namely, of allowing the plenary power and incidental and ancillary powers, would be valid even though there is this residuary power. Thirdly, if two interpretations are possible, one of which will sustain the validity of an Act without reference to the residuary powers that should be preferred.

UNDER THE CONSTITUTION 1950

7.17 As noted earlier, the Constitution of India has specifically vested the residuary power as an exclusive head of power in the Union by entry 97 of List I of the Seventh Schedule and article 248 of the Constitution. The ad hoc allocation of residuary power by the Governor-General as in the case of the Government of India Act, 1935 has therefore been discarded. Though in view of the exhaustive enumeration of subjects in the Lists it was thought[18] that the role of the residuary power was an extremely limited one, events have proved that this has not been so. The residuary power has been increasingly pressed into service in connection with the

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18. For example, T.T. Krishnamachari said in the Constituent Assembly: "Now if you ask me why we have really kept the residuary power with the Centre and whether it means anything at all, I will say that it is because we have gone to such absolute length to enumerate the powers of the Centre and of the States and also the powers that are to be exercised by both of them in the concurrent field.... I think the vesting of the residuary power is only a matter of academic significance today". C.A.D. Vol.XI, p.953.

resolution of conflicts of power between the Union and the States. The chief uses of the residuary power as evidenced by the case-law are dealt with below.

As an alternate ground to sustain Union power

7.18 It is well-known that the grant of legislative power carries with it all necessary ancillary powers. In certain cases when the power of the Union was challenged and it could have been sustained on the doctrine of ancillary powers, the availability of the residuary power has lent an additional argument to support the Union power.

7.19 In Abraham v. Assistant Sales Tax Officer[19] the question was whether animals and birds in captivity (monkeys, minas and parrots in the instant case) could be treated as movable property and as 'goods' within the meaning of section 2(d)[20] of the Central Sales Tax Act, 1956. P.T. Raman Nair J. held that the animals and birds in captivity were 'goods' within the section 2(d) of the Central Sales Tax Act 1956. Even if it were assumed that animate things did not come within the definition of article 366(12)[21] of the Constitution, and the sale in question would not fall within entry 54[22] of List II or

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19. A.I.R. 1960 Ker. 360.
20. 2(d)- "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and certificates.
21. Article 366(12): "goods" includes all materials, commodities, and articles.
22. 54- Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

entry 92A[23] of List I, it would come within entry 97 of List I, namely the 'residuary' entry. To levy a tax on such sale would be within the competence of Parliament. One would suggest that the ratio decidendi of the decision is to be based on the second holding.

7.20 In M/s. Rungta Engineering & Construction Co. Ltd. v. Income Tax Officer[24] it was argued that Parliament had no power to enact the Income Tax Amendment Act, 1954 (33 of 1954) which introduced sub-sections 1-A to 1-D in Section 34 of the Income Tax Act making escaped income in respect of periods prior to Indian Independence liable to assessment. Bachawat J. held that the tax in question would still be a tax on income within the meaning of entry 82 of List I. Even if it were assumed that it was not a law with respect to income tax, since the Act in question was not a law with respect to any matter enumerated in the Concurrent List or the State List, the Parliament had the legislative competence to pass the Act under residuary powers.

7.21 Similarly, in Lakshmana v. Additional Income Tax Officer[25], the validity of sections 2(6A)(a) and 12(1B) of the Income Tax Act, 1922 (as amended by the Finance Act, 1955)

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23. 92A- Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
24. A.I.R. 1960 Cal. 619.
25. A.I.R. 1961 Mad. 146.

entry 97 of List I and went on further to state that there was no objection for the Parliament incorporating the provisions under the Income Tax Act which called for the exercise of power under two or more entries in List I. This it is respectfully submitted is bad advice, for, it encourages clumsy legislation. Of course nothing prevents Parliament from clubbing together provisions regarding preventive detention under entry 9, List I, and preventive innoculation for inter-State quarantine under entry 81, List I, in one law on the ground that it has competence under the Constitution; but none should encourage the practice. These thoughts must have prompted Hidayatullah J. for, in his concurrent judgment he held that the annuity deposit scheme was in pith and substance referrable to entry 82 relating to taxes on income and incidental matters, and there was no need to resort to residuary powers and thereafter he made the following observations regarding the use of residuary powers:

> "The very frequent reliance on entry No.97 makes me say these few words. That entry, no doubt, confers residuary powers of legislation or taxation but it is not an entry to avoid a discussion as to the nature of a law or of a tax with a view to determining the precise entry under which it can come. Before recourse can be had to entry No.97 it must be found as a fact that there is no entry in any of the three Lists under which the impugned legislation can come. For if the impugned legislation is found to come under any entry in List II, the residuary entry will not apply. Similarly, if the impugned legislation falls within any entry in one of the other two Lists recourse to the residuary entry

will hardly be necessary. The entry is not a first step in the discussion of such problems but the last resort. One cannot avoid the issue by taking its aid unless such a course is open. It is always necessary to examine the pith and substance of any law impugned on the ground of want of legislative competence with a view to ascertaining the precise entry in which it can come. The entries in the three Lists were intended to be exhaustive and it would be a very remote chance that some entry would not suit the legislation which is impugned".[27]

7.23 A challenge to the validity of the Payment of Bonus Act, 1965 was repelled by the Supreme Court. It was held that the power of the Parliament to fix minimum bonus flowed from its jurisdiction over industrial and labour disputes, welfare of labour including conditions of work and wages. The court did not hold that the fixation of minimum bonus was legal under any of the above powers. But then it added that if the above powers were held to be insufficient, the residuary powers of the Parliament must lend validity to the Act.[28] One wonders whether this is going to be a refrain in this class of cases.

7.24 The competence of the Parliament to introduce section 2-A in the Industrial Disputes Act, 1947 by the Amendment Act of 1955 (35 of 1955) according to which the dismissal

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27. Ibid, at p.624. That the learned judge is not averse to make legitimate use of the residuary power is clear from Second Gift Tax Officer, Mangalore v. D.H. Nazareth, A.I.R. 1970 S.C. 999. See para 7.33 infra.
28. Jalan Trading Co. v. Mill Mazdoor Sabha, A.I.R. 1967 S.C. 691.

etc. of an individual workman could be deemed to be an industrial dispute, was upheld by the Madras[29] and Delhi[30] High Courts. It was held that the Act was sustainable under entry 22 of List III and that even if entry 22 of List III was held not wide enough to treat an individual dispute an industrial dispute, the Parliament could enact the amendment in question in exercise of its residuary powers.

7.25 The challenge to the validity of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 (No.32 of 1966) in M/s. C.P. Patel v. State of Maharashtra[31] was repelled by Deshmukh J. on the ground that the impugned Act fell principally under entry 24[32] of List III, and partly under entries 7, 22 and 23 of the same list. Hence it was unnecessary to resort to the residuary entry. However, if it were necessary to resort to residuary entry it would undoubtedly cover the legislation in question.

7.26 Criticising the Supreme Court's opinion in the Berubari opinion[33] that the territory of India could be transferred to a foreign power only by a constitutional

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29. T.V.S. Iyengar & Sons v. State of Madras, A.I.R. 1970 Mad. 82.
30. Fedders Lloyd Corporation Private Limited v. Union of India A.I.R. 1970 Del. 60.
31. A.I.R. 1971 Bom. 244 at Nagpur.
32. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
33. Reference by President under article 143(1), A.I.R. 1960 S.C. 845.

to agrarian reforms. In 1956 Himachal Pradesh was merged in Punjab and article 240 of the Constitution was amended. The Parliament passed the validating Act in question with a view to save the agrarian reforms enacted by the irregularly constituted Assembly of Himachal Pradesh. The Supreme Court upheld the validity of the Act on the ground that legislation seeking to remove the disability of members of a Legislative Assembly of a Part C State arising because of the failure to issue a notification under the Representation of People Act was not covered by any item in the Concurrent List or in the State List and hence it was covered by the residuary power of the Union Parliament under entry 97 of List I.

7.28 In Pio Fernandes v. Union of India[36] the validity of the Goa, Daman and Diu (Opinion Poll) Act, 1966 was challenged. Jetley J.C. held that the decision of the Supreme Court in Mithan Lal v. State of Delhi[37], that in the case of Part C State, Parliament had under article 246(4) of the Constitution power to make laws on any matter notwithstanding that such matter was included in State List, applied to the case on hand. Therefore, though there was no specific entry in the Lists regarding opinion poll, Parliament had the power to enact the Act in question under the residuary power and under article 246(4).

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36. A.I.R. 1967 Goa 79.
37. A.I.R. 1958 S.C. 682.

Power of constitutional amendment as residuary power

7.29 In L.C. Golaknath v. State of Punjab[38] the Supreme Court had held that the power of the Parliament to amend the Constitution was derived from article 248 read with entry 97 of List I and that article 368 dealt only with the procedure for amendment. However, in view of the 24th Amendment of the Constitution and the Supreme Court's pronouncement in Kesavan Bharathi v. State of Kerala[39], article 368 should be held to include both the power and procedure for amendment and there is no case for invoking a residuary power for constitutional amendment. It is also doubtful whether the residuary power can be relied upon by Parliament to call a new Constituent Assembly for the purpose of constitutional revision.

A State Act challenged as violating the residuary power

7.30 The foundation of the Calcutta City Civil Courts was questioned in this case by attacking the vires of the Calcutta City Civil Court Act, 1953 (No.xxi of 1953) and of the amendment of 1969 conferring additional jurisdiction.[40] It was contended that under article 247 of the Constitution only Parliament had the power to set up additional courts, or that such a power belonged to Parliament under the residuary powers. Sabyasachi Mukherjee J. for the Division Bench, confirming P.K. Banerji J., held that the Act in question was

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38. A.I.R. 1967 S.C. 1643.
39. A.I.R. 1973 S.C. 1461.
40. Indu Bhusan De v. State of West Bengal, A.I.R. 1972 Cal. 160.

covered by expressions "administration of justice" and "constitution and organisation of courts" in entry 3 of the State List. It was also pointed out that resort to residuary power should be made only as a last refuge and that where two constructions were possible one of which would avoid resort to residuary power, and the other would not, the former should be preferred.

RESIDUARY TAXING POWERS

7.31 The maximum use of the residuary powers has been made in the field of taxing powers. Since taxing powers have been specifically mentioned in the Lists such a power cannot be inferred as ancillary or incidental to any other entry relating to legislation. Again, taxing powers have been given only in the exclusive fields and there is no taxing power in the concurrent field. These factors seem to have made the resort to the residuary power for sustaining the validity of taxing measures. The chief uses of residuary powers in these fields are discussed below.

Gift tax

7.32 The competence of the Parliament to enact the Gift Tax Act, 1958 (18 of 1958) for levying a tax on gifts of agricultural land was sustained by the Kerala[41] and Madras[42] High Courts, on the basis of the residuary powers. Both these

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41. M.T. Joseph v. Gift Tax Officer, A.I.R. 1962 Ker. 97.
42. Dandapani v. Additional Gift Tax Officer, A.I.R. 1963 Mad. 419.

High Courts held that the power to impose a tax on gift of agricultural land could not be held to be incidental to the power to legislate with respect to land under entry 18 of List II. Nor could that power be comprehended within entry 47 of List II relating to duties in respect of succession to agricultural land. In Shyam Sunder v. Gift Tax Officer[43] on a similar reasoning, the Allahabad High Court held that a tax on land and buildings was distinctly different from a tax on gift of land, and that legislation in respect of a tax on gift of land and buildings would not fall under entry 49 of List II, namely, tax on land and buildings. The Gift Tax Act was validly passed by Parliament under article 248 read with entry 97 of List I.

7.33 However, in D.H. Nazareth v. Gift Tax Officer[44], the Mysore High Court held that the power to levy a gift tax on lands and buildings, particularly on agricultural land (gift of coffee plantation in the instant case) was reserved to the State Legislature under entries 18 and 49 of List II, and that Parliament had no power to do so under entry 97 of List I. On appeal by the Government, the Supreme Court reversed the decision of the Mysore High Court.[45] Hidayatullah C.J. held that the entries in the Lists did not follow a logical classification or dychotomy, and must be regarded as enumeratio simplex of broad categories bound to overlap occasionally.

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43. A.I.R. 1967 All. 19.
44. A.I.R. 1962 Mysore 269.
45. Second Gift Tax Officer, Mangalore v. D.H. Nazareth, A.I.R. 1970 S.C. 999.

It was usual to examine the pith and substance of the legislation in solving questions about legislative competence. If the legislation was not covered by any entry when examined in that fashion, it would belong to the residuary power.

7.34 In Sudhir Chandra Nawn v. Wealth-Tax Officer, Calcutta[46] it was held that entry 49 of List II referred to a tax on the ownership of lands and buildings and not to a tax, like wealth tax, where lands and buildings were taken only as a measure. This decision must be held to have impliedly overruled the judgment of the Mysore High Court under appeal. Sustaining the validity of the Gift Tax Act, 1958 under the residuary power the learned Chief Justice observed:

> "The pith and substance of Gift Tax Act is to place the tax on the gift of property which may include land and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in an year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Indeed the lands and buildings are valued to find out the total amount of the gift and what is taxed is gift. A gift tax is thus not a tax on lands and buildings as such which is a tax resting upon general ownership of lands and buildings but is a levy upon a particular use, which is transmission of title by gift. The two are not the same thing and the incidence of tax is not the same. Since Entry 49 of State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament.

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46. A.I.R. 1969 S.C. 59.

There being no other entry which covers, the residuary powers of Parliament could be exercised to enact a law".[47]

Excise duty on the use of rubber

7.35 In M/s. Jullundur Rubber Goods Manufacturers' Association v. Union of India[48] the validity of the Rubber Amendment Act, 1960 (xxi of 1960) by which the excise duty payable under the Rubber Act, 1947 could be collected by the Rubber Board either from the owners of estates or from the manufacturers by whom the rubber was used, was challenged. It was contended that the levy of an excise duty from the manufacturers or users of rubber was outside the ambit of entry 84 of List I under which excise duty could be levied on goods manufactured or produced in India. The appellants were an association of chappal manufacturers who used rubber for the manufacture of chappals. The Supreme Court speaking through Grover J. held that excise duty was primarily a duty on the production or manufacture of goods within the country with its ultimate incidence on the consumer, and could be levied at any convenient stage. What was called excise duty on the use of rubber "will be a kind of non-descript tax which has been given the nomenclature of the duty of excise"[49], which the Parliament could validly impose under the residuary powers.

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47. Ibid, at p.1002.
48. A.I.R. 1970 S.C. 1589.
49. Ibid, at p.1593.

Irregular sugarcane cess levied by State

7.36 The residuary powers have been pressed into service even for sustaining, though indirectly, the irregular exercise of taxing power by the States. In Diamond Sugar Mills Limited v. State of U.P.[50], it may be recalled[51], the Supreme Court held that the premises of a factory was not a "local area" within the meaning of entry 52[52] of List II. The Uttar Pradesh Sugarcane Cess Act, 1956 which had levied cess on the entry of cane into the premises of a factory for use, consumption or sale therein on the basis that the premises of a factory was a 'local area' was therefore struck down. On the basis of this decision, the M.P. High Court struck down the M.P. Sugarcane Regulation of Supply and Purchase Act, 1958 (No.1 of 1959) which had levied a similar cess. The Central Act, the Sugarcane Cess (Validation Act) 1961 (No.38 of 1961) was passed which by section 3 validated levy of a cess on sugarcane under 10 Acts in 7 States including the one under the M.P.Act.

7.37 In Jaora Sugar Mills v. State of M.P.[53] the validity of the central legislation was questioned. Gajendragadker C.J. delivering the judgment of the Supreme Court held that section 3 of the Central Act did not merely validate the invalid State Acts, because it would not have been competent for Parliament

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50. A.I.R. 1961 S.C. 652.
51. See para 2.10 ante.
52. "Taxes on the entry of goods into a local area for consumption, use or sale therein".
53. A.I.R. 1966 S.C. 416.

to confer jurisdiction on State Legislatures in that way, but had included all the States and Notifications in the Central Act at all material times by virtue of section 3. Parliament had the power to levy the cess as had been levied in the invalid State Acts, under article 248 read with entry 97 of the List II.

This case shows that the Union can always, if it is so disposed, go to the rescue of the State to sustain invalid State legislation by invoking the residuary powers. This really adds a new dimension to co-operative federalism.

Sales tax on works contract

7.38 In State of Madras v. Gannon Dunkerley & Co.[54] the Supreme Court had upheld as we have already seen,[55] the judgment of the Madras High Court that under entry 48 of List II of the Government of India Act, 1935 (entry 54 of List II of the Constitution) a Province could not levy a sales tax on the materials used in building contract as there was no sale as defined in the Sale of Goods Act. But this decision given on a statute passed by the Provincial Legislature under the Government of India Act, 1935 had no application to a Part C State even when the Provincial law extended to a Part C State. Under section 2 of the Part C States (Laws) Act 1950, Bengal Finance (Sales Tax) Act, 1941 was extended to Delhi, the effect of which was to levy a sales tax on building contract. This

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54. A.I.R. 1958 S.C. 560.
55. See para 2.11 ante.

extension was challenged on the basis of the Gannon Dunkerley decision. T.L. Venketarama Iyer J. held that in the case of Part C States there was no need to invoke the residuary taxing power referred to in article 248(2) which had application only as between the Union and the States mentioned, in Parts A and B, and that in the case of Part C State, Parliament had competence to enact under article 246(4) a law levying a sales tax on works contract and it was immaterial if the result was achieved by an enactment of the Parliament or by extending a Part A State Act under the Provisions of the Part C States (Laws) Act, 1950.[56]

7.39 Similarly resort to the residuary power is unnecessary in the case of some pre-constitution laws on taxation. The validity of the Travancore-Cochin General Sales Tax Act (published in the Gazette on 17-1-1950 and came into force on 30-5-1950) was called in question. It had defined sale for the purpose of sales tax to include "a transfer of property in goods involved in the execution of a works contract". The Act was challenged as ultra-vires based on the Gannon Dunkerley decision. Ansari C.J. held that the Union Parliament was competent to levy sales tax in question under the residuary powers under entry 97 of List I. The T.C. Act though came into operation after the Constitution came into force was passed before the Constitution and was saved by article 372. Hence under article 277 a State could

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56. Mithan Lal v. State of Delhi, A.I.R. 1958 S.C. 682.

continue to levy the sales tax until a contrary provision was made by Parliament.[57]

Expenditure tax

7.40 The Andhra Pradesh High Court upheld the validity of Expenditure Tax Act, 1957 as expenditure tax which was not specifically provided for in any of the entries in List II or List III, was within the ambit or scope of entry 97 of List I.[58] So long as it was a tax on expenditure, the mere fact that in furtherance of the legislative intent and object, the expenditure on which the tax was sought to be levied was not necessarily confined to the expenditure actually incurred by the assessee himself (in this case it had included the expenditure of his wife) did not render it other than an expenditure tax. On appeal, the Supreme Court upheld the validity of the Expenditure Tax Act, 1957 on the ground that it did not fall within entry 62[59] of List II, but under the residuary powers.[60]

Wealth tax

7.41 There was a conflict of decisions in various High Courts regarding the validity of the Wealth Tax Act, 1957.

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57. South India Corporation v. Secretary, Board of Revenue, A.I.R. 1962 Ker. 72 F.B.
58. Azam Jah v. Expenditure Tax Officer, A.I.R. 1970 A.P. 86.
59. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.
60. Azam Jah v. Expenditure Tax Officer, A.I.R. 1972 S.C. 2319.

In Jugal Kishore v. Wealth Tax Officer,[61] Special Circle it was held by the Allahabad High Court that section 3 of the Wealth Tax Act, 1957 which imposed a wealth tax on Hindu undivided family was intra-vires the Parliament under article 248 read with entry 97 of the List I. Jagdish Shah J. held that a Hindu undivided family was included in the term 'individual' in entry 86 of List I and, if not, the tax on Hindu undivided family was sustainable under article 248 read with entry 97 of List I. Gurtu J. held that entry 86 did not include Hindu undivided family and hence the Act had to be sustained on the residuary power. Upadhya J. however, held that the word "individual" in entry 86 did not include a Hindu undivided family. What had been left out of entry 86 could not be included in the residuary power. The Wealth Tax Act should therefore be declared ultra-vires the powers of the Parliament.

7.42 An argument that the levy of wealth tax on Hindu undivided family would not be covered by entry 86 of List I was repelled by the Bombay,[62] Andhra Pradesh,[63] Kerala[64] and Mysore[65] High Courts. Before the Kerala High Court an argument that entry 46[66] of List II or entry 49[67] of List II was attracted by the

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61. A.I.R. 1961 All. 487 (F.B.).
62. Mahavirprasad Bhadridas v. Yagnik, Second Wealth Tax Officer, A.I.R. 1960 Bom. 191.
63. N.V. Subrahmanyam v. Wealth Tax Officer, A.I.R. 1961 A.P. 75 and P. Ramabhadra Raju v. Union of India, A.I.R. 1961 A.P. 355.
64. C.K. Mammad Kevi v. Wealth Tax Officer, A.I.R. 1962 Ker.110.
65. Sarjirao Appasaheb Shitole v. Wealth Tax Officer, 52 I.T.R. 372.
66. "Taxes on agricultural income".
67. "Taxes on lands and buildings".

Wealth Tax Act was rejected. There was no tax on agricultural income as such but only on the net wealth. A tax on land and building referred to in entry 49 of List II, based on the annual or capital value was only a measure adopted to ensure the justness or reasonableness of the levy. In the case of a tax on the capital value under entry 86 of List I such value itself was the base or object of the levy. In all these cases the courts thought that it was not necessary to uphold the validity of the Wealth Tax Act on the alternative ground urged by the Government, viz., that the Act could be sustained under residuary powers. In Banarasi Dass v. Wealth Tax Officer[68] the Supreme Court held that capital value of assets of individuals in entry 86 of List I included Hindu undivided family. It was held in subsequent cases that a tax on the capital value under entry 86 of List I would not come under entry 49 of List II. The former one was not directly on lands and buildings, but only on the capital value of assets, which might include lands and buildings, whereas the latter one was a direct tax on lands and buildings even if the capital value was adopted as a measure of tax. Hence the two fields of legislation referred to by the two entries did not overlap.[69]

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68. A.I.R. 1965 S.C. 1387.
69. See para 6.35 ante and the decisions of the Supreme Court in Assistant Commissioner of Urban Land Tax v. Buckingham Carnatic Co. Ltd., A.I.R. 1970 S.C. 169 and in Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta, A.I.R. 1969 S.C. 59.

7.43 In Union of India v. H.S. Dhillon[70] the competence of Parliament to include the capital value of agricultural land for the purpose of computing net wealth for the imposition of the wealth tax was in question. The pronouncement of the Supreme Court in this important case by a bench of seven judges of the Supreme Court[71] has given a new approach in the interpretation of the Legislative Lists.

7.44 The Finance Act, 1969 amended the Wealth Tax Act, 1957 and included the capital value of agricultural land for the purpose of computing net wealth. The Punjab and Haryana High Court held that the amendment was beyond the legislative competence of Parliament in view of the specific exclusion of agricultural land in entry 86 of List I. The majority of the Supreme Court noted that though agricultural land was specifically excluded in entry 86 of List I it did not fall within any entry in the State List. It was noticed that all the matters and taxes which had been excluded from List I, except tax on the capital value of agricultural land under entry 86 of List I, fell specifically within one or other of the entries in List II. Thus while taxes of agricultural income was excluded from entry 82 of List I they were included in entry 46 of List II, duties of excise excluded in entry 84 of List I were included in entry 51 of List II, agricultural

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70. A.I.R. 1972 S.C. 1061.
71. Sikri C.J., S.C. Roy and D.G. Palekar JJ. (majority), G.K. Mitter, J. (concurring), and J.M. Shelat, A.N. Ray and I.D. Dua JJ. (dissenting).

land exempted in entry 87 of List I was included in entry 48 of List II and agricultural land exempted from the incidence of duties in respect of succession to properties was included in entry 47 of List II. It was really not the exclusion of an item from enumerated entries in List I that denied the competence to the Union to legislate with respect to that matter but its inclusion in the State List.

7.45 In support of this position, a reference was made to the Constituent Assembly Debates and in particular to the speech of Shri T.T. Krishnamachari[72] to the effect that after the exhaustive enumeration of the fields of legislation in the Lists there seemed to be only one power left out, which could be exercised under residuary power in future, namely, the capital levy on agricultural land.

7.46 The conclusion was also supported on the analogy of the Canadian Constitution which with regard to the division of powers was similar to the one adopted in the Constitution. In the case of a doubt whether a particular power was available to the Parliament of Canada the question to be asked was whether it belonged to the Province. If the power did not belong to the Province it would belong to the Dominion. So was the case in India too. If a particular power did not belong to the State it should necessarily be with the Union. The fact that a particular item was excluded from the enumeration of powers in the Union List would not alter this

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72. C.A.D. Vol. XI, 952-54.

position as there could not be a category of powers which did not belong either to the State or to the Union. No subject was kept outside the full legislative sovereignty shared between the Union and the States. Once it was decided that a tax on the capital value of agricultural land could not come within entry 49 of List II, such tax should belong to the Union.

7.47 The majority also distinguished between a tax on the capital value of assets which would come within entry 86 of List I and a tax on wealth. In the case of the former tax though there should be aggregation it was not necessary to provide for the deduction of debits in ascertaining the capital value of assets whereas in the case of a wealth tax (ie, a tax on the net wealth of a person) there should be provision for the deduction of the general liabilities of the person and the liabilities in respect of particular assets.

7.48 G.K. Mitter J. in his concurring judgment held that the expression "capital value of assets" could only mean the market value of assets less any encumbrances charged thereon. The expression did not take in either the general liabilities of the individual owning them or in particular the debts owned in respect of them. The subject-matter of legislation by Wealth Tax Act was therefore not covered by entry 86 but by entry 97 of List I. Article 248(1) also made it clear beyond doubt that "any other matter" in entry 97 were those not covered by entries in List II or III.

7.49 J.M. Shelat, A.N. Ray and I.D. Dua JJ. delivering a dissenting judgment held that the amending Act fell under

entry 86 of List I and not under the residuary power under article 248 read with entry 97 of List I. The basis of the wealth tax was the capital value of the assets held by an assessee on the relevant valuation date. The fact that a particular tax included one or more of the assets such as agricultural land or allowed from its incidence certain deductions such as, debts and liabilities, pertained to the field of computation and the true basis of the tax was the capital value of the assets. A valid tax including agricultural land could not be imposed under entry 86 which was the only entry authorising such a tax in view of the specific exclusion of agricultural land. They also doubted the support derived from the analogy to the Canadian Constitution and the reference to the Constituent Assembly Debates.

7.50 It may be seen that the minority judgment has not answered the question whether a wealth tax on agricultural land would come within the State's sphere. Exclusion from a particular entry in the Union List would not by itself take it outside the Union's purview unless the power would come within the State's sphere. Therefore, the minority judgment, it is submitted, has not answered a basic question connected with the distribution of powers as there cannot be a power which does not belong to the Union and to the States. The position now reached by judicial interpretation is the same as the one envisaged by Alladi Krishnaswamy Ayyar when he suggested a redrafting of the provisions of the draft Constitution governing the distribution of powers, after it become

known that the residuary powers would be vested in the Centre, and which was given up on the assurance of Dr. Ambedker that an elaborated enumeration of the central power was necessary for the information of the States intending to accede to the federation.[73] Hereafter any question regarding the competence of the Union power should be answered by asking whether the power in question really belongs to the State. If it does not, then it belongs to the Union. Entries 1 to 96 in the Union List are only illustrative of the residuary powers vested in the Union Parliament and may be of some assistance in defining the enumerated powers in the State List or Concurrent List.

7.51 It is interesting to compare this landmark decision with the decision of the High Court of Australia in the famous Engineer's Case[74] where it was held that "the specific grant of power must be defined before the residue can be defined"[75]. Now any question about the Union power, which in fact is a residuary power, would raise the question: "residue of what?", and would invite the answer: "the residue of what has been given to the States". Hence the logical step in determining a question about the Union power would be to enquire whether the power in question belongs to the State. Specific enumeration in the Union List in entries 1 to 96 may be helpful in determining the extent of the specific grant of power to the State and hence

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73. See para 7.3 ante.
74. (1920) 28 C.L.R. 129.
75. See Sir Rober Menzies, Central Power in Australian Commonwealth (1967), pp.26-48.

of the residuary powers of the Union. The stand that resort to the residuary power may be had only when all the category of enumerated powers in the three Lists have been exhausted is no longer valid.

RESIDUARY POWER AND COLOURABLE LEGISLATION

7.52 The presence of residuary power has sometimes refuted arguments based on colourable legislation. Thus it was held that Parliament had under the residuary powers the power to legislate in respect of compulsory deposits[76], to order opinion poll in Goa[77], levy a sugarcane cess and thereby to validate the irregular levy by the State[78]. An argument that Parliament tried to do indirectly what it could not do directly was not accepted as the competence of the Parliament was sustainable under the residuary power.

THE RESIDUARY POWER AND THE DOCTRINE OF OCCUPIED FIELD

7.53 Since the residuary power is an exclusive power there is no scope for applying the doctrine un-occupied field. In other words, even if the Parliament has not occupied the residuary field by its legislation there is no question of the States occupying the field. Such a step on the part of a State would be ultra-vires its legislative competence. In fact no such case seems to have ever come up in which the

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76. A.I.R. 1966 S.C. 619.
77. A.I.R. 1967 Goa, 79.
78. A.I.R. 1966 S.C. 416.

States sought to justify their exercise of legislative powers on the basis of the doctrine of unoccupied field in residuary powers.

CONCLUSION

7.54 The residuary powers which were supposed to have very limited scope in view of the elaborate enumeration of the topics of legislation in the three Legislative Lists in the Constitution have turned out to be not so limited. Particularly, in the field of taxation, the resort to residuary powers to justify wealth, gift, expenditure etc. taxes shows that it has added a new dimension to the Union power. Since the important decision of the Supreme Court in Union of India v. H.S. Dhillon[79], a new approach in the constitutional interpretation of the legislative entries has been opened. Hereafter there is no need to justify the exercise of Union power on the basis of one or more entries in the Union List, all that is enough is to show that the power in question does not belong to the State. This logical way of approach to the entries has really rendered superfluous the detailed enumeration of powers in List I though it may still serve some purpose in showing the scope of Union's residuary powers and for determination of the scope of the specifically enumerated powers in the state and concurrent fields.

7.55 It is well-known that in interpreting the provisions of sections 91 and 92 of the Canadian Constitution containing

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79. A.I.R. 1972 S.C. 1061.

the distribution of powers the Privy Council gave primacy only in respect of the specifically enumerated powers referred to in section 91. Though the general residuary power of the Dominion was also entitled by the constitution to the same status as its enumerated exclusive powers, in the case of a conflict between the enumerated Provincial power in section 92 and the general residuary power of the Dominion in section 91, the Privy Council gave primacy to the former. Added to this the extended interpretation of "Property and Civil Rights" in section 92 has transferred in effect the residuary power from section 91 to section 92. In India, the residuary power has received its due constitutional treatment, as an exclusive Union power which has primacy over the State and Concurrent powers. It is unlikely that a position similar to that of Canada will develop in India with regard to the residuary powers. The residuary power in India has sharpened further the dominant position of the Centre. It is hoped that it will not encourage careless drafting of Union legislation.

# CHAPTER VIII

## IMMUNITY OF INSTRUMENTALITIES

### SCOPE OF THE DOCTRINE

8.1 In a federal system of government where the federation and the units are given independent and limited legislative powers it is necessary that each refrain from interfering with the activities of the other, or from destroying the other's existence by the exercises of its taxing powers. This principle of mutual tolerance and non-interferenc is called the doctrine of immunity of instrumentalities.[1] This is also sometimes described as the doctrine of implied prohibitions as the powers of each should be construed as subject to such an implied limitation.

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1. This was first enunciated by Marshall, C.J. in McCulloch v. Maryland, (1819) 4 Wheat. 316 where it was held that the State of Maryland could not tax a federally chartered bank. This doctrine which received extended application has, of late, been very much restricted, practically to strictly governmental functions. For example, see New York v. U.S., (1946) 326 U.S. 572 where a federal tax on State sale of mineral waters was upheld.

   In Australia the doctrine was initially applied in D'Emden v. Pedder, (1904) 1 C.L.R. 91 but given up in Amalgamated Society of Engineers Limited v. Adelaide Steamship Co. Ltd. (Engineers Case), (1920) 28 C.L.R. 129 and South Australia v. The Commonwealth (First Uniform Tax Case), (1942) 65 C.L.R. 373, but revived to some extent in Melbourne Corporation v. The Commonwealth (State Banking Case), (1947) 74 C.L.R. 31 and Victoria v. Commonwealth (Second Uniform Tax Case), (1957) 99 C.L.R. 575.

   In Canada the doctrine was rejected in Bank of Toronto v. Lambe, (1887) 12 A.C. 575.

IMMUNITY IN THE FIELD OF TAXATION

8.2 In India the question of such immunity has a. n with reference to the taxing power. However, in the case of clear Constitutional provisions the scope for applying the immunities from general principles has been very much reduced. The property of the Union, subject to Parliamentary permission, is exempt from tax imposed by a State.[2] The property and income of a State are exempt from Union taxation; but property and income used for trading activities (other than those declared by Parliament to be incidental to governmental functions) are not exempt.[3] The States are prohibited from levying, unless otherwise provided by Parliament, a tax on electricity consumed by the Government of India or the Railways.[4] States are also prohibited from taxing without the President's sanction water or electricity from an inter-State river or river-valley.[5]

8.3 The scope of the exemption of State property and income from Union taxation was considered by the Supreme Court in its advisory opinion in In re Sea Customs Act (1878) S.20(2).[6]

8.4 A Bill was proposed according to which the existing immunity from Union import and excise duties enjoyed by the States in respect of goods not used for purposes of trade or business was to be withdrawn by suitable amendments in the Sea Customs Act, 1878 and the Central Excise and Salt Act, 1944.

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2. Article 285 of the Constitution.
3. Article 289 of the Constitution.
4. Article 287 of the Constitution.
5. Article 288 of the Constitution.
6. A.I.R. 1963 S.C. 1760.

Since the States protested that this would be contrary to the immunity conferred by article 289 of the Constitution, the President sought the advisory opinion of the Supreme Court.

8.5 In a closely divided opinion, the Supreme Court upheld the proposed amendment. The majority opinion delivered by Sinha C.J.[7] held that the words 'property and income' exempt from Union taxation in clause (1) of article 289 referred only to direct taxes on property and on income, and not to indirect taxes such as import duty or excise duty. Though the immunity conferred on the Union from State taxation in article 285 and the immunity of the States from Union taxation as per article 289 were complementary in character, and construed in the light of the broad definition of taxation in article 366(28)[8] might refer to all kinds of taxes, the amplitude of the definition had to be cut down, if the context so required. The power to levy import duties and excise duties were very often used for the purposes of regulating foreign commerce and inter-State trade and commerce. If these powers were denied on the ground of State immunity it might seriously interfere with the regulatory power of the Union government. The import and excise duties collected by the Union government were shared with the States.

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7. On behalf of himself and Gajendragadker, Wanchoo and Shah JJ. Rajagopala Iyengar J. joined the majority in a separate concurring opinion.
8. Taxation includes the imposition of any tax or impost, whether general or local or special, and tax shall be construed accordingly.

8.6 S.K. Das J. in his dissenting opinion[9] referred to the comprehensive nature of the term property, the comprehensive meaning of the term taxation and the various taxes that may be imposed in relation to property in entries 82 to 92A of the Union List for taxing property as such, the tax on property referred to in clause (1) of article 289 could only mean a tax in relation to property, and not a tax on property directly imposed as held in the majority opinion. The majority opinion had held that even though the Union List did not provide for a direct tax on property the question of the Union levying such a tax would arise under article 246(4) in respect of the Union Territories. Touching this, the minority opinion said "it would be a case of much ado about nothing if the Constitution solemnly provided for an exemption against 'property tax' on State property only for such rare cases as are contemplated in article 246(4)"[10]. The supposed distinction between 'tax on property' and 'tax in relation to property' made out in the majority judgment was not material for the purpose of determining the extent of immunity conferred on the States.

8.7 Hidayatullah J. in his separate dissenting opinion held that the goods imported and goods produced were both property; the broad definition of taxation in article 366 should be applied to article 289 also and that there was

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9. Joined by Sarkar and Das Gupta JJ. Hidayatullah J. delivered a separate dissenting opinion.
10. Ibid at p.1784.

evidence in Section 20 of the Customs Act, that customs duty was a tax on property. Therefore, the States were immune from Union import and excise duties.

8.8 Rajagopala Ayyangar J. held that the distinction between 'a tax on property' and 'a tax on the production or movement of property' was material for the purpose of determining the scope of immunity conferred by article 289. He also thought that the history of article 289(2) showed that it could be of no assistance in interpreting the meaning of clause (1) of that article.

8.9 The majority opinion seems to be preferrable, though it has not fully spelt out the reasons for limiting the immunity of the States to direct taxes on property and income. It referred to the adverse effect on the regulation of trade and commerce which the broader meaning of the immunity canvassed on behalf of the State would imply. To a suggestion that the narrow construction might seriously affect the activities of the States, the majority opinion replied: "This argument does not take into account the more serious consequences that would follow if the wider interpretation suggested on behalf of the States were to be adopted"[11]. It went on to hold that the broader construction might nullify the exclusive power of Parliament to regulate foreign and inter-State trade and commerce. It seems that though this

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11. Ibid at p.1777.

may not be literally true there would be practical difficulty for evenly regulating trade and commerce if the broader immunity pleaded for the States was conferred. Thus, for example, in the interest of regulating consumption, and the conservation of foreign exchange resources, substantial import and excise duties have been imposed on petrol. If the petrol imported on State account were to be differently treated, it would give rise to practical difficulties. First of all, it has to be decided which are the governmental activities that would qualify for the use of the "immunity petrol". Then, there is the question that State and private activity have to compete on unequal terms. In such matters, it seems preferrable, that the State and the private consumers are on the same level.

8.10 No substantial reason apart from the broad interpretation of the Constitutional phraseology has been adduced in support of the immunity claimed for the State with regard to the taxes in question. The old argument of sovereign immunity is untenable. Immunity in respect of property and income can be justified as necessary for the purpose of the basic governmental functions. On a balance of considerations, the extension of this immunity to other indirect taxes does not seems to be called for.

8.11 Some writers have expressed the fear that the interpretation given by the majority might in turn adversely affect the powers of the Union, because on a parity of reasoning, the scope of the immunity in article 285 available to the Union

from State taxation would also be limited to a tax on property and that the States might impose other taxes on the activities and functions of the Union.[12] This fear is baseless for article 285 clearly says that the property of the Union shall be exempted from "all taxes" imposed by a State or by any authority within a State. The use of the word "all" before taxes can be construed to refer, not merely to direct taxes on property, but to all taxes in relation to property. Further, there is no need that the extent of the immunity for the Union and the States be the same. The Union has under its care the more vital functions of all India importance, like defence, and enjoys a special position which is unlike that of any one of the States. There is therefore no difficulty in conceding from a functional point, subject to Parliamentary legislation, complete immunity from State taxation to the property held by the Union for all its governmental functions.

8.12 The scope of the exemption in favour of the property and income of a State conferred by article 289(1) of the Constitution was further considered by the Supreme Court in Andhra Pradesh State Road Transport Corporation v. Income Tax Officer.[13] Immunity from Union income tax was claimed for the income received by the Road Transport Corporation. This corporation which had a separate personality had its stock contributed substantially by the State Government and to a

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12. G.C. Venkata Subba Rao, Indian Constitutional Law, Vol.I (1970), p.150.
13. A.I.R. 1964 S.C. 1486.

small extent by the Central Government with provision for participation by private citizens. The income received by such a corporation cannot be treated as the income of the State. The trading activity carried on by the corporation was not trading activity carried on by the State departmentally, nor was it a trading activity carried on by the State through its agents appointed in that behalf. By the provisions of clauses (2) and (3) of article 289, the income received from trading activity was also not exempt from Union taxation. Therefore, there was no scope for conferring on the Road Transport Corporation the immunity claimed for the income of the State.

POWER OF THE UNION TO ACQUIRE LAND VESTED IN A STATE

8.13 A very important question connected with the problem of immunity of instrumentalities came up for the decision of the Supreme Court in State of West Bengal v. Union of India.[14] The Coal Bearing Areas (Acquisition and Development) Act, 1957 (XX of 1957) provided, inter alia, for the acquisition by the Union Government of coal bearing lands vested in the State of West Bengal. The competence of the Union to so acquire the lands belonging to a State was challenged before the Supreme Court in a suit under article 131 of the Constitution.

8.14 The State of West Bengal claimed that it was a sovereign authority, and hence the Union had no authority to acquire its lands. Alternatively, it was contended that on a true construction of the Act in question, it should not be

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14. A.I.R. 1963 S.C. 1241.

held as applicable to a State on the principle that a State was not bound by a statute unless specifically mentioned. The Union of India denied that the State of West Bengal was a sovereign authority. The Parliament had declared that the regulation of coal mines and mineral development under the control of the Union were expedient in public interest. In the interest of rapid industrialisation, it was necessary to increase the production of coal. For this purpose it was necessary for the Union to acquire the coal bearing areas in question.

The majority judgment

8.15 Sinha C.J. in his majority judgment[15] held for the Union. From a scrutiny of the provisions of the Act it was seen that there was no restriction, express or necessarily implied, as contended by the State of West Bengal, that it did not apply to the lands of the State Government. The claim that the State of West Bengal was a sovereign authority was rejected on a scrutiny of the federal structure of the Constitution and the position of a state vis-a-vis the Union. The restrictions on the legislative, executive and taxing powers of the State, the fact that the separate existence of a State was subject to the power of Parliament under article 3, the absence of dual citizenship, and the absence of separate Constitution for the State, all combined to negative the claim for State sovereignty put forth by the State of West Bengal.

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15. Others joining him were S.J. Imam, J.C. Shah, N. Rajagopala Ayyangar and J.R. Mudholkar JJ.

The State Government's claim for immunity savoured of the exploded doctrine of immunity of instrumentalities.

8.16 The claim that the State of West Bengal was not bound by the Act in question in view of the principle that a State was not bound by an enactment unless specifically mentioned therein also was not sustainable. A State would also be bound by necessary implication. Since the Parliament was given the exclusive power under entry 54 to regulate development of coal mines, it should also be given the necessary ancillary powers for that purpose including the acquisition of the coal mines if considered expedient. Entry 42 of the Concurrent List which conferred on the Union the power of acquiring property contained no prohibition that the power should not be extended to State property. To read an implied limitation on the Union power excluding State property from its scope would be to deny the Union the means to realise its constitutionally entrusted powers. A reference to the case law in the United States of America, Australia and Canada also did not support the claim for State immunity put forth by the State of West Bengal.

The minority judgment—a criticism

8.17 K. Subba Rao J. delivered a dissenting judgment upholding the claim of the State of West Bengal. From a review of the provisions of the Constitution, he came to the conclusion that within their respective fields the Union and the States were supreme. The relations between the Union and the States

could not be found in the fields of legislation demarcated by the Lists, but could only be discovered in specific constitutional provisions forging links between them. The special powers given to the Union to act in State fields in special circumstances, like emergency, did not affect the scope of the States' powers in normal times.

8.18 He then proceeded to state that the power of acquisition by a State of private property for public purposes did not apply to the property of a sovereign. This stand is clearly based on assumption that in a State there is only one sovereign. In a unitary state, there may be no occasion for the sovereign to acquire its own property. Justice Subba Rao's statements that the power of eminent domain cannot apply to sovereign's property may thus be true of a unitary state. When the sovereignty is divided as in a federal state the statement would need qualification. If the property of a State which does not enjoyful sovereignty is required for the purpose of the Union, an argument that the principle of eminent domain cannot apply to sovereign can be of a little help. Of course, Justice Subba Rao's answer is that in such a situation the property of the State may be taken over by the Union only by agreement.

8.19 Regarding the position under the Government of India Act he said that if the federation or a province wanted the property owned by the other, it could secure it only under an agreement and not otherwise.[16] This conclusion is not correct.

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16. Ibid at p.1273.

According to section 127 of the Government of India Act, 1935, if the federation wanted the lands belonging to a province it could require the province to transfer it to the federation on such terms as might be agreed upon, or, in default of agreement, as might be determined by an arbitrator appointed by the Chief Justice of India. It is clear from this provision that the federation could require the transfer of land belonging to the province and what was subject to arbitration was only the terms of the transfer when no agreement could be reached. From this it is difficult to conclude that the federation could, under the Government of India Act, 1935 acquire provincial land only on the basis of an agreement.

8.20 He rightly rejected the reliance placed by the Union on the residuary power to sustain the acquisition in question. When there is a specific entry regarding acquisition it is not necessary to resort to the residuary power. But if the specific power is held not to comprehend the acquisition in question, then the case for resorting to residuary power would seem to be much stronger than what Justice Subba Rao made of it. The correct way would have been to hold that the specifically enumerated power included the power of acquisition in question.

8.21 Justice Subba Rao feared that there would be some anomalies in the working of the Constitution if the power of acquisition was conceded to the Union. One such anomaly was that the power of acquisition being in the Concurrent List the State could also acquire the property of the Union. He

thought the provisions of article 31(3) which made the President's assent necessary for the validity of a State acquisition law insufficient to resolve any conflict between the Union and the State in this regard. He simply held that since the article 31(2) did not apply, article 31(3) also did not apply to the case of acquisition by the State of Union property. Further, nothing prevented the President from giving assent to such a State law, though that might not happen normally. Similarly he thought that the paramountcy given to the Union law with regard to the legislation in the concurrent field under article 254(1) of the Constitution was also not sufficient to resolve possible conflict as under article 254(2) a State law could override a Union law with the President's consent. Though normally the President might not give such a consent, the President could legally give it.[17]

8.22 Another fear was that the Union might acquire the entire property of the State, including its offices and buildings, and prevent the State indirectly from functioning. He conceded that normally the Parliament might not be expected to do such a thing but "nothing will prevent it from doing so".[18]

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17. Here Justice Subba Rao was reflecting a view that the President has independent powers which he might exercise disregarding the advice of the Council of Ministers. This should be held to be settled by the Supreme Court pronouncement in Samsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192, wherein the Supreme Court held that the President and the Governors act on the advice of the Council of Ministers. The concurring judgment of V.R.Krishna Iyer J. is particularly illuminating.

18. Ibid at p.1274.

In fact an answer to this is contained in the majority judgment wherein Chief Justice Sinha repelled a similar argument by the Counsel for the State of West Bengal. Sinha C.J. observed:

> "It was urged that to hold that property vested in the State could be acquired by Union, would mean, as was picturesquely expressed by the learned Advocate General of Bengal, that the Union could acquire and take possession of writer's buildings where the Secretariat of the State Government is functioning and thus stop all State Governmental activity. There could be no doubt that if the Union did so, it would not be using but abusing its power of acquisition, but the fact that a power is capable of being abused has never been in law a reason for denying its existence for its existence has to be determined on very different considerations".[19]

8.23 Apart from the impossibility of preventing any abuse of power by judicial construction Justice Subba Rao's stand would seem to imply that the Indian Federation would be working only on the extremely narrow legalistic level. The entire political process which makes the federal government a living reality has been completely ignored in thinking that the Union would completely acquire State property and paralyse it. It is also clear that, in the last analysis, in relations between the State and the Union, norms which are not backed up by political processes cannot stand in the long run, and it is the political sovereignty that creates legal sovereignty.

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19. Ibid at p.1256.

that the majority judgment is not based on any assumption of federal supremacy. It has merely negatived the claim to state sovereignty advanced by the State of West Bengal which can truly be described as based on an a priori assumption. Further Basu forgets that the provisions of articles 246(1) and 254(1) are clearly analogous to the supremacy clause of Article VI of the U.S. Constitution. Thus while federal supremacy is clearly explicit in the Indian Constitution the claim for state immunity is based on implications from a doubtful doctrine of state sovereignty.

8.29 The same author has criticised the stand of the majority that if the power of acquisition is denied to the Union, the Union would lack the power to carry out the national purposes as incorrect.[24] The suggestion is that failing agreement between the Union and the State, the Union could coerce the State under article 257(1) read with article 365 of the Constitution! Then why not the coercion of entry 42 of List III itself?

An untenable view of federalism

8.30 The stand of Justice Subba Rao and those who have criticised the majority judgment is really based on a theory of federalism according to which the States enjoy co-ordinate and equal status with the Union. It is true that Professor Wheare has defined federal principle as "the method of dividing powers, so that the general and regional governments

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24. Ibid at p.394, note 7.

are each, within a sphere, co-ordinate and independent."[25] This definition which is substantially the same as the one given by Dicey in his "Law and the Constitution"[26] is really based on the 19th century ideas of federalism. In the beginning, the American federalism was described as a 'dual' federalism where the Federation and the States were competing for competence. The definition of Professor Wheare, which seems to have been the basis of Justice Subba Rao's judgment, and of the writers who support him, really described this phase of 'dual' federalism. But this phase has given place to what has been described as the co-operative federalism where, instead of competing for power, the federation and the units would be co-operating to achieve the broad governmental purposes for the people.

8.31 The Royal Commission on the Constitution in the U.K., in its report to Parliament presented in October 1973, has pointed out how the increasing demands on the states to ensure a large measure equality in public services and general standards of living, and the pressure of the ideas of about social justice have made the old federal theory, unworkable in modern times. Pointing out the difficulty in maintaining the federal idea of divided sovereignty in these days, the Commission has observed:

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25. K.C. Wheare, Federal Government, 4th Edn. (Paper back) Oxford University Press, p.10.
26. See A.V. Dicey, Law of the Constitution, 10th Edn. (1964), Chapter III- Parliamentary Sovereignty and Federalism, pp.138-180.

> "Provincial governments can no longer keep *de facto* control over all the matters which are constitutionally their sole responsibility. Their sovereignty is being eroded because their electorates are demanding more than can be provided without federal help. In most federations, therefore, power is fast gravitating to the centre. The entrenchment of provincial sovereignty in federal constitutions has not prevented this. It has been overcome either by the transfer of provincial powers to the federal government through changes in the constitution or, more usually, by elaborate measures of co-operation between the provincial and federal governments which in theory leave the provinces' powers intact but which in practice put the federal government in a largely controlling position. In short, to make federalism work in modern conditions federal countries have been compelled to take steps which tend to undermine the principle of provincial sovereignty on which the system itself is based. What is actually in operation is not true federalism. Professor Vile in his paper suggests that in the United States the concentration of power at the centre has become so great that the country may be moving out of a system of federalism into one of decentralised unitary government".[27]

These important changes in the federal concept and its working have been ignored by those who insist on the concept of divided sovereignty and of co-ordinate and equal status.

8.32 As one writer has pointed out about American

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27. Report of the Royal Commission on the Constitution, Vol.I, (Cmnd.5460), Her Majesty's Stationery Office, London (1973), p.155.

Federation[28], the old concept of federalism is dead. If justice for all is to be achieved it will not be by leaving its definition to the dominant factions of small areas but by action at the national level. This would mean that except for the independent existence of the States, which means the autonomy of the personnel both elective and appointive, all the constitutional formalities of federalism are so much rhetoric today. What is practised in America today has been described as "permissive federalism" which has been defined as: "there is a sharing of power and authority between the national and state governments, but... the state's share rests upon the permission and permissiveness of the national government[29]". Further elaborating the concept of permissive federalism the author says:

> "Permissive federalism is, in fact, the effective key to administrative decentralisation, because such decentralisation makes sense and is safe from the view-point of accountability only when it is within the boundaries and constraints set by firmly developed policy at the top. Dual federalism was wrong because it encouraged a false competition between state and national governments and left too many problems in a no-man's-land in between. Cooperative federalism was an improvement, because it presumed that there would always be room for some government to act, and it encouraged the levels to act jointly on occasion. But it was inadequate conceptually because it tended to assume

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28. Michael D. Reagan, The New Federalism, Oxford University Press, New York (1972).
29. Ibid, at p.163.

that the responsibilities of state and national governments were coordinate, whereas the reality is that the national government needs to be superior".[30]

CONCLUSION

8.33 In the light of these developments in federalism noted above, it is submitted that there is no need to introduce into the Indian Constitution concepts of federalism of the past. The clear words of the Constitution do not give countenance to any such exercise. The majority opinion is clearly in accord with the letter of the Constitution, the prevailing practice in federalism and the particular needs of the country, giving sufficient power to the Union to discharge its responsibilities to the people of India. It is therefore, respectfully submitted that the majority opinion is preferrable to the minority opinion of Justice Subba Rao.

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30. Ibid at p.167.

## CHAPTER IX

## CONFLICTS IN THE CONCURRENT FIELD

### CREATION OF THE CONCURRENT FIELD

9.1 The Constitution provides for the creation of the concurrent field in three ways. Article 246(2) creates a concurrent jurisdiction in respect of matters enumerated in List III, the Concurrent List, in the Seventh Schedule. This concurrent field in which both the Union Parliament and the State legislatures are competent to enact laws is hierarchically subordinate to the Union field but above the State field. This is achieved by making the Concurrent field subject to the Union field and by the use of a 'non-obstante clause' capable of overriding the State field.

9.2 If the Council of States (Rajya Sabha) has declared by a resolution supported by not less than two-third of its members that in the national interest Parliament should make laws with respect to matters in the State List specified in the resolution, Parliament gets competence to make laws for such subjects. Such resolutions would remain in force for one year, but could be extended by further resolutions similarly passed by the Council of States. The laws made by Parliament under the above provision would remain in force for a period of six months after the expiry of the supporting resolution except as respects things done or omitted to be done.[1] But the effect of the resolution passed by the Council

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1. Article 249 of the Constitution.

of States, and of the laws made by Parliament on that basis, is not to restrict the power of the Legislature of a State.[2] Therefore the effect of the resolution is to temporarily transfer the subject covered by it to the concurrent field.

9.3 When a Proclamation of Emergency is in operation Parliament is competent to pass laws with respect to matters in the State List. Such laws would remain in force for a period of six months after the Proclamation of Emergency has ceased to operate except as respects things done or omitted to be done.[3] The competence conferred on Union Parliament by the Proclamation of Emergency does not detract from the competence of the State legislatures to pass laws on the subjects concerned. In other words, a temporary concurrent jurisdiction is created in this case also.

RESOLUTION OF CONFLICTS IN THE CONCURRENT FIELD

9.4 If two valid enactments stand side by side regulating the same matter differently it will lead to confusion and it would be impossible to enforce the legislation. Such conflict is avoided by the principle of repugnancy which makes the Union legislation paramount whether passed before or after the State legislation. In respect of the temporary concurrent sphere created by the Council of State resolution or by the Proclamation of Emergency, this is specifically provided for in article 251. In respect of the concurrent field created

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2. Article 251 of the Constitution.
3. Article 250 of the Constitution.

by article 246(2) read with List III in the Seventh Schedule, article 254 provides for the resolution of conflicts. Here also the usual principle is to make the Union law prevail, except in cases where a State law is reserved for, and has obtained, the concurrence of the Union President. It may be noted here that while conflicts in exclusive fields raise a question of power, these conflicts in the concurrent field raise a question of inconsistency or repugnancy, both legislatures being competent. However, the provisions of article 254(1) have been invoked indiscriminately for resolution of both the above types of conflicts. It is therefore proposed to deal with question of proper interpretation of article 254(1) before the question of repugnancy is taken up for consideration.

INTERPRETATION OF ARTICLE 254(1)

9.5 Article 254(1) of the Constitution and the corresponding section of the Government of India Act, 1935, section 107(1), are extracted below:

> "Article 254(1). 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 is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void".

Section 107(1) of the Government of India Act 1935:

> "If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of any existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void".

9.6 The question is whether the words "Federal law which the Federal Legislature is competent to enact" refer only to laws of the Federal Parliament with respect to the Concurrent List or whether they refer to legislation of the Federal Parliament with respect to the exclusive Federal List and the Concurrent List.

9.7 Various reasons have been suggested for holding that section 107(1) of the Government of India Act, 1935 (similar to section 254(1) of the Constitution) refers to both the Federal and Concurrent Lists.

Literal reading

9.8 In Sadananda Jha v. Aman Khan[4], Dhavale J. did not accept the suggestion to read words "with respect to one of the matters enumerated in the Concurrent List" along with the expressions "any provision of a Provincial law" and "any provision of Federal law" occurring earlier in the sub-section

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4. A.I.R. 1939 Pat. 55.

and thus to limit the scope of sub-section (1) to conflict in the concurrent field. He held that such a construction was opposed the plain grammar of that sub-section and there was nothing in the scheme of the legislation laid down in the Act to indicate that Parliament intended it. If the Parliament had intended that section 107(1) to be restricted to conflicts in the concurrent field it could have adopted phraseology similar to the one in sub-section (2) thereof. He thought that the true scope of section 107(1) was to be supplementary to section 100 and deal with the effect of repugnancies between provincial and federal legislation (whenever passed) without any reference to the fields to which the conflicting enactments related.[5]

9.9 However, this way of literal reading is not free from difficulty. It would seem that a literal reading would equally provide other ways of reading the sub-section. Thus, Pal J. in Bikram Kishore v. Tafzzal Hossain[6] observed as follows:

> "Reading section 107(1) Government of India Act, 1935 by itself there is some difficulty in seeing the exact bearing of the words 'with respect to one of the matters enumerated in the Concurrent Legislative List'. As the section stands, these words may be taken with (1) 'an existing law' or (2) any provision of an existing Indian law or (3) 'repugnant'. In sub-section (2) of the section,

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5. Ibid at p.65.
6. A.I.R. 1942 Cal. 587.

however, these words are taken with 'a Provincial law and 'an existing Indian law'." [7]

He also gave an analysis of the conflicts that might possibly be covered by section 107(1).[8] Meredith J. thought that the correct way of reading section 107(1) would be to read the

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7. Ibid, at p.590.
8. "1.(a) The Provincial law must be with respect to one of the matters enumerated in the Concurrent List; (b) the existing Indian law must also be with respect to the same matter; (c) a provision in (a) must be repugnant to a provision in (b), (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must also be with respect to one of the matters enumerated in the Concurrent Legislative List;

2.(a) The Provincial law need not be with respect to one of the matters enumerated in the Concurrent List; (b) the existing Indian law must be with respect to one of the matters enumerated in the Concurrent List; (c) a provision in (a) must be repugnant to a provision in (b); (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must be with respect to one of the matters enumerated in the Concurrent Legislative List or (iii) the provision in the existing Indian law must be with respect to one of the matters enumerated in the Concurrent Legislative List, the provision in the Provincial law is not required to be with respect to any such matter;

3.(a) The Provincial law is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (b) the existing Indian law also is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (c) a provision in (a) must be repugnant to a provision in (b), the repugnancy being with respect to one of the matters enumerated in the Concurrent List. This can happen only when the provisions are with respect to the same matter and that matter is one of those enumerated in the Concurrent Legislative List". ibid, at p.591.

words "with respect to one of the matters enumerated in the Concurrent List" as qualifying not only "any provision of an existing Indian law" but also the words "provision of a Federal law which the Federal Legislature is competent to enact" occurring earlier.[9] Therefore it is submitted that a grammatical reading of the sub-clause is not conclusive either way.

Incidental encroachment and the doctrine of occupied field

9.10 It has sometimes been suggested that unless the sub-section is read to cover also the laws passed by the Union and the State Legislatures in the exclusive fields, there will be no means of solving conflicts due to incidental encroachment of laws in the exclusive Union and the exclusive State fields. Thus Ivor Jennings, wanted the sub-section to be revised omitting all references to the Concurrent List, so that it could apply to all conflicts between Union and State laws.[10] Sulaiman J. also thought that along with the doctrine of incidental encroachment, which permitted the provinces to encroach on the exclusive field of the federation, the doctrine of unoccupied field in favour of the federation, which would not allow such incidental encroachment when the field was already occupied by the Central or Federal legislation, should also be imported from Canada.[11] It seems that Jennings and

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9. Deo Nandan v. Ram Prasad, A.I.R. 1944 Pat. 303 (F.B.) at p.304.
10. Ivor Jennings, Some Characteristics of the Indian Constitution, Oxford University Press, Madras (1953) at pp.61-62.
11. See Subramanyan v. Muttuswami, A.I.R. 1941 F.C. 47 at p.63.

Sulaiman J. were influenced by the Canadian experience to suggest the application of the principle of occupied field for the resolution of conflicts arising out of an incidental encroachment in the case of legislation in the exclusive fields. It is true that the doctrine of occupied field is not limited to the concurrent field in Canada[12], United States[13] and possibly in Australia[14]. But in none of these federations the jurisdictions have been arranged hierarchically with non-obstante and subjection clauses, as in section 100 of the Government of India Act, 1935 and article 246 of the Constitution. The provisions of these sections are quite sufficient for resolving

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12. "Paramountcy (or the occupied field doctrine or the overlapping doctrine, call it what one will) has a two-fold operation in Canada. It applies by express stipulation to the exercise of concurrent powers under section 95 of the British North America Act, and it applies by implicit recognition to the exercise of the mutually exclusive powers of Parliament and Provincial legislature under sections 91 and 92". Bora Laskin, "Occupying the Field : Paramountcy in Penal Legislation", (1963) 41 Can. B. Rev. 234 at p.237.

13. Henry L. Bowden. Jr., A Conceptual Refinement of the Doctrine of Federal Pre-emption, (1973) 22 J.Pub. L. pp.391-405, where a comment has been made about the indiscriminate use by the judiciary of the doctrines of supremacy and pre-emption for settling federal-state conflicts.

14. The Queen v. Philips (1970) 44 A.L.J.R. 497 (section 109 is inappropriate when the exclusive power of the Commonwealth is concerned) However, see W. Anstey Wynes, Legislative, Executive and Judicial Powers in Australia, Law Book Co. Ltd., Sydney, (4th Ed.) (1970) p.101, where it is said that section 109 applies equally where commonwealth Act is passed under the exclusive or concurrent power.

any conflict between incidentally encroaching provisions of laws in the mutually exclusive fields. In India, therefore, the doctrine of occupied field may properly be confined to the resolution of conflicts in the concurrent field. This is considered later in the chapter on Repugnancy.

Transfer of exclusive field and the doctrine of repugnancy

9.11 It has sometimes been thought that, when a part of the exclusive State field is transferred to the exclusive Union field, any conflict between the law that may be passed by the Union in the field so transferred and any State law existing in that field could be solved only by applying the principle of repugnancy and that for this purpose the scope of article 254(1) has to be construed as necessarily applying to the concurrent field as well as to the exclusive fields. Four types of such instances have been noticed:

(i) Transfer of the field when a new Constitution is introduced

9.12 When a legislative field is transferred and brought under the power of a legislature for the first time as a result of constitutional changes it seems that all the existing laws would automatically become invalid. To avoid such a result when a new Constitution is brought into effect and legislative powers are conferred on the new legislatures, provision is made for continuance of the existing laws in spite of the repeal of the previous Constitution enactment. Such provisions

have been made in articles in the Government of India Act, 1915[15], in the Government of India Act, 1935[16], in the Indian Independence Act, 1947[17] and in the Constitution of India, 1950.[18] The new legislature will be competent to repeal any old law which is continued in that field.[19] Without appreciating the fact that the continuance of the old laws in a field which is transferred to another legislature is fully subject to the power of the new legislature, it has sometimes been suggested that to resolve a conflict between the Provincial law and an existing law with respect to the exclusive Federal List, it is necessary to invoke article 107(1) of the Government of India Act 1935.[20] However, after noting that the Government of India Act, 1935, section 107, seemed to have left a gap in that it did not provide for the resolution of conflicts between Provincial law and existing laws with respect to matters in the exclusive Federal List, Sulaiman J. correctly observed as follows:

> "Apparently, it was thought that as the Provinces had been given any authority to legislate with respect to matters falling in List I, all cases where there is an encroachment would be met by section 100 itself".[21]

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15. Section 130.
16. Section 292.
17. Section 18(3).
18. Section 372.
19. In A.B.Abdul Kadir v. State of Kerala, A.I.R.1962 S.C.922 it was held that on extension of the Central Excise and Salt Act 1944 to the Travancore Cochin area with effect from 1.4.1950, the Cochin Tobacco Act, 1084 and the Travancore Tobacco Act 1087 which previously applied in those areas were repealed.
20. Dhavale J. in Sadananda Jha v. Aman Khan, A.I.R. 1939 Pat. 55 at p.65.
21. In Subramanyan v. Muttuswami, A.I.R.1941 F.C.47 at p.62.

9.13 It is submitted that this view is correct and there is no need to invoke section 107(1) for settling a conflict between Provincial law and existing laws referrable to matters in the Federal List.

(ii) Transfer of field by Parliamentary declaration

9.14 Another instance involving the transfer of legislative field which might suggest the application of the principle of repugnancy is that of the transfer of the State fields under mines and mineral development, industries, education etc., by virtue of Parliamentary enactments. In these cases there is no scope for applying the principle of repugnancy. The effect of Parliamentary enactment on the existing State law has been stated by N. Rajagopala Iyyangar in the following terms: "The Parliamentary enactment supersedes the State law and thus it virtually effects a repeal".[22] The invalidity of the State law in such case would arise "not because of any repugnance between two statutes but because...the State Legislature has no jurisdiction to pass the law".[23]

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22. State of Orissa v. M.A. Tulloch & Co., A.I.R. 1964 S.C. 1284 at p.1293.
23. Per Gajendragadker J. in Hingir-Rampur Coal Co. v. State of Orissa, A.I.R. 1961 S.C. 459 at pp.467-70. It is true that he speaks of the Federal law covering the same field occupied by the State law, and the judgment in State of Orissa v. M.A. Tulloch & Co., A.I.R. 1964 S.C. 1284 has also used similar language vide para 15 of the judgment, which would have been apt for describing conflicts in the concurrent field. However, the judgments have made beyond doubt that the invalidity of the State law arises not from repugnancy but from lack of power.

In these cases also therefore the principles applicable to the resolution of conflicts in the exclusive fields are sufficient for resolving the conflict.

(iii) Transfer of field by delegation by State Legislatures under article 252

9.15 We have seen[24] that the Union Parliament gets competence to pass laws on subjects mentioned in the State List when authorised by resolutions passed by the house or houses of State Legislatures under article 252 of the Constitution. The field so transferred is an exclusive one in favour of the Union. There is possibility of a conflict between the laws passed by Parliament under article 252 and the laws passed by the States before the transfer of legislative competence to the Union. It has been suggested that such conflicts cannot be solved unless article 254(1) is interpreted as applicable not merely to the concurrent field but also to the exclusive fields.[25] But since the State Legislature loses its competence on the transfer of the field to the Union, State laws in the transferred field should be considered to have been impliedly repealed. Then there would be no scope for invoking article 254(1).

(iv) Transfer of field on enacting legislation by Parliament to implement treaties under article 253

9.16 As has already been seen[26] Parliament has exclusive

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24. para 2.2 ante.
25. Shukla, Constitution of India, 6th Edn., by D.K. Singh, (1975), p.433.
26. para 2.2 ante.

power to implement under article 253, any treaty, agreement or convention made in the course of international relations. It has been argued that a conflict between a law passed by the Parliament to effectuate a treaty and an existing State law on that subject can be resolved only by giving a meaning to article 254(1) which would make it applicable also to the exclusive fields.[27] However it seems that a conflict of this type also is resolvable without invoking article 254(1). The rule of implied repeal of existing State law in the transferred field would apply here also.

9.17 In all cases where a part of exclusive State field is transferred to the exclusive Union field, any existing State law in that field would "wither away" leaving no possibility of a conflict with the law that the Union may pass thereafter. If, however, the Union Parliament continues any existing State law in the transferred field, such law is as good as a law made in exercise of the Union legislative competence and would be subject to repeal, amendment etc. by the Union Parliament. This would not of course create any problem of legislative conflict. Any conflict between incidental encroachment of the laws referrable to the exclusive jurisdiction could be solved under article 246 itself.

The view that the sub-section refers only to the Concurrent List

9.18 The view advanced that section 107(1) of the Government of India Act and article 254(1) of the Constitution refer

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27. Jain, Indian Constitutional Law, 2nd Edn.(1970), p.311.

only to conflicts in the concurrent field has been supported by various reasons. The presence of sub-section (2) in section 107 of the Government of India Act 1935, according to which a State law repugnant to a Federal law or an existing Indian law with respect to one of the matters in the Concurrent List could have precedence if the assent of the Governor-General was obtained, has been taken as indicative of the correct scope of sub-section (1). Thus Pal J. in Bikram Kishore v. Tafazzal Hossain[28], observed:

> "In my opinion, therefore, only that kind of provincial law is contemplated by sub-section (1) as is covered by sub-section (2). Sub-section (2) clearly contemplates only a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List".[29]

9.19 Similar views have been expressed by others too with reference to article 254 of the Constitution.[30] Dhavale J. has held that such a construction would be opposed to the plain grammar of the sub-section and that there was nothing in the scheme of legislation laid down in the Act to indicate that the Parliament intended it.[31]

9.20 In fairness it may be conceded that, since what is referred to in sub-clause (2) is only an exception, there will

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28. A.I.R. 1942 Cal.587.
29. Ibid, at p.591.
30. "The words 'subject to the provisions of clause (2)' which occur in clause (1) support this construction. This would have no meaning if clause (2) is dealing with something completely different from clause (1)". V.N. Shukla, The Constitution of India, 5th Edn. (1969), at p.447.
31. Sadananda Jha v. Aman Khan, A.I.R.1939 Pat.55, at p.65.

be no difficulty even if it referred only to a part of what is mentioned in sub-section (1). So while sub-section (1) referre to Federal law referrable to the exclusive Federal List and the Concurrent List the exception of Provincial law prevailing over the Federal law with the Governor-General's assent could refer only to that part of the Federal law referrable to the Concurrent List. So this argument is not decisive of the question.

Supporting judicial dicta

9.21 Judicial dicta are available to support the view that the scope of the sub-section is confined to the Concurrent List. Thus, Lord Wright observed that section 107(1) of the Government of India Act 1935 had no application in a case where the Province could show that it was acting wholly within its power under the Provincial List and was not lying on any power conferred on it by the Concurrent List.[32]

9.22 In Subramanyan v. Muttuswami[33] Sulaiman J. noticed that section 107(1) of the Government of India Act, 1935 did not provide for the resolution of a conflict between a Provincial law and an existing Indian law with reference to matters in the Federal List. He thought that this gap could be filled if the words "with respect to one of the matters enumerated in the Concurrent List" were held to qualify only "existing Indian law" and not "the Federal law" mentioned

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32. Megh Raj v. Allah Rakhia, A.I.R. 1947 P.C. 72 at p.74.
33. A.I.R. 1941 F.C. 47. See also para 9.12 ante.

earlier. However, according to him the normal way of reading that sub-section would be to read the words "with respect to one of the matters enumerated in the Concurrent List" as qualifying not only "existing Indian law" but also the Federal law occurring earlier.[34]

9.23 In Bar Council of Uttar Pradesh v. The State of U.P.[35] A.N. Grover J. observed: "The question of repugnancy can only arise in matters where both Parliament and the State Legislatures have legislative competence to pass laws. In other words when the legislative power is located in the Concurrent List the question of repugnancy arises."[36] There are also dicta of the High Courts of Mysore[37] and

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34. Ibid. at p.62. The opposite view attributed to Sulaiman J. in Satishchandra v. Sudhir Krishna, A.I.R. 1942 Cal. 429, at p.434, it is submitted, is incorrect.
35. A.I.R. 1973 S.C. 231.
36. Ibid. at p.238. Similar observations in Prem Nath Kaul v. State of Jammu & Kashmir, A.I.R. 1959 S.C. 749, at p.763. have been referred to in this judgment. But the judgment clarifies that the decision in State of Jammu & Kashmir v. M.S. Farooqi, A.I.R. 1972 S.C. 1738, where a Jammu & Kashmir law governing the disciplinary action was held repugnant to the Union law is not applicable as a general precedent as there was no Concurrent List for Jammu & Kashmir as the Constitution applied to that State at that time. In view of this it is not clear whether, the dictum in the earlier decision Prem Nath Kaul is fully reliable. See also, the dictum of Alagiriswami J. in K.S.E. Board v. Indian Aluminium Co., A.I.R. 1976 S.C. 1031, at p.1039, "That the question of repugnancy can arise only with reference to a legislation falling under the Concurrent List is now well settled". But the laws involved in this case were held to belong to the exclusive fields.
37. In State of Mysore v. Mohamed Ismail, A.I.R. 1958 Mys.143 at p.145 M. Sadasivayya J. observed as follows: "Under article 254, any question of repugnancy can arise only as between a law made by the Legislature of a State in regard to a matter in the Concurrent List and a law made by the Parliament in regard to the same subject in the Concurrent List..."

Andhra Pradesh[38] to the effect that article 254(1) applies only to questions of the Concurrent List.

Suggested interpretation

9.24 It is submitted that the interpretation that article 254(1) and section 107(1) of the Government of India Act, 1935 apply only to conflicts in the Concurrent List is the correct one. Such a result would also be reached on a true literal interpretation of the section. This section was designed to solve conflicts between (1) Provincial law in the concurrent field and Federal law in the same field, and (2) Provincial law in the concurrent field and existing Indian law with respect to a matter in the concurrent field. Stated fully, these could be put in the following two clauses:-

(1) if any provision of a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List is repugnant to any provision of a Federal law which the Federal Legislature is to competent to enact with respect to one of the matters enumerated in the Concurrent Legislative List, and,

(2) if any provision of a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List is repugnant to any provision of an existing Indian law

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38. In Sesharatnam v. Gift Tax Officer, A.I.R. 1960 A.P. 115, Chandra Reddy C.J. observed: "the question of occupied field is absolutely irrelevant in the context of the present enquiry since we are concerned here with Lists I and II and not with the Concurrent List". at p.119.

with respect to one of the matters enumerated in the Concurrent Legislative List. Avoiding repetition and using the words "with respect to one of the matters enumerated in the Concurrent Legislative List" only once in each of the two clauses, the clauses may be wrewritten as follows:-

(1) If any provision of Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact with respect to one of the matters enumerated in the Concurrent Legislative List, and

(2) If any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List.

9.25 What section 107(1) attempted, was to combine the above two clauses. This combination was achieved by using "if any provision of a provincial law is repugnant" and "with respect to one of the matters enumerated in the Concurrent Legislative List" each only once and by synthesising the two by using the disjunctive "or" without any comma. It seems therefore that the words "with respect to one of the matters enumerated in the Concurrent List" should qualify not merely "existing Indian" law but also the "Federal law which the Federal Legislature is competent to enact" and "Provincial law" occurring earlier in the sub-section. Read in this way section 107(1) would clearly indicate that the conflicts envisaged therein are between Provincial law and existing law or Federal laws within the Concurrent List.

9.26 The insertion of the comma after the phrase which Parliament is competent to enact before the disjunctive "or" in article 254(1) of the Constitution may make it literally more difficult to read the provisions in the way suggested above. But it is significant that in section 107(1) Government of India Act, 1935 there was no comma to separate the clauses after the words "which the federal legislature is competent to enact" and before the words "or to any provisions of an existing Indian law with respect to one of the matters enumerated in the Concurrent List", as we find in article 254(1) of the Constitution. It is also well-known that punctuations have no place in legislative enactments and should not stand in the way of a proper reading of the legislation to give effect to the intention of the legislation.[39]

9.27 It is submitted that the true scope of article 254(1) is confined to the resolution of conflicts in the concurrent

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39. "On the parliament roll there is no punctuation, and we are not bound by that in the printed copies". per Cockburn C.J. in Stephenson v. Taylor, (1861) 1 B & S 101 at p.106; 121 E.R. 652 at p.654; "The truth is that, if the article is read without commas inserted in the print, as a Court of law is bound to do, the meaning is reasonably clear". per Lord Warrington in Lewis Pugh v. Ashuthosh Sen, A.I.R. 1929 P.C. 69 at p.71; "Punctuation is after all a minor element in the construction of a statute....and cannot be allowed to control the plain meaning of a text", per B.K.Mukherjea J. at p.383, and "...the comma, if it may at all be looked at, must be disregarded as being contrary to this plain meaning of the statute", per S.R.Das J. at p.389 in Aswini Kumar v. Arabinda Bose, A.I.R. 1952 S.C. 369; Maxwell on the Interpretation of Statutes, 12th Edn. (1969) by P.St.J. Langan, pp.13-14.

field. The clear provisions of article 246 are sufficient to solve all conflicts relating to the exclusive fields including conflicts between State law and the Union law when a part of the exclusive State field is transferred to the Union[40] or for settling conflicts on account of the incidental encroachment of Union and State law in their respective exclusive fields.[41]

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40. Such as the instances of industry, mining, article 252, 253 etc.
41. According to this view, the passage in H.M. Seervai, Constitutional Law of India, (1967) at p.36: "The prevalence of the Federal or State law in respect of mutually exclusive powers of legislation is secured by the non-obstante clause of article 246(1) and by article 254(1)", would be correct if, instead of the words "article 254(1)", the words "subjection of the State field to the Union field provided for in article 246(3)" are substituted.

# CHAPTER X

## REPUGNANCY

### MEANING OF REPUGNANCY

10.1 Article 254 of the Constitution, and its predecessor, section 107 of the Government of India Act, 1935, use the term repugnancy to describe the incompatibility between the Union and State laws in the concurrent field. Repugnancy seems to have been used to mean inconsistency as the marginal notes to these sections refer to inconsistency between laws. The meaning of both the terms seems to be the same.[1] The terms 'inconsistency' and 'invalid' are used in section 109 of the Australian Constitution instead of the words 'repugnant' and 'void' used in the Indian Constitution. The use of the term 'void' to describe the status of repugnant State law which is capable of becoming valid again if the Union law is repealed is not very apt. Therefore the phraseology adopted in the Australian Constitution in this regard seems to be preferrable.

10.2 Before the tests for determining repugnancy are considered, it is necessary to dispose of certain instances which seemingly involve repugnancy, but which on closer scrutiny are not instances which attract article 254(1) of the Constitution.

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1. Repugnancy from latin repugnāre. re (against), pugnāre (to fight); inconsistency from latin consistere. con (together), sistere (to set, to stand) and therefore that which cannot stand together.

INSTANCES WHICH DO NOT INVOLVE REPUGNANCY

Laws based on exclusive powers

10.3 As we have already seen[2], if the conflict is between two laws or their incidentally encroaching provisions and one or, both of the laws, belongs to the exclusive field, what is involved is a question of power and not a question of repugnancy[3].

Laws applying at different periods of time

10.4 If the laws relating to the same matter are not applicable at the same time there will be no question of repugnancy. Thus, when it was argued that the scheme for nationalisation of road transport services made under the U.P. Transport Services (Development) Act, 1955 (9 of 1955) was invalid as that Act was repugnant to the Motor Vehicles (Amendment) Act, 1956 (100 of 1956) which introduced the

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2. Para 9.27 ante, see also the decisions in the following cases: Megh Raj v. Allah Rakhia, A.I.R. 1947 P.C.72; Lakhi Narayan Das v. Province of Bihar, A.I.R. 1950 F.C. 59; A.S. Krishna v. State of Madras, A.I.R. 1957 S.C. 297; Sita Ram Sharma v. State of Rajasthan, A.I.R. 1974 S.C. 1373; S.K.G. Sugar Limited v. State of Bihar, A.I.R. 1974 S.C. 1533; Mangalore Ganesh Beedi Works v. Union of India, A.I.R. 1974 S.C. 1832; Kerala State Electricity Board v. Indian Aluminium Co., A.I.R. 1976 S.C. 1031. See also M.C. Setalvad, Union and State Relations under the Indian Constitution (Tagore Law Lectures), Calcutta, 1974, p.60.
3. As far as Australia is concerned, this position is well expressed in the statement that a question of inconsistency under section 109 of the Constitution of Australia is a question not between powers but between laws made under power. See O'Sullivan v. Noarlunga Meat Ltd.,(1957) A.C.1 wherein Privy Council affirming the Australian High Court decision in (1955) 92 C.L.R. 565 held that what was involved in that case was not an inter se question under section 74 turning on the extent of power, but a question of inconsistency under section 109.

Chapter IV-A in the Motor Vehicles Act, 1939, K. Subba Rao J. observed as follows in Deep Chand v. State of Uttar Pradesh.[4]

> "The identity of the field may relate to the pith and substance of the subject matter and also to the period of its operation. When both coincide, the repugnancy is complete and the whole of the State Act becomes void. The operation of the Union law may be entirely prospective leaving the State law to be effective in regard to thing already done. Section 68C, 68D and 68E inserted by the Amending Act, clearly show that these sections are concerned only with a scheme initiated after the Amending Act came into force".

Since the scheme framed under the State Act and those that might be framed under the Central Act in the future, operated at different times, there was no question of repugnancy.

10.5 Similarly, when the Essential Commodities Act, 1955 which came into force from 1-4-1955, did not include mica as essential commodity and the earlier Central enactment, the Essential Supplies (Temporary Power) Act, 1946, which had included also mica within its scope, expired on 26-1-1955, there was no Central enactment to compete with the Bihar Mica (Amendment) Act, 1949 to raise a question of repugnancy.[5]

One of the laws provides for the application of other laws

10.6 If the dominant law expressly or impliedly provides for the application of other laws there is no repugnancy. In

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4. A.I.R. 1959 S.C. 648 at p.667.
5. Srikant Lal v. State of Bihar, A.I.R. 1958 Pat. 496.

G.P. Stewart v. Brojendra Kishore Roy Chaudhury[6], one of the arguments was that section 10-C of the Assam Court of Wards (Amendment) Act, 1937 which stayed for a certain period the execution of decrees against property of ward administered by the Court of Wards was repugnant to section 51 and O.21, R.24 of the Civil Procedure Code. Narasimha Rao J. held that, as section 4 of the Civil Procedure Code clearly envisaged that the provisions of any special law which was applicable should have effect, there was no repugnancy[7]. An argument that section 21 of the Bihar Maintenance of Public Order Ordinance, 1949 (4 of 1949) which authorised arrest without warrant was repugnant to section 54 of the Criminal Procedure Code, 1898 was repelled by the Federal Court as the Criminal Procedure Code expressly laid down in section 1(2) that its provisions would not affect any special form of procedure prescribed by any law for the time being in force[8].

10.7 Conversely, if the State law has specifically left out matters provided for in the Central law, there is no case for repugnancy. Thus, in Tika Ramji v. State of U.P.[9] it was argued that the U.P. Sugar Cane (Regulation of Supply and Purchase) Act, 1953 (24 of 1953) and the U.P. Sugar Cane (Regulation of Supply and Purchase) Order, 1954 issued thereunder were repugnant to the Industries (Development and

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6. A.I.R. 1939 Cal. 628.
7. See also Mukunda Murari Chakravarti v. Pabitramoy Ghosh, A.I.R. 1945 F.C. 1.
8. Lakhi Narayan Das v. Province of Bihar, A.I.R. 1950 F.C.59.
9. A.I.R. 1956 S.C. 676.

Regulation) Act, 1951 and the Essential Commodities Act, 1955 (10 of 1955) and the Sugar Control Order, 1955 issued under the last mentioned Act. Bhagawati J. on a comparison of the provisions involved found that matters provided for by the Centre had been left out of the State law and, therefore, there was no repugnancy.

Central law provides only for an additional benefit

10.8 There will also be no question of repugnancy if a provision in the Central law makes a provision for an additional benefit. A question was raised whether, on closure of an industrial establishment, a workman was entitled to claim the benefits of section 25 FFF(1) of the Industrial Disputes Act, 1947 (in the case of a closure, compensation under section 25F should be paid as if it were a retrenchment subject to certain restrictions) when the relevant State Act provided only for the payment of compensation for retrenchment. It was held that since the State law did not make any provision for compensation in the case of closure, and the Central law supplied the lacuna, there was no repugnancy between the State law and the Central law, and the workman could avail himself of the beneficial provisions of the Central law.[10]

TESTS FOR DETERMINING REPUGNANCY

10.9 From the days of the Government of India Act, 1935 references have been frequently made to Australian decisions

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10. Workmen of the Straw Board Manufacturing Co. Ltd. v. M/s. Straw Board Manufacturing Co. Ltd., A.I.R. 1974 S.C. 1132 at p.1141.

for determining the tests of repugnancy.[11] In the Australian Constitution, there is a provision[12] similar to the one in section 107(1) of the Government of India Act, 1935 and article 254(1) of the Constitution of India. Naturally the principles evolved in Australia[13] have been borrowed by analogy for application in India. Following Australian precedents Subba Rao J. said that repugnancy between two statutes may be ascertained on the basis of the following three principles:

(1) whether there is direct conflict between the two provisions;

(2) whether parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature, and

(3) whether the law made by the Parliament and the law made by the State Legislature occupy the same field.[14]

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11. G.P.Stewart v. Brojendra Kishore Chaudhury, A.I.R. 1939 Cal.628; Srikant Lal v. State of Bihar, A.I.R.1958 Pat.496; Piara Kishen v. Crown, A.I.R.1951 Punj. 409; Deep Chand v. State of U.P., A.I.R. 1959 S.C. 648.
12. Section 109. "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and former shall, to the extent of the inconsistency be invalid". There is no parallel provision in the Constitution of Canada or in the Constitution of the U.S.A. In the former judicially-evolved doctrines are available for settling conflicts while in the latter, the supremacy provision in article VI of the Constitution has been invoked for the purpose.
13. Inconsistency within the section 109 may arise because it is impossible to obey both laws, or there is a direct collision between the laws, or because the Commonwealth permits what the State prohibits, or because the Commonwealth covers a field on to which the state trespasses. P.H. Lane, The Australian Federal System, The Law Book Co. Ltd., Sydney, (1972), p.693.
14. Deep Chand v. State of U.P., A.I.R. 1959 S.C. 648 at p.665.

Direct conflict

10.10 If the provisions of the two laws are such that both cannot be given effect to at the same time, there is direct conflict between the provisions. There is a clear instance of such a repugnancy when one law prohibits what the other requires to be done with respect to the same conduct. Such a situation was involved in Mati Lal Shah v. Chandra Kanta Sarkar[15] before a Special Bench[16] of the Calcutta High Court according to the characterisation of the concerned laws by that Bench. The conflict was between sections 20 and 34 of the Bengal Agricultural Debtors Act, 1936 as amended by Act 8 of 1940 on the one hand and section 31 of the Presidency Small Cause Courts Act, 1882, an existing Indian law, on the other. The former provided for the staying, on the service of a notice, of the execution of certain decrees against agricultural debtors, while the latter provided for the execution, through other courts if necessary, of decrees passed by the Small Cause Court. Speaking for the Bench, Chakravarti J. held that all the provisions of the Bengal Act were not in pith and substance relatable to subjects[17] in the Provincial List. Some were relatable to the entries[18] in the Concurrent List. He observed:

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15. A.I.R. 1947 Cal. 1 (S.B.).
16. Chakravarti, Biswas and Blank JJ.
17. 20 Agriculture.... 21 .... agricultural loans....27 .... money lending.... 32 Relief of the poor....
18. 4 Civil Procedure.... 5 ... recognition of ... judicial proceedings. 10. Contracts.... 15. Jurisdiction and powers of all courts....

> "...while s.31 of the Indian Act directed that the decree should be executed by the Civil Court, s.34 directed that it must not be executed for the time being, and, in certain events, might no longer be executed at all....The position, therefore, is that while s.31, Presidency Small Cause Court Act, enables and even requires the transferee Court to execute the decree, s.34 of the Bengal Act, read with s.20, disables it altogether from doing so, as soon as it is served with a notice..."[19]

The provisions of the Bengal Act was therefore held be void for repugnancy.[20]

10.11 How a direct conflict proved fatal to the rent control measure of a State is illustrated by Mangtulal v. Radha Shyam.[21] The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (3 of 1947), which was to be in force till 14-3-1952 with the assent of the Governor-General under s.107(2) of the Government of India Act, 1935, was extended till 14-3-1954 by an Act of the same title in 1951 but without the President's assent under article 254(2) of the Constitution. A Full Bench[22] of the Patna High Court held that the Act

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19. Ibid. at p.9.
20. This piece-meal treatment of the provisions of the Bengal Act for characterisation, it is submitted, is wrong. There seems to have been no difficulty in saying that the pith and substance of the Act was in the Provincial List, and only the incidentally encroaching provision affected the Concurrent List., and therefore the provisions were valid. On the basis of the court's approach the provisions afford an example of repugnancy on account of direct conflict.
21. A.I.R. 1953 Pat. 14 (F.B.).
22. Das, Ramaswami and Narayan JJ.

was referrable to entry "8. Transfer of property...." of the Concurrent List. While the provisions of the Transfer of Property Act, 1882, an existing Indian law with respect to the above entry, gave to the lessor the rights to terminate a lease on notice to quit and to be put in possession of the property on the determination of the lease, the Bihar Act not only curtailed these rights, but also prevented a landlord from evicting even a trespasser. Section 11 of the Bihar Act was therefore held void.

10.12 In Vishwanath v. Harihar Gir[23] it was alleged that section 16 read with section 17 of the Bihar Money Lenders Act, 1938 (Act 3 of 1938) was repugnant to O.21, R.66 of the Civil Procedure Code. According to the Bihar Provisions, when a property was brought to sale, the Court should fix the price of the property and should not allow it to be sold at a lower price. According to the Civil Procedure Code, the Court should only mention the price stated by the decree holder and the judgment debtor, but need not vouch for the correctness of either. Mohammed Noor J. said:

> "For the purpose of this case I will construe it (repugnancy) very strictly and hold that in order that two provisions of law may be called repugnant to one another, they should be so contradictory that it will be impossible to carry out both of them; in other words if one says "do" and the other says "don't".[24]

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23. I.L.R. 1939 Pat. 90.
24. Ibid. at p.94

to the actual conflicting provisions. On any other test of repugnancy, like covering the whole field, or giving an exhaustive code, perhaps, the whole provision of the State Act would have been held as repugnant.

10.14 In providing for revision only in the case of non-appealable order the Central law seems to have aimed at statutory superintendence by designated authorities over quasi-judicial orders and thus hoped to exclude the general control by "executive" government in "judicial" decisions. The Bihar State wanted to circumvent it. Thus in substance, it is submitted, there was repugnancy. The judicial eagerness to limit the area of repugnancy, however desirable it may be, when coupled with a rather mechanical reconciliation of the provisions, without considering the values involved, may not always prove beneficial to the community.

10.15 There have been interesting instances of repugnancy on account of the direct collision of the provisions involved under the Australian Constitution.[28]

Exhaustive code

10.16 The direct conflict test may at times prove to be too narrow for the fuller realisation of the policy of the

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28. See for example, R v. Brisbane Licensing Court, ex parte Daniell, (1920) 28 C.L.R. 23. A State statute provided that a state vote on liquor licensing should be taken on the same day as that fixed for a poll at an election for the Senate of the Commonwealth. A Commonwealth statute provided that no vote of electors of a State should be taken under the law of a State on any day appointed for election of the Senate. There was direct conflict between the two statutes and the State law was therefore inoperative.

dominant legislature. Another principle was therefore evolved which stated that, if the Union legislation showed an intention to lay down an exhaustive code for regulating the subject-matter on hand, it would be inconsistent for the State Legislature to legislate for the same matter. This test provides ample scope for the judiciary to uphold the values envisaged in the paramount legislation and to defeat narrow arguments which could be raised on the basis of the direct collision test.

10.17 The subject of industrial disputes comes under entry 22[29] of the Concurrent List. At the time when the Industrial Disputes Act, 1947 of the Centre was extended to Part B States in 1950, there was in existence in the Part B State of Travancore-Cochin an Industrial Disputes Act with provisions similar to those of the Central Act. In the State Act also there was a provision, as in the case of section 10 of the Central Act, for referring an industrial dispute for adjudication. When an industrial dispute was referred to a tribunal under section 10 of the Central Act, it was argued that the reference was incompetent as the State Act which was not repugnant to the Central Act in the matter of reference held the field and the reference should have been made under the State Act. But Koshy J. held[30] that the Central law was

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29. 22- Trade Unions; industrial and labour disputes.
30. Nagalinga Nadar Sons v. Ambalapuzha Taluk Head Load Conveyance Workers' Union, A.I.R. 1951 T.C. 203. See also Ayyaswami Nadar v. Joseph, A.I.R. 1952 T.C. 371.

intended to be an exhaustive code on the subject. The State law in its entirety was for that reason repugnant to the Central law and the reference to the tribunal was therefore valid.

10.18 In State of Assam v. Horizon Union[31] the Supreme Court had an occasion to deal with the exhaustive code test. In the matter of appointment of a Presiding Officer of an Industrial Tribunal the provision in the State Act was to the effect that the person should have worked for three years as a District Judge or was qualified for appointment as a Judge of a High Court provided that appointment would be made only on consultation with the High Court. When the appointment of a person as the Presiding Officer not in consultation with the High Court was challenged, the Supreme Court held that the Central Act was intended to be an exhaustive code on the subject-matter, i.e., the appointment of District Judges as Presiding Officer and the appointment was valid. However, if a person qualified to be appointed as a Judge of the High Court were to be appointed as the Presiding Officer, the provisions in the State law for consultation with the High Court was still valid. This shows on what narrow field the Union Government was held to have laid down an exhaustive code.

10.19 While the direct collision test insists on a more rigorous test for repugnancy, the exhaustive code test is more

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31. A.I.R. 1967 S.C. 442.

liberal towards the Union law. When the court comes to a conclusion that the policy expressed in the State law is incompatible with that of the Union law, the exhaustive code test is quite handy to uphold the Union law. This test was developed in Australia[32] following the inadequacy of the direct collision test.

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32. In Ex parte Mc Lean (1930) 43 C.L.R. 472, at p.483 Dixon J. spelt out this test as follows: "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes and s.109 applies. That this is so is settled, at least when the sanctions they impose are diverse (Hume v. Palmer (1926) 38 C.L.R. 441). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention it is inconsistent with it for the law of a State to govern the same conduct or matter". Applying this test, the provision of section 52A of the Metropolitan and Export Abattoir Act 1936 to 1952 of the State of South Australia was held inconsistent with the Commonwealth Commerce (Meat Export) Regulation issued under the Customs Act 1901 to 1953. See O'Sullivan v. Noarlunga Meat Ltd., (1955) 92 C.L.R. 565 confirmed by the Privy Council on appeal in (1957) A.C. 1.

Occupying the field or covering the field

10.20 Closely allied to the principle of laying an exhaustive code is the principle of covering the field.[33] If the Union legislature by its law has shown an intention to cover the whole field, it would be inconsistent for the State to legislate in the same field.

10.21 In Zaverbhai Amaidas v. State of Bombay,[34] a person convicted of an offence under a law relating to essential supplies pleaded that he was convicted by a court which had no jurisdiction. The provision in the State law prescribed 7 years imprisonment for the offence committed by him, namely, transporting foodgrains without permit. The provision in a subsequent Central law prescribed only 3 years for that offence with a provision that there would be enhancement of the punishment upto 7 years for certain offences like possessing more than double the allowed quantities of foodgrains. The person argued that he should be governed by the provision in the Bombay law for 7 years punishment rather than by the Central law which provided only for 3 years. If this were accepted, the Magistrate who punished him would have no jurisdiction as that was confined to cases involving maximum

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33. This is also related in a sense with the doctrine of occupied field developed in the Canadian Constitutional law for the purpose of solving conflict of incidental encroaching powers. This has been considered along with the interpretation of article 254(1) of the Constitution. See, para 9.10 ante.

34. A.I.R. 1954 S.C. 752.

punishment of 3 years imprisonment. But to sustain the State law it had to be accepted that the State law and the Central law were not on the same subject matter. At least one of the judges[35] in the High Court had thought that the subject matter of the Central law was punishment for the offence, and that of the State law was enhanced punishment for the offence and, hence, the subject matter of the two laws were different. In the Supreme Court, Venkitarama Ayyar J. rejected this plea and held that both constituted a single subject matter and could not be split up in the manner suggested. Since the two laws covered the same field the State law was repugnant, and hence the punishment under the Central law was proper.

10.22 This test was also developed in Australia.[36]

Difficulty of formulating tests

10.23 The cases considered above reveal the difficulty of formulating the tests for finding out when the Union law may be said to show an intention to lay down an exhaustive code or to cover the whole field. The cases also do not suggest any helpful test for this purpose. The judiciary has got a wide

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35. Bavdekar J.
36. See Clyde Engineering Co. Ltd. v. Cowburn, (1926) 37 C.L.R. 466. The New South Wales Wages Act (the 44 hours week) Act 1925 provided for maximum working upto 44 hours in a week. The award of the Commonwealth Court of Conciliation and Arbitration pursuant to the Commonwealth Conciliation and Arbitration Act 1904 to 1921 prescribed upto 48 hours in a week; held there was inconsistency.

legislation on that matter subject to the condition that the previous sanction of the Governor-General in his discretion was necessary for introducing the amendment in question. The Constitution of India also has made provision for the prevalence of the State law with the assent of the President. Specific provision has also been made enabling Parliament to enact a law amending or varying or repealing the State law which had gained predominance because of President's assent.[38] In the Government of India Act there was no provision enabling the Federal Legislature to repeal a Provincial law in the Concurrent field. The Federal Legislature could supersede the Provincial law only by enacting subsequent and inconsistent legislation.

The State law that may be repealed by Parliament

10.25 In Tika Ramji v. State of U.P.[39] it was held that the law that could be repealed by the Parliament under article 254(2) was a law made by the State Legislature with the President's assent with reference to a matter in the Concurrent List containing provisions repugnant to an earlier law made by Parliament or an existing law. If the State law did not relate to any matter which was the subject of an earlier legislation by Parliament, then there was no scope for Parliament to repeal that State law. So, if the State law made fresh provisions touching any matters and did not contain anything inconsistent

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38. Article 254(2).
39. A.I.R. 1956 S.C. 676.

with any law enacted earlier by Parliament, such law could not be repealed by Parliament. On this view the provision of certain Central laws which repealed State laws were held to be void.[40]

10.26 Bhagawati J. also held that the power to repeal the State law had to be exercised by the Parliament and not delegated to any executive authority.

10.27 Though an Act passed by a State Legislature is reserved for the President's assent and thereby gains precedence over any Union law, there is no need for any amendment made by the State to such a law also to be reserved for the President's assent unless the amendment also relates to a matter in the Concurrent List.[41]

10.28 In order that the State law may prevail over the Union law with the President's assent, there should have been an operative inconsistency between the two laws. Thus forward contracts in groundnuts were illegal under the Central laws.[42] Then the Bombay Forward Contracts Control Act, 1947

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40. Section 16(1)(b) of the Essential Commodities Act, 1955 and clause 7 of the Sugar Control Order 1955 issued thereunder, in so far as they sought to repeal the U.P. Sugar Cane Regulation (Supply and Purchase) Act 1953.
41. M/s. H.D. & G. Mills v. State of Haryana, A.I.R. 1976 P.& H. 1.
42. The Essential Supplies (Temporary Powers) Act, 1946 (as a result of which the Oil Seeds (Forward Contracts) Prohibition Order, 1943, was continued in force) deriving its force from the India (Central Government and Legislature) Act, 1946 was in operation.

was passed which received the assent of the Governor-General. According to this Act all forward contracts were to be made subject to certain conditions. Otherwise, such contracts were to be illegal. It was argued that a forward contract in groundnut made according to the stipulation of the Bombay Act would be valid as the provision of the Bombay Act had prevailed over the Central laws under section 107(2) of the Government of India Act, 1935. This argument could not prevail as the operation of the Central and State laws was different and therefore could not lead to any repugnancy and hence there was no scope for the application of section 107(2). The State Act made certain valid contracts illegal if certain stipulations were not complied with whereas the Central law had declared certain forward contracts to be illegal. The provisions of the two Acts applied to different fields and there was no repugnancy between them. Therefore there was no question of an illegal forward contract in groundnuts being rendered valid by the Bombay Act.[43]

EFFECTS OF REPUGNANCY

10.29 A State law repugnant to Union or existing law would be void. Here void means only inoperative. So long as the Union law remains in the field the State law is eclipsed. Once the Union law is repealed the State law will revive.[44]

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43. M/s. Basant Lal v. Bansi Lal, A.I.R. 1961 S.C. 823.
44. Srikant Lal v. State of Bihar, A.I.R. 1958 Pat. 496. For the general doctrine of eclipse see Bhikaji Narain v. State of M.P., A.I.R. 1955 S.C. 781.

10.30 Further, the State law in the concurrent field is void only to the extent of the repugnancy and not in its entirety. So there is scope for applying the principle of severability[45]

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45. For the tests for determining whether a provision is severable or not, see R.M.D.C. v. Union of India, A.I.R. 1957 S.C. 628. Summarising the tests Venkatarama Ayyar J. said as follows, at pp.636-37:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol.82, p.156; Sutherland on Statutory Construction, Vol.2, pp.176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol.1 at pp. 360-361; Crawford on Statutory Construction, pp.217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole, Vide Crawford on Statutory Construction, pp.218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different section; (Vide Cooley's Constitutional Limitations, Vol.1, pp.361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

(contd....299).

in the case of State law that has become void on account of repugnancy.

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(f.n.45 contd.)

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol.2, p.194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol.2, pp.177-178.

## CHAPTER XI

## CONFLICTS BETWEEN EXCLUSIVE AND CONCURRENT FIELDS

11.1 Conflicts between the exclusive fields and the concurrent field raise a question of power and not one of repugnancy. Between an exclusive field and the concurrent field it is a relation of hierarchy, subordination and power in contrast to the relations within the same field, viz., concurrent field, where it is relation of co-existence, co-operation and tolerance. Hence the techniques available for the resolution of conflicts between exclusive State and Union fields are applicable here also. Thus, the principle of harmonious construction, the principle of pith and substance, the doctrine of incidental encroachment and that of hierarchical arrangement of the Union, Concurrent and State jurisdictions with provision for subjection of each to the immediately higher one, can all be pressed into service for the resolution of such conflicts.

11.2 In State of Bombay v. Narottamdas[1] the validity of the Bombay City and Civil Court Act, 1948 (40 of 1948) which created an additional civil court for Greater Bombay with jurisdiction to try all civil suits upto a certain value was in issue. It was contended that the Bombay Legislature could confer such powers only in respect of matters in the Provincial List. It was held that entry 1 of List II in the Government

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1. A.I.R. 1951 S.C. 69.

of India Act, 1935 (administration of justice, constitution and organisation of all courts except the Federal Court) could be harmonised with entries 53 in List I, 2 of List II and 15 of List III dealing with jurisdiction and powers of all courts (except the Federal Court) with respect to the matters in the respective Lists, by reading the general power of entry 1 of List II as not including the special power mentioned in the three entries of the three Lists. It was held that the legislation in question was referrable in pith and substance to entry 1 of List II and was valid.

11.3 A conflict between entry 4 (civil procedure including the law of... and all matters included in the Civil Procedure Code at the date of passing of this Act) of the Concurrent List, and entry 2 (jurisdiction and powers of all courts except the Federal Court with respect to any of the matters in this list) of the Provincial List has been solved by reading Civil Procedure in the Concurrent List as exclusive of jurisdiction and powers of courts specifically provided for in List II.[2]

11.4 A provision in a State Sales Tax law, which provided for finality of the assessment to the exclusion of appeal or revision otherwise than as provided in that Act, and for punishment of offences against the Act, was challenged as void being repugnant to the Criminal Procedure Code and the Indian Evidence Act, both in the concurrent field. It was held that

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2. Stewart v. Brojendra Kishore, A.I.R. 1939 Cal.628.

a State legislature legislating on sales tax under entry 54 of List II was also competent to legislate with regard to offences against that law as per entry 64 of List II, and to regulate and control the jurisdiction and powers of courts (except the Supreme Court) in regard to that law as per entry 65 of List II. Entry 1 of the Concurrent List (criminal law etc.) specifically excluded from its purview offences against laws with respect to matters in List II. Therefore the provision in question was referrable to the entry in State List itself and any encroachment to the concurrent field was only incidental.[3]

11.5 The power over trade and commerce provides an interesting possibility of conflicts between exclusive and concurrent fields. This power is distributed among the three Lists.[4] Conflicts between these entries may be solved by applying the principles of reconciliation of the entries,[5] of pith and substance, of incidental encroachment and of the hierarchical arrangement of the jurisdictions.[6]

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3. State of Mysore v. Mohamed Ismail, A.I.R. 1958 Mys. 143.
4. Entries 41 and 42 of List I, entry 26 of List II and entry 33 of List II.
5. See para 2.14 ante for the decision in Tika Ramji v. State of U.P., A.I.R. 1956 S.C. 676.
6. In the United States of America the power of Congress over inter-State commerce is "exclusive" as to those phases of it which require uniform regulation. Outside this field, as plotted by the court, the States enjoy a "concurrent" power of regulation, subject to the "overriding power" of the Congress. See, Constitution of the U.S.A. Analysis and Interpretation, U.S. Government Printing Office, 1964, p.208.

   Regarding the power of the Congress to regulate inter-State carriers See, Houston & Texas Railway v. United States

(contd....303).

based on entries 63 of List II and 44 of List III. Therefore the U.P. Amendment Act was valid.

11.8 The question of the powers regarding ancient monuments and archaeological sites was involved in Joseph Pothen v. State of Kerala[11]. The argument was that the Central Act, Ancient Monument Preservation Act, 1904 had displaced the Travancore Ancient Monument Preservation Regulation I of 1122 M.E. on the extension of the former to the State. The power over ancient monuments etc. have been distributed as follows in the Constitution:

> Entry 67 of List I- Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.
>
> Entry 12 of List II- Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.
>
> Entry 40 of List III- Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

The court found that though the Central Act and the Travancore Act practically covered the same field there was no declaration of national importance in the Central Act and hence the State regulation was not impliedly repealed. It

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11. A.I.R. 1965 S.C. 1514.

was further argued that the subject-matter of the dispute (the wall around the Sri Padmanabha Temple declared in the State Regulation as a protected monument) was an archaeological site and being in the Concurrent List (entry 40) the Central Act occupied the whole field and displaced the State Regulation. But the court held that it was only an ancient monument and not an archaeological site. This meant that the competence of the State Regulation was not ousted.

11.9 Thus the principles and techniques adopted in resolving conflicts between the Concurrent and exclusive fields are really the ones adopted in solving the conflicts between the exclusive fields.

# CHAPTER XII

## CONCLUSION

12.1 This study was aimed at an examination of the principles used by the judiciary in India for the resolution of conflicts in the legislative sphere arising out of the division by the Constitution of the total legislative fields into an exclusive Union field, an exclusive State field and a concurrent field. The conclusions and suggestions are given at the respective places where each problem is discussed. Still a brief survey of the more important points may be attempted here.

12.2 For the resolution of inter-jurisdictional conflicts, the doctrines of pith and substance, and of incidental encroachment are pressed into service. The doctrine of pith and substance or of characterisation of legislation is of somewhat uncertain content though eminently suited to preserve State powers which on a literal reading of the Constitutional provisions would otherwise have been substantially whittled down. It is said that in order to determine the pith and substance of legislation "one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions"[1]. But in practice it has been seen that the basis of characterising the legislation to find out its

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1. Per Venkatarama Ayyar, J. in A.S. Krishna v. State of Madras, A.I.R. 1957 S.C. 297 at p.303.

pith and substance is often inarticulate. It has been submitted that the judges should canvass more openly the policy considerations involved.

12.3 The problem of incidental encroachment between the exclusive fields can be solved by the supremacy of the Union over both the concurrent and State fields and of the concurrent over the State field provided for in article 246 of the Constitution by the hierarchical arrangement of the jurisdictions and by the use of the 'non obstante' and 'subjection' clauses. However, the judiciary has not been consistent in their devotion to this principle. Particularly, in cases where a part of the exclusive State field is transferred to the exclusive Union field, as in the case of industry, mining and education, the decisions reveal the confusion between the principles that are to be applied in the resolution of conflicts between exclusive fields and the resolution of conflicts in the concurrent field. It has been pointed out that there is no scope in such cases for bringing the conflicts under the principle of repugnancy or of the doctrine of occupied field.

12.4 In the area of colourable legislation the attempt to levy taxes under the guise of fees has revealed the weakness of the judicial process in this area. It has been suggested that having regard to fundamental principles and the interest of certainty of law, the judiciary should adopt a criterion according to which, wherever the element of force is present

it should be treated as tax and not as a fee. This might perhaps mean that the fees that are being at present levied by the State under the doubtful doctrines evolved by the judiciary may have to be discontinued which might affect State finances. The answer to this is that the Union should, where considered necessary, exact the levies as taxes, and distribute the shares to the States, and not continue the present practice of going to the rescue of the States by retrospective legislation to validate in effect the levy of illegal taxes by the States in the guise of fees.

12.5 In the field of industry and mining, where there is provision for transfer of part of a field from the State to the Union on parliamentary declaration, the effects of such a declaration have not been properly understood. The view that on such a declaration the State's power to acquire or requisition the property of the undertaking in question ceases to be effective has been shown to be untenable. It has been submitted that in the absence of repugnant Union legislation, the States would be free to exercise their powers of acquisition and requisition. A mere prohibition as in section 20 of the Industrial Disputes Act, 1951 which says that the State shall not exercise the power of taking over of the management of an industrial undertaking of a controlled industry has been shown to be unconstitutional. The Union Parliament cannot merely prohibit the States from legislating in the concurrent field, but if necessary should override State legislation by its power of paramount legislation. In interpreting the

meaning of 'industry' the need for a broader perspective has been suggested. The interpretation restricting the meaning of the term industry to the process of production or manufacture and excluding raw materials and the products of manufacture might create difficulties for the smooth realisation of the Union policy. Therefore, it has been pointed out that an interpretation which would concede a broader scope for the Union power under the doctrine of ancillary powers could be adopted.

12.6 Though the approach of the courts to the relation between the co-ordination and determination of standards in institutions of higher education in entry 66 of Union List and of education in entry 11 of the State List has been satisfactory, the difficulty of an unregulated area being there in view of the inherent difficulties of abstractly determining in advance the contents of co-ordination and determination of standards has been pointed out. To avoid this, it has been submitted that the Union instrumentalities should actively cover the area to the extent uniformity of policy is desired and delegate to the States power to regulate the remaining matters.

12.7 Since there are no taxing powers in the Concurrent List, the problem of conflict in this area has been confined to the exclusive fields. The solutions of the court have been satisfactory. However, it has been submitted that, in the interest of fostering of export trade, not merely the last sale which in a highly technical sense occasions export,

other, has been considered in the light of the doctrine of immunities of instrumentalities, the provisions of the Constitution and the judicial decisions. It has been submitted that the majority decisions in the cases of State of West Bengal v. Union of India[3] and In re Sea Customs Act, section 20(2)[4] are correct. The minority judgments and the criticism of certain writers have been shown to be untenable and as based on a view of competitive federalism which is out of tune with the modern world and of the Indian context.

12.10 Regarding conflicts in the concurrent field, it has been shown that on a true interpretation of article 254(1) it applies only to the concurrent field and not to the exclusive fields. It has also been shown that the doctrine of occupied field is properly applicable only to the concurrent field, though that has sometimes been improperly invoked in the case of conflicts in the exclusive field. The uncertainties involved in the application of the tests of repugnancy, namely, exhaustive code test, and covering the field test, have been brought out. It has been submitted that the judiciary should discuss more openly the policy perspectives in coming to the conclusion that the Union Legislation has laid down an exhaustive code or that it has evinced an intention to cover the whole field.

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3. A.I.R. 1963 S.C. 1241.
4. A.I.R. 1963 S.C. 1760.

12.11 As regards questions of conflicts between exclusive and concurrent fields it has been pointed out that they could be solved by applying the principles of pith and substance and the supremacy of the fields resulting from hierarchical arrangements.

12.12 A word may be said about the need for constitutional amendment. In so far as such a step may be ventured from the conclusions of this study, this writer is of the opinion that the provisions regarding the distribution of powers and for the resolution of conflicts are well drawn. Though there may be scope for refinement in the application of certain principle there seems to be no need for any radical change. In the difficult question whether the powers of the Union ought to be curtailed in favour of the States it may be submitted that the limited support available from this study does not disclose any such need. The decision of the Union Government endorsing the view of the Administrative Reforms Commission (A.R.C.) that no changes in the Constitution are called for to ensure proper and harmonious Centre-State relations[5] is therefore welcomed as far as the problem of legislative conflicts is concerned.

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5. See, "The Hindu" dated March 15, 1975.

ANNEXURE A

(See footnote 15 under para 1.7 at page 8)

THE DEVOLUTION RULES (Under the GOI Act, 1915)

(Rules under section 45A of the Government of India Act)
No.308-S., dated the 16th December, 1920.

SCHEDULE I

(SEE RULE 3)

Part I - Central Subjects.

1.(a) Defence of India, and all matters connected with His Majesty's Naval, Military, and Air Forces in India, or with His Majesty's Indian Marine Service or with any other force raised in India, other than military and armed police wholly maintained by local Governments.

(b) Naval and military works and cantonments.

2. External relations, including naturalisation and aliens, and pilgrimages beyond India.

3. Relations with States in India.

4. Political charges.

5. Communications to the extent described under the following heads, namely:-

(a) railways and extra-municipal tramways, in so far as they are not classified as provincial subjects under entry 6(d) of Part II of this Schedule;

(b) aircraft and all matters connected therewith; and

(c) inland waterways, to an extent to be declared by rule made by the Governor General in Council or by or under legislation by the Indian legislature.

6. Shipping and navigation, including shipping and navigation or inland waterways in so far as declared to be a central subject in accordance with entry 5(c).

7. Light-houses (including their approaches), beacons, lightships, and buoys.

8. Port quarantine and marine hospitals.

9. Ports declared to be major ports by rule made by the Governor General in Council or by or under legislation by the Indian legislature.

10. Posts, telegraphs and telephones, including wireless installations.

11. Customs, cotton excise duties, income-tax, salt, and other sources of all-India revenues.

12. Currency and coinage.

13. Public debt of India.

14. Savings Banks.

15. The Indian Audit Department and excluded Audit Departments, as defined in rules framed under section 96-D (1) of the Act.

16. Civil law, including laws regarding status, property, civil rights and liabilities, and civil procedure.

17. Commerce, including banking and insurance.

18. Trading companies and other associations.

19. Control of production, supply, and distribution of any articles in respect of which control by a central authority is declared by rule made by the Governor General in Council or by or under legislation by the Indian legislature to be essential in the public interest.

20. Development of industries, in cases where such development by central authority is declared by order of the Governor General in Council, made after consultation with the local Government or local Governments concerned, expedient in the public interest.

21. Control of cultivation and manufacture of opium, and sale of opium for export.

22. Stores and stationery, both imported and indigenous, required for Imperial Departments.

23. Control of petroleum and explosives.

24. Geological survey.

25. Control of mineral development, in so far as such control is reserved to the Governor General in Council under rules made or sanctioned by the Secretary of State, and regulation of mines.

26. Botanical survey.

27. Inventions and designs.

28. Copyright.

29. Emigration from, and immigration into, British India, and inter-provincial migration.

30. Criminal law, including criminal procedure.

31. Central police organization.

32. Control of arms and ammunition.

33. Central agencies and institutions for research (including observatories), and for professional or technical training or promotion of special studies.

34. Ecclesiastical administration, including European cemeteries.

35. Survey of India.

36. Archaeology.

37. Zoological Survey.

38. Meteorology.

39. Census and statistics.

40. All-India services.

41. Legislation in regard to any provincial subject, in so far as such subject is in Part II of this Schedule stated to be subject to legislation by the Indian legislature, and any powers relating to such subject reserved by legislation to the Governor General in Council.

42. Territorial changes, other than intra-provincial, and declaration of laws in connection therewith.

43. Regulation of ceremonial, titles, orders, precedence, and civil uniform.

44. Immoveable property acquired by, and maintained at the cost of, the Governor General in Council.

45. The Public Service Commission.

46. All matters expressly excepted by the provisions of Part II of this Schedule, from inclusion among provincial subjects.

47. All other matters not included among provincial subjects under Part II of this Schedule.

Part II - Provincial Subjects.

1. Local self-government, that is to say, matters relating to the constitution and powers of municipal corporations, improvement trusts, district boards, mining boards of health, and other local authorities established in a province for the purpose of local self-government, exclusive of matters arising under the Cantonments Act, 1910; subject to legislation by the Indian legislature as regards-

(a) the powers of such authorities to borrow otherwise than from a provincial government, and

(b) the levying by such authorities of taxation not included in Schedule II to the Scheduled Taxes Rules.

2. Medical administration, including hospitals, dispensaries, and asylums, and provision for medical education.

3. Public health and sanitation and vital statistics; subject to legislation by the Indian legislature in respect to infectious and contagious diseases to such extent as may be declared by any Act of the Indian legislature.

4. Pilgrimages within British India.

5. Education: provided that-

(a) the following subjects shall be excluded, namely:-

(i) the Benares Hindu University and such other Universities constituted after the commencement of these rules as may be declared by the Governor General in Council to be central subjects, and

(ii) Chief's Colleges and any institution maintained by the Governor General in Council for the benefit of members of His Majesty's Forces or of other public servants or of the children of such members or servants; and

(b) the following subjects shall be subject to legislation by the Indian legislature, namely:-

(i) the control of the establishment and the regulation of the constitutions and functions of Universities constituted after the commencement of these rules, and

(ii) the definition of the jurisdiction of any University outside the province in which it is situated, and

(iii) for a period of five years from the date of the commencement of these rules, the Calcutta University, and the control and organization of secondary education in the Presidency of Bengal.

6. Public works, other than those falling under entry 14 of this Part and included under the following heads, namely:-

(a) construction and maintenance of provincial buildings used or intended for any purpose in connection with the administration of the province; and care of historical monuments, with the exception of ancient monuments as defined in section 2(1) of the Ancient Monuments Preservation Act, 1904, which are for the time being declared to be protected monuments under

section 3(1) of that Act; provided that the Governor General in Council may, by notification in the Gazette of India, remove any such monument from the operation of this exception;

(b) roads, bridges, ferries, tunnels, ropeways, and causeways, and other means of communication, subject to such conditions as regards control over construction and maintenance of means of communication declared by the Governor General in Council to be of military importance, and as regards, incidence of special expenditure connected therewith, as the Governor General in Council may prescribe;

(c) tramways within municipal areas; and

(d) light and feeder railways and extra-municipal tramways, in so far as provision for their construction and management is made by provincial legislation; subject to legislation by the Indian legislature in the case of any such railway or tramway which is in physical connection with a main line or is built on the same gauge as an adjacent main line.

7. Water-supplies, irrigation and canals, drainage and embankments, water storage and water power; subject to legislation by the Indian Legislature with regard to matters of inter-provincial concern or affecting the relations of a province with any other territory.

8. Land revenue administration as described under the following heads, namely,—

(a) assessment and collection of land revenue;

(b) maintenance of land records, survey for revenue purposes, records-of-rights;

(c) laws regarding land tenures, relations of landlords and tenants, collection of rents;

(d) Courts of Wards, incumbered and attached estates;

(e) land improvement and agricultural loans;

(f) colonisation and disposal of Crown lands and alienation of land revenue; and

(g) management of Government estates.

9. Famine relief.

10. Agriculture, including research institutes, experimental and demonstration farms, introduction of improved methods, provision for agricultural education, protection against destructive insects and pests, and prevention of plant diseases; subject to legislation by the Indian Legislature in respect to destructive insects and pests and plant diseases to such extent as may be declared by any Act of the Indian Legislature.

11. Civil Veterinary Department, including provision for veterinary training, improvement of stock, and prevention of animal diseases; subject to Legislation by the Indian Legislature in respect to animal diseases to such extent as may be declared by any Act of the Indian Legislature.

12. Fisheries.

13. Co-operative Societies.

14. Forests, including preservation of game therein and buildings and works executed by the Forest Department; subject to legislation by the Indian Legislature as regards disforestation of reserved forests.

15. Land acquisition; subject to legislation by the Indian Legislature.

16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase, and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles, but excluding, in the case of opium, control of cultivation, manufacture and sale for export.

17. Administration of justice, including constitution, powers, maintenance and organisation of courts of civil and criminal jurisdiction within the province; subject to legislation by the Indian Legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners, and any courts of criminal jurisdiction.

18. Provincial law reports.

19. Administrators General and Official Trustees; subject to legislation by the Indian Legislature.

20. Non-judicial stamps, subject to legislation by the Indian Legislature, and judicial stamps, subject to legislation by the Indian Legislature as regards amount of court-fees levied in relation to suits and proceedings in the High Courts under their original jurisdiction.

21. Registration of deeds and documents; subject to legislation by the Indian Legislature.

22. Registration of births, deaths, and marriages; subject to legislation by the Indian Legislature for such classes as the Indian Legislature may determine.

23. Religious and charitable endowments.

24. Development of mineral resources which are Government property, subject to rules made or sanctioned by the Secretary of State, but not including the regulation of mines.

25. Development of industries, including industrial research and technical education.

26. Industrial matters included under the following heads, namely,—

(a) factories;
(b) settlement of labour disputes;
(c) electricity;
(d) boilers;
(e) gas;
(f) smoke nuisances; and

(g) welfare of labour, including provident funds, industrial insurance (general, health and accident), and housing;

subject as to heads (a), (b), (c), (d), and (g) to legislation by the Indian Legislature.

27. Stores and stationery, subject, in the case of imported stores and stationery, to such rules as may be prescribed by the Secretary of State in Council.

28. Adulteration of foodstuffs and other articles; subject to legislation by the Indian Legislature as regards import and export trade.

29. Weights and measures; subject to legislation by the Indian Legislature as regards standards.

30. Ports, except such ports as may be declared by rules made by the Governor General in Council or by or under Indian legislation to be major ports.

31. Inland water-ways, including shipping and navigation thereon so far as not declared by the Governor General in Council to be central subjects, but subject as regards inland steam-vessels to legislation by the Indian Legislature.

32. Police, including railway police; subject, in the case of railway police, to such conditions as regards limits of jurisdiction and railway contributions to cost of maintenance as the Governor General in Council may determine.

33. The following miscellaneous matters, namely,—

(a) regulation of betting and gambling;

(b) prevention of cruelty to animals;

(c) protection of wild birds and animals;

(d) control of poisons, subject to legislation by the Indian Legislature;

(e) control of vehicles, subject, in the case of motor vehicles, to legislation by the Indian Legislature as regards licences valid throughout British India; and

(f) control of dramatic performances and cinematographs, subject to legislation by the Indian Legislature in regard to sanction of films for exhibition.

34. Control of newspapers, books and printing presses; subject to legislation by the Indian Legislature.

35. Coroners.

36. Excluded areas.

37. Criminal tribes; subject to legislation by the Indian Legislature.

38. European vagrancy; subject to legislation by the Indian Legislature.

39. Prisons, prisoners (except State prisoners), and reformatories; subject to legislation by the Indian Legislature

40. Pounds and prevention of cattle trespass.

41. Treasure trove.

42. Libraries (except the Imperial Library) and museums (except the Indian Museum, the Imperial War Museum, and the Victoria Memorial, Calcutta) and Zoological Gardens.

43. Provincial Government Presses.

44. Elections for Indian and provincial Legislatures; subject to rules framed under sections 64(1) and 72A(4) of the Act.

45. Regulation of medical and other professional qualifications and standards; subject to legislation by the Indian Legislature.

46. Local Fund Audit, that is to say, the audit by Government agency of income and expenditure controlled by local bodies.

47. Control, as defined by rule 10, of members of all-India and provincial services serving within the province; and control, subject to legislation by the Indian Legislature, of public services within the province other than all-India services.

48. Sources of provincial revenue, not included under previous heads, whether:-

(a) taxes included in the Schedules to the Scheduled Taxes Rules; or

(b) taxes not included in those Schedules, which are imposed by or under provincial legislation which has received the previous sanction of the Governor General.

49. Borrowing of money on the sole credit of the province; subject to the provisions of the Local Government (Borrowing) Rules.

50. Imposition by legislation of punishments by fine, penalty, or imprisonment for enforcing any law of the province relating to any provincial subject; subject to legislation by the Indian Legislature in the case of any subject in respect of which such a limitation is imposed under these rules.

51. Any matter which, though falling within a central subject, is declared by the Governor General in Council to be of a merely local or private nature within the province.

52. x x x x x x

ANNEXURE B

(See footnote 27 under para 1.12 at page 11)

APPENDIX VI

LIST I (Exclusively Federal)

1. The common defence of India in time of an emergency declared by the Governor General.

2. The raising, maintaining, disciplining and regulating of His Majesty's naval, military and air forces in India and any other armed force raised in India, other than military and armed police maintained by local governments, and armed forces maintained by the Rulers of Indian States.

3. Naval, Military and Air Works.

4. The administration of cantonment areas by organs of local self-government, and the regulation therein of residenti accommodation.

5. The employment of the armed forces of His Majesty for the defence of the Provinces against internal disturbance and for the execution and maintenance of the laws of the Federation and the Provinces.

6. (a) Chiefs' Colleges and Educational Institutions for the benefit of past and present members of His Majesty's Forces or of the children of such members.

(b) The Benares Hindu University and the Aligarh Muslim University.

7. Ecclesiastical affairs including European cemeteries.

8. External Affairs, including International Obligations, subject to previous concurrence of the Units as regards non-federal subjects.

9. Emigration from and immigration into India and inter-provincial migration, including regulation of foreigners in India.

10. Pilgrimages beyond India.

11. Extradition and Fugitive Offenders.

12. (a) Construction of Railways in British India and with the consent of the State, in a State, but excluding light and feeder railways and extra-municipal tramways being wholly within a Province, but not being in physical connection with federal railways.

(b) Regulation of railways in British India and Federal railways in States.

(c) Regulation of other railways in respect of—

(i) Fares.
(ii) Rates.
(iii) Terminals.
(iv) Interchangeability of traffic.
(v) Safety.

13. Air Navigation and Aircraft including the regulation of Aerodromes.

14. Inland Waterways, passing through two or more Units.

15. Maritime Shipping and Navigation including carriage of goods by sea.

16. Regulation of fisheries in Indian waters beyond territorial waters.

17. Shipping and Navigation on Inland Waterways as regards mechanically propelled vessels.

18. Lighthouses (including their approaches), beacons, lightships and buoys.

19. Port Quarantine.

20. Ports declared to be Major Ports by or under Federal legislation.

21. Establishment and maintenance of postal, telegraphic, telephone, wireless and other like services, and control of wireless apparatus.

22. Currency, Coinage and Legal Tender.

23. Public Debt of the Federation.

24. Post Office Savings Bank.

25. The incorporation and regulation of Banking, Insurance Trading, Financial and other Companies and Corporations.

26. Development of Industries in cases where such development is declared by or under a federal law to be expedient in the public interest.

27. Control of cultivation and manufacture of opium and sale of opium for export.

28. Control of petroleum and explosives.

29. Traffic in arms and ammunition and, in British India, control of arms and ammunition.

30. Copyright, Inventions, Designs, Trademarks and Merchandise Marks.

31. Bankruptcy and Insolvency.

32. Negotiable instruments.

33. Control of motor vehicles as regards licences valid throughout the Federation.

34. The regulation of the import and export of commodities across the customs frontiers of the Federation, including the imposition and administration of duties thereon.

35. Salt.

36. The imposition and regulation of duties of excise but not including duties of excise on alcoholic liquors, drugs or narcotics (other than tobacco).

37. Imposition and administration of taxes on the income or capital of corporations.

38. Geological Survey of India.

39. Botanical Survey of India.

40. Meteorology.

41. Census; Statistics for the purposes of the Federation.

42. Central Agencies and Institutes for research.

43. The Imperial Library, Indian Museum, Imperial War Museum, Victoria Memorial, and any other similar Institution controlled and financed by the Federal Government.

44. Pensions payable out of Federal revenues.

45. Federal Services and Federal Public Service Commission

46. Immovable property in possession of the Federal Government.

47. The imposition by legislation of punishment by fine, penalty or imprisonment for enforcing any law made by the Federal Legislature.

48. Matters in respect of which the Act makes provision until the Federal Legislature otherwise provides.

49. Imposition and administration of taxes on income other than agricultural income or the income of corporations, but subject to the power of the Provinces to impose surcharges.

50. The imposition and administration of duties on property passing on death other than land.

51. The imposition and administration of taxes on mineral rights and on personal capital other than land.

52. The imposition and administration of terminal taxes on railway, water or air-borne goods and passengers, and taxes on railway tickets and goods freights.

53. Stamp duties which are the subject of legislation by the Indian Legislature at the date of Federation.

54. The imposition and administration of taxes not otherwise specified in this List or List II, subject to the consent of the Governor-General given in his discretion after consulting Federal and Provincial Ministers or their representatives.

55. Naturalisation and status of aliens.

56. Conduct of elections to the Federal Legislature, including election offences and disputed elections.

57. Standards of weight.

58. All matters arising in Chief Commissioners' Provinces (other than British Baluchistan) not having a legislature.

59. Survey of India.

60. Archaeology.

61. Zoological Survey.

62. The recognition throughout British India of the laws, the public Acts and records and judicial proceedings of the Provinces.

63. Jurisdiction, powers, and authority of all courts in British India, except the Federal Court and the Supreme Court with respect to the subjects in this list.

64. Matters ancillary and incidental to the subjects specified above.

## LIST II (Exclusively Provincial)

1. Local self-government, including matters relating to the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlements and other local authorities in the Province established for the purpose of local self-government and village administration, but not including matters covered by item No.4 in List I.

2. Establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province (other than marine hospitals).

3. Public health and sanitation.

4. Pilgrimages other than pilgrimages beyond India.

5. Education other than the Universities and institutions covered by item No.6 in List I.

6. Public Works and buildings in connection with the administration of the Province.

7. Compulsory acquisition of land.

8. Roads, bridges, ferries, tunnels, ropeways, causeways and other means of communication.

9. Construction (query—regulation) and maintenance of light and feeder railways and extra-municipal tramways not being in physical connection with federal railways.

10. Tramways within municipal areas.

11. Water supplies, irrigation and canals, drainage and embankments, water storage and water power.

12. Land Revenue, including-

(a) assessment and collection of revenue,

(b) maintenance of land records, survey for revenue purposes and records of rights.

13. Land tenures, title to land and easements.

14. Relations of landlords and tenants and collection of rents.

15. Courts of Wards and encumbered and attached estates.

16. Land improvement and agricultural loans.

17. Colonisation, management and disposal of lands and buildings vested in the Crown for the purposes of the Province.

18. Alienation of land revenue and pensions payable out of Provincial revenues (query—frontier remissions).

19. Pre-emption.

20. Agriculture, including research institutes, experimental and demonstration farms, introduction of improved methods, agricultural education, protection against destructive pests and prevention of plant diseases.

21. Civil veterinary department, veterinary training, improvement of stock and prevention of animal diseases.

22. Fisheries.

23. Co-operative Societies.

24. Trading, literary, scientific, religious and other Societies and Associations not being incorporated Companies.

25. Forests.

26. Control of production, manufacture, possession, transport, purchase and sale of alcoholic liquors, drugs and narcotics.

27. Imposition and regulation of duties of excise on alcoholic liquors, drugs and narcotics other than tobacco.

28. Administration of justice, including the constitution and organisation of all Courts within the Province, except the Federal Court, the Supreme Court and a High Court, and the maintenance of all Courts within the Province, except the Federal Court and the Supreme Court.

29. Jurisdiction of and procedure in Rent and Revenue Courts.

30. Jurisdiction, powers and authority of all Courts within the Province, except the Federal Court and the Supreme Court, with respect to subjects in this list.

31. Administrators-General and Official Trustees.

32. Stamp duties not covered by item No.53 in List I.

33. Registration of deeds and documents other than the compulsory registration of documents affecting immovable property.

34. Registration of births and deaths.

35. Religious and charitable endowments.

36. Mines and the development of mineral resources in the Province, but not including the regulation of the working of mines.

37. Control of the production, supply and distribution of commodities.

38. Development of industries, except in so far as they are covered by Item No.26 in List I.

39. Factories, except the regulation of the working of factories.

40. Electricity.

41. Boilers.

42. Gas

43. Smoke nuisances.

44. Adulteration of foodstuffs and other articles.

45. Weights and measures, except standards of weight.

46. Trade and Commerce within the Province, except in so far as it is covered by any other subject in these lists.

47. Actionable wrongs arising in the Province.

48. Ports other than Ports declared to be Major Ports by or under a federal law.

49. Inland waterways being wholly within a Province, including shipping and navigation thereon, except as regards mechanically-propelled vessels.

50. Police (including railway and village police), except as regards matters covered by the Code of Criminal Procedure.

51. Betting and gambling.

52. Prevention of cruelty to animals.

53. Protection of wild birds and wild animals.

54. Regulation of motor vehicles, except as regards licences valid throughout the Federation.

55. Regulation of dramatic performances and cinemas.

56. Coroners.

57. Criminal tribes.

58. European vagrancy.

59. Prisons, Reformatories, Borstal Institutions, and other institutions of a like nature.

60. Prisoners.

61. Pounds and the prevention of cattle trespass.

62. Treasure trove.

63. Libraries (except the Imperial Library), Museums (except the Indian Museum, the Imperial War Museum and the Victoria Memorial) and other similar institutions controlled and financed by the Provincial Government.

64. Conduct of elections to the Provincial Legislature, including election offences and disputed elections.

65. Public Services in a Province and Provincial Public Service Commission.

66. The authorisation of surcharges, within such limits as may be prescribed by Order in Council, upon income-tax assessed by the Federal Government upon the income of persons resident in the Province.

67. The raising of provincial revenue—

(i) from sources and by forms of taxation specified in the Annexure appended to this list and not otherwise provided for by these lists; and

(ii) by any otherwise unspecified forms of taxation, subject to the consent of the Governor-General given in his discretion after consulting the Federal Ministry and Provincial Ministries or their representatives.

68. Relief of the poor.

69. Health insurance and invalid and old-age pensions.

70. Money-lenders and money-lending.

71. Burials and burial grounds other than European Cemeteries.

72. Imposition by legislation of punishment by fine, penalty or imprisonment for enforcing any law made by the Provincial Legislature.

73. Matters with respect to which the Act makes provision until the Provincial Legislature otherwise provides.

74. The administration and execution of federal laws on the subjects specified in List III, except No.22.

75. Statistics for provincial purposes.

76. Generally, any matter of a merely local or private nature in the Province not specifically included in this List and not falling within List I or List III, subject to the right of the Governor-General in his discretion to sanctio general legislation on that subject.

77. Matters ancillary and incidental to the subjects specified in this list.

ANNEXURE (see item 67)

(Compare Appendix IV of Report of Federal Finance Committee--Cmd. 4069)

1. Revenue from the public domain, including lands, buildings mines, forests, fisheries, and any other real property belonging to the Province.

2. Revenue from public enterprises such as irrigation, electric power and water supply, markets, slaughter houses, drainage, tolls and ferries, and other undertakings of the Province.

3. Profits from banking and investments, loans and advances and State lotteries.

4. Fines and penalties arising in respect of subjects administered by the Government of the Province.

5. Fees levied in the course of discharging the functions exercised by the Government of the Province and local authorities, such as court fees, including all fees for judicial or quasi-judicial processes, local rates and dues, fees for the registration of vehicles licences to possess fire-arm and to drive automobiles, licensing of common carriers, fees for the registration of births, deaths and marriages, and of documents.

6. Capitation taxes other than taxes on immigrants.

7. Taxes on land, including death or succession duties in respect of succession to land.

8. Taxes on personal property and circumstance, such as taxes on houses, animals, hearths, windows, vehicles; chaukidari taxes; sumptuary taxes; and taxes on trades, professions and callings.

9. Taxes on employment, such as taxes on menials and domestic servants.

10. Excises on alcoholic liquors, narcotics (other than tobacco) and drugs and taxes on consumption not otherwise provided for, such as cesses on the entry of goods, into a local area, taxes on the sale of commodities and on turnover, and taxes on advertisements.

11. Taxes on agricultural incomes.

12. Stamp duties other than those provided for in List I.

13. Taxes on entertainments and amusements, betting, gambling and private lotteries.

14. Any other receipts accruing in respect of subjects administered by the Province.

## LIST III (Concurrent)

1. Jurisdiction, powers and authority of all Courts (except the Federal Court, the Supreme Court and Rent and Revenue Courts) with respect to the subjects in this List.

2. Civil Procedure, including the Law of Limitation and all matters now covered by the Indian Code of Civil Procedure.

3. Evidence and Oaths.

4. Marriage and Divorce.

5. Age of majority and custody and guardianship of infant

6. Adoption.

7. Compulsory registration of documents affecting immovable property.

8. The law relating to—

(a) Wills, intestacy and succession, including all matters now covered by the Indian Succession Act.

(b) Transfer of property, trusts and trustees, contracts, including partnership, and all matters now covered by the Indian Specific Relief Act.

(c) Powers of attorney.

(d) Relations between husband and wife.

(e) Carriers.

(f) Innkeepers.

(g) Arbitration.

(h) Insurance.

9. Criminal Law including all matters now covered by the Indian Penal Code, but excluding the imposition of punishment by fine, penalty or imprisonment for enforcing a law on a subject which is within the exclusive competence of the Federal legislature or a Provincial legislature.

10. Criminal Procedure including all matters now covered by the Indian Code of Criminal Procedure.

11. Control of newspapers, books and printing presses.

12. Lunacy, but not including Lunatic Asylums.

13. Regulation of the working of Mines but not including mineral development.

14. Regulation of the working of factories.

15. Employer's liability and Workmen's compensation.

16. Trade Unions.

17. Welfare of labour including provident funds and industrial insurance.

18. Labour disputes.

19. Poisons and dangerous drugs.

20. The recovery in a Province of public demands (including arrears of land revenue and sums recoverable as such) arising in another Province.

21. Regulation of medical and other professional qualifications.

22. Ancient and historical monuments including administration thereof.

23. Matters ancillary and incidental to the subjects specified in this list.

NOTE: The word 'now' in Nos.2, 8, 9 and 10 is intended to refer to the date on which the list takes effect.

ANNEXURE C

(See footnote 41 under para 1.20 at page 17)

# PART V

# LEGISLATIVE POWERS

## CHAPTER I

## DISTRIBUTION OF POWERS

**Extent of Federal and Provincial laws**

**99.**-(1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, no Federal law shall, on the ground that it would have extra territorial operation, be deemed to be invalid in so far as it applies—

(a) to British subjects and servants of the Crown in any part of India; or

(b) to British subjects who are domiciled in any part of India wherever they may be; or

(c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(e) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be.

Subject matter of Federal and Provincial laws

100.-(1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

Extent of power to legislate for States

101. Nothing in this Act shall be construed as empowering the Federal Legislature to make laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitations contained therein.

Power of Federal Legislature to legislate if an emergency is proclaimed

102.-(1) Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a "Proclamation of

Indian law, the Naval Discipline Act as so applied shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, subject however—

(a) in the application of the said Act to the forces and ships of the Indian navy and to the trial by court martial of officers and men belonging thereto, to such modifications and adaptations, if any, as may be, or may have been, made by the Act of the Federal or Indian Legislature to adapt the said Act to the circumstances of India, including such adaptations as may be, or may have been, so made for the purpose of authorising or requiring anything which under the said Act is to be done by or to the Admiralty, or the Secretary of the Admiralty, to be done by or to the Governor-General, or some person authorised to act on his behalf; and

(b) in the application of the said Act to the forces and ships of His Majesty's navy other than those of the Indian navy, to such modifications and adaptations as may be made, or may have been made under section sixty-six of the Government of India Act, by His Majesty in Council for the purpose of regulating the relations of those forces and ships to the forces and the ships of the Indian navy.

(2) Notwithstanding anything in this Act or in any Act of any Legislature in India, where any forces and ships of the Indian navy have been placed at the disposal of the Admiralty, the Naval Discipline Act shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, without any such modifications or adaptations as aforesaid.

Provisions as to legislation for giving effect to internationa agreements

106.-(1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.

(2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.

(3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.

Inconsistency between Federal laws and Provincial, or State, laws

107.-(1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that

matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

## SEVENTH SCHEDULE

## LEGISLATIVE LISTS

### LIST I

### FEDERAL LEGISLATIVE LIST

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organisations.

15. Ancient and historical monuments; archaeological sites and ramains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom; pilgrimages to places beyond India.

18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, designs, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms; firearms; ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oilfields

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner' Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalisation.

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

## LIST II

## PROVINCIAL LEGISLATIVE LIST

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.

2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province; markets and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport,

purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

## LIST III
## CONCURRENT LEGISLATIVE LIST
## PART I

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the

use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibiti

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

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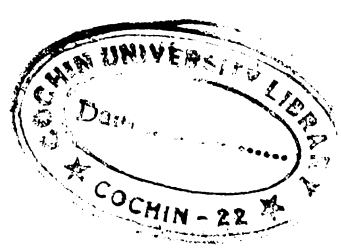

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1.29 The Constituent Assembly appointed a number of committees. They were the Union Powers Committee, the Union Constitutional Committee, the Provincial Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights, the Committee on Chief Commissioners Provinces, the Committee on Financial Relations Between Union and States, and the Advisory Committee on Tribal Areas. Based on the reports of these Committees the scheme for the drafting of the new Constitution was accepted. The Drafting Committee was appointed on August 29, 1947. The draft prepared by the Drafting Committee was discussed in the Constituent Assembly and finally passed on 24th November 1949. It is proposed to note some developments regarding the drafting and acceptance of the provisions governing the distribution of powers.

PROVISIONS GOVERNING THE DISTRIBUTION OF POWERS

1.30 Since the Cabinet Mission proposals which formed the basis for the working of the Constituent Assembly envisaged a federal set up with defence, communication and foreign affairs allocated to the federation, initial attempts were to spell out the full implications of these powers. The Objectives Resolution spoke of the inherent, implied, and resulting powers of the Union which betrayed the anxiety to make the Union as powerful as possible within the frame-work of the Cabinet Mission Plan. Thus the Union Powers Committee set up on January 25, 1947, received a number of memoranda from its members like K.M. Munshi and Alladi Krishnaswamy Ayyar regarding the scope of the Union powers. In its report to the Assembly

cannot be allowed as an incidental power of another legislative power though in the absence of a specific enumeration, it could have been so conceded.[42] When the State Legislatures surrendered to the Union Parliament under article 252 of the Constitution, the power of legislating with respect to betting and gambling,[43] the power to tax on betting and gambling given to the States under entry 62 of List II did not pass to the Union, though in the absence of a specific entry it would have been held to have passed as ancillary power.[44]

2.20 If a matter cannot be fairly and reasonably be said to be comprehended in the given topic of legislation it will not be allowed as an incidental one. Bhagawati J. held that the requisition of immovable property could not be allowed as an incidental power to compulsorily acquire land (in entry 9 of List II) nor to rights in or over land included in entry 21 of List II nor to transfer of property within entry 8 of List III in the Government of India Act, 1935.[45]

2.21 In State of Bihar v. Kameswar Singh[46] the Attorney General had raised a contention that the Bihar Land Reforms Act, 1950 was a legislation with respect to land under entry 18

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42. M.P.V. Sundramier & Co. v. State of Andhra Pradesh, A.I.R. 1958 S.C. 468.
43. Entry 34 of List II.
44. R.M.D.C. (Mysore) Pvt. Ltd. v. State of Mysore, A.I.R. 1962 S.C. 594.
45. Tan Bug v. Collector of Bombay, A.I.R. 1946 Bom.216. In the Constitution of India requisition is specifically mentioned vide entry 42 of List III in the Seventh Schedule.
46. A.I.R. 1952 S.C. 252.

of the State List, and a legislation under that entry should include all ancillary matters including acquisition of land. This contention was repelled by the court. Das J. observed:

> "There is no doubt that 'land' in Entry 18 in List II, has been construed in a very wide way but if 'land' or land tenure' in that entry is held to cover acquisition of land also, then Entry 36 of List II will have to be held as wholly redundant, so far as acquisition of land is concerned...to give a meaning and content to each of the two legislative heads under Entry 18 and Entry 36 in List II, the former should be read as a legislative category or head comprising land and land tenure and all matters connected therewith other than acquisition of land which should be read as covered by Entry 36 in List II".[47]

Limits of incidental power

2.22 The rule that an entry conferring legislative power should be interpreted broadly to include all ancillary and incidental matters cannot be stretched to any extent. In R.C. Cooper v. Union of India[48] (The Bank Nationalisation Case) it was argued that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 affected also the non-banking business (miscellaneous services, strictly not within banking, but customarily performed by banks to attract business) of the acquired banks. The non-banking business

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47. Ibid, at p.283. See also observations to the same effect by Venkatarama Ayyar J. in Amar Singhji v. State of Rajasthan, A.I.R. 1955 S.C. 504 at p.520, and by Shah J. in R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564 at p.591.

48. A.I.R. 1970 S.C. 564.

the Orissa Estate Abolition Act, 1952 compensation for estates taken over had to be calculated on the basis of net income and in computing the net income the agricultural income tax had to be deducted. The impugned Act had greatly increased the rates of agricultural income tax.[62] It was challenged that this was a device to reduce the net income and, therefore, the compensation payable. The Act had therefore to be struck down on the analogy of the decision in State of Bihar v. Kameswar Singh.[63] B.K. Mukherjea J.[64] speaking for the Supreme Court examined the scope of colourable legislation in the light of the principles laid down in Canadian,[65] and Australian[66] Constitutional law cases,

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62. For the actual increase see n. 69 infra.
63. A.I.R. 1952 S.C. 252.
64. Others on the Bench were Patanjali Sastri, C.J. S.R. Das, Ghulam Hassan and Bhagawati, JJ.
65. Union Colliery Co. of British Columbia Ltd. v. Bryden, 1899 A.C. 580. In this case section 4 of the British Columbian Coal Mines Regulation Act 1890 prohibited the employment of Chinese men in underground coal mines. It was held that the Act was not really aimed at the regulation of coal mine but was in truth a device to deprive the Chinese naturalise or not (naturalisation of aliens being within the exclusive authority of the Dominion Parliament) of ordinary rights of inhabitants of the British Columbia and in effect to prohibit their continued residence in that Province.

    (2) In Re Insurance Act of Canada, 1932 A.C. 41, the Privy Council held that sections 11 and 12 of the Canadian Insurance Act which required foreign insurers to be license invalid since under the guise of legislation as to aliens and immigration (both within the exclusive dominion authority) the Dominion Legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority.
66. Moran v. Dy. Commissioner of Taxation for New South Wales, 1940 A.C. 838. In this case the allegation was that a Commonwealth Financial Assistance Scheme contemplated in the Commonwealth legislation was a colourable device to overcome the prohibition against discriminatory taxation. Though this was not accepted by the Privy Council it was conceded that such instances might arise.

for the rendering of any service, the levy cannot be regarded as a fee. In Corporation of Calcutta v. Liberty Cinema[108] the validity of the Calcutta Corporation increasing the licence fee for a cinema house, which was Rs.400/- in 1948, to Rs.6,000/- in 1958, under section 443 read with sections 548(2) of the Calcutta Municipal Act, 1951 (XXXII of 1951), was in issue. Holding the licence fee to be a tax, A.K. Sarkar J.[109] observed that as the Act did not provide for any service of special type being rendered resulting in benefits, there was no question of correlating the amount of the levy to the cost of any services. The levy was a tax and was valid as such. It was immaterial how it was called.

3.63 In Madurai Municipality v. R. Narayanan[110] the attempt of the Madurai Municipality to justify the increased licence fee payable by hoteliers as a tax as the quid pro quo test could not be satisfied was not accepted by the Supreme Court on the principle of the Liberty Cinema decision. V.R. Krishna Iyer J.[111] observed that the stand of the Municipality if conceded would detract from the procedural safeguards of previous invitation and consideration of objections envisaged in the Act for the enhancement of a tax. Also, as the levy in question was on the licence for business, it was too tenuously connected to land-use to be sustained as a tax on land under

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108. A.I.R. 1965 S.C. 1107.
109. Others on the Bench were Raghubar Dayal, N.Rajagopala Ayyangar and J.R. Mudholkar JJ.
110. A.I.R. 1975 S.C. 2193.
111. Others on the Bench were A.N. Ray C.J., K.K. Mathew, S. Murtza Fazl Ali JJ.

entry 49 of List II. He concluded: "the case falls between two stools. It is not a fee ex-concessis, it is not a tax ex-facie"[112].

3.64 The two decisions considered above appear to be conflicting at first sight. But there is no conflict in fact. In the Liberty Cinema Case it was held that the increased licence fee, which could not be justified as a fee, was a tax. There was no difficulty in sustaining the levy as a valid tax under entry 62[113] of List II. There was also no excessive delegation of taxing power to the Calcutta Municipal Corporation to affect the validity of the levy. In the Madurai Municipality Case also the levy could not be justified as a fee. But it could not be properly characterised as a tax coming within any of the taxing entries in List II. To pass it as a tax would have also meant disregard of the procedural provisions of the Municipal Act for the exercise of taxing power. Hence the levy could not change its improper fee-label to a valid tax-label and had to be invalidated on that account.

Inspection services

3.65 In Corporation of Calcutta v. Liberty Cinema[114] for the majority A.K. Sarkar J. held that the work of inspection done by the Corporation to see that the terms of the licence were obeyed by the licensee, was not a service to

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112. Ibid at p.2198.
113. 62- Taxes on licences, including taxes on entertainments, amusements, betting and gambling.
114. A.I.R. 1965 S.C. 1107.

him to constitute a quid pro quo. For the dissenting judges[115] it was observed:

> "The placing of an activity, industrial or commercial, under regulation and control is no doubt done in furtherance of public interest but so are most of the activities of public bodies. Nevertheless the supervision, inspection and regulation is in the interest of the industry or activity itself. To say that to enable a fee strictly so called to be levied an immediate advantage measurable in terms of money should be conferred on the payer is to take too narrow a view of the concept of a fee....the Orissa Endowment Act and the Bombay Public Trust Act cases, as also the Orissa Mining Area Development Fund case support a broader view of what constitutes service to the fee-payer.... It therefore appears to us that the word quid pro quo should be read not in the narrow and restricted sense ...but in a somewhat wider sense as including cases where the function of the licence is to impose control upon an activity (and) the cost incurred for effectuating that control, and this on the basis that the industry or activity is placed under regulation and control not merely in public interest but in the interest and for the benefit of the licensees as a whole as well".[116]

3.66 In Delhi Cloth and General Mills v. The Chief Commissioner of Delhi[117] the validity of the levy under the Delhi Factory Rules issued under section 142 of the Factories Act, 1948 where the annual licence fee calculated according to the

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115. N. Rajagopala Ayyangar J. and Subba Rao J.
116. Ibid at p.1128.
117. A.I.R. 1971 S.C. 344.

horse power and the maximum workers employed on any day during the year subject to a maximum of Rs.2,000/- for a factory was in question. The Delhi Cloth and General Mills contended that by the Factory Inspectors performing their function it could not be said that any service had been rendered to the factory owners.[118] Grover J. of the Supreme Court did not accept this contention. He held that from the inspections the factory owners received substantial service in the form of advice and guidance involving technical knowledge, timely pointing out of defect in machinery etc. to the safety department. The inspections would help the factory owners to run factories according to rules and to escape liability which they would have otherwise incurred.

3.67 However, in India Mica and Micanite Industries Ltd. v. State of Bihar,[119] K.S. Hegde J. observed for a unanimous Bench[120] of the Supreme Court that the grant of licence for regulating a profession or trade did not confer the privilege or benefit to constitute an element in the quid pro quo. Only if the use of the State property was envisaged the licence could confer a benefit and a consideration could be collected therefor. The supervision required for preventing the conversion of deanatured spirit to potable alcohol was therefore no service to the consumer, but the State was merely protecting its own right.

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118. Others on the Bench were J.C.Shah and V. Ramaswami JJ.
119. A.I.R. 1971 S.C. 1182.
120. Others on the Bench were S.M. Sikri C.J., G.K. Mitter, A.N. Grover and P. Jaganmohan Reddy JJ.

3.68 The State has to regulate many activities in public interest. Licensing and inspection are but means of regulation. Though it may be said that a licensee receives a benefit in the form of a privilege from the State for which a payment may be stipulated and levied as fee, there are licence fees, like liquor licence fees, which are more in the nature of a sale price.[121] The cost of the inspections performed to ensure that the terms of the licence have been complied with may also be taken as part of the cost of securing the privilege. But there are inspections the main purpose of which is to see that safety, health and such other standards socially necessary are maintained. Thus both in the case of Railways and Civil Aviation there are separate governmental inspectorates for this purpose. The benefits received from inspections of this sort are quite general as in the case of the benefits received by the general public from the performance by the government of its manifold functions. The inspections of this type are part of the normal governmental functions, the cost of which should be met from State funds collected by way of taxation. Hence regarding inspection services the view taken by the majority decision in the Liberty Cinema and by Hegde J. for the unanimous Bench in the India Mica and Micanite Industries is preferrable.

General service to be excluded

3.69 In Hingir-Rampur Coal Co. Ltd. v. State of Orissa[122] it was contended that the service rendered at the expense of

121. On this see para 3.80-82 infra.
122. A.I.R. 1961 S.C. 459.

the mining fund was general to the notified mining area for the development of that area and hence could not be taken as service to the mine owners in question. The majority speaking through Gajendragadker J.[123] held that, when the services performed out of the fees to a class or area also formed service to the public in general, the primary object of the levy should be looked into. If the services to the general public was indirect and incidental, as in that case, it was still a fee. Wanchoo J. in his dissenting judgment said the levy in question was an excise duty imposed for the purpose of providing communications, water supply and electricity services in the area and for implementing social security and welfare schemes in the case of labourers. "There can be no doubt in the circumstances that the levy of a cess as a fee in this case is a colourable piece of legislation"[124].

3.70 However, in Nagar Mahapalika, Varanasi v. Durga Das Bhattacharya,[125] Ramaswamy J. of the Supreme Court held that the Varanasi Municipality could not take into account the cost of ordinary municipal services, like lighting of streets and paving of bylanes, which it was the statutory duty of the municipality to provide, in determining whether the annual licence fee at Rs.30/- on each Riksha owner and at Rs.5/- on each riksha driver imposed by the municipality was a fee or

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123. Others on the Bench were A.K. Sarkar, K. Subba Rao, K.N. Wanchoo and J.R. Mudholkar JJ.
124. Ibid at p.479.
125. A.I.R. 1968 S.C. 1119.

a tax. It was held that the levy was a tax. That a public body should meet its general obligatory services from taxation and not by levy of fee was made clear in the Government of A.P. v. Hindustan Machine Tools Limited.[126] Holding the levy of permission fee at half percent of the capital value on factory buildings, and at one percent on other buildings, imposed on the Hindustan Machine Tools by a certain Panchayat in Andhra Pradesh to be a tax, the Supreme Court observed:

> "One cannot take into account the sum total of the activities of a public body like a Gram Panchayat to seek justification for the fees imposed by it. The expenses incurred by a Gram Panchayat or a Muncipality in discharging its obligatory functions are usually met by the imposition of a variety of taxes. For justifying the imposition of fees the public authority has to show what services are rendered or intended to be rendered individually to the particular person on whom the fee is imposed. The Gram Panchayat here has not even prepared an estimate of what the intended services would cost it".[127]

The laying of roads and drainage, or the supply of street light was a statutory function of public authority, and it was difficult to hold that these services had been rendered to the respondent. The levy of fees at a percentage of capital cost showed that the panchayat never thought of correlating it to the expenses. The argument that "permission fee" was a tax

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126. A.I.R. 1975 S.C. 2037.
127. Ibid at p.2044 per Chandrachud J.; the other Judges on the Bench were H.R. Khanna and M.H. Beg.

on buildings was also not acceptable. The fee was payable when permission to construct was applied for. It had to be paid whether building was in fact constructed or not. It was therefore in the nature of a tax on proposed activity and not a tax on building.

3.71 In the light of these decisions it is now doubtful whether the decision in Hingir-Rampur Coal Co. Case[128] could be upheld as correct. The general services there rendered from the separate fund constituted were clearly referrable to the statutory functions of the authority in question and the decision of Sarkar J. in the dissenting judgment seems to be correct.

Extent of correlation

3.72 How much of the money collected by way of fees should be expended in providing the special services for which it is levied? In India Mica and Micanite Industries Ltd. v. State of Bihar,[129] touching the correlationship between the services rendered and the fee levied therefor, K.S. Hegde J. observed:

> "In these matters it is impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmatical exactitude".[130]

3.73 However, from the decisions of the courts it seems that if the expenditure for providing services is less than

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128. A.I.R. 1961 S.C. 459.
129. A.I.R. 1971 S.C. 1182.
130. Ibid at p.1186.

50% of the fees collected, it would be held that there is no substantial correlation between levy and the services. Thus where only 44% of the fees collected were spent on the services, it was held that there was no sufficient quid pro quo.[131] Where 60% of the licence fees realised were actually spent for the services rendered to the factory owners, it was observed: "it can therefore, hardly be contended that the levy of licence fee was wholly unrelated to the expenditure incurred out of the total realisation"[132].

3.74 In State of Rajasthan v. Sajjanlal Panjawat[133] the expenditure of Rs.2,76,715/- incurred by the Devastan Department, which supervised the Rajasthan Public Trusts, against a collection of Rs.3,000/- was held to repel any argument of want of quid pro quo.

3.75 How a variation in the expenditure incurred might change what was originally a fee later on into a tax is interestingly illustrated by the Supreme Court decision in State of Maharashtra v. The Salvation Army.[134] Under section 48 of the Public Trusts Act, 1958 (as amended in 1962) and Rule 32 of the Bombay Public Trust Rules, 1951 every public trust was required to pay a contribution at the rate of 2 percent to the public trusts administration fund. The Salvation Army,

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131. Nagar Mahapalika, Varanasi v. Durga Das Bhattacharya, A.I.R. 1968 S.C. 1119.
132. Per Grover J. in Delhi Cloth & General Mills v. Chief Commissioner, Delhi, A.I.R. 1971 S.C. 344 at 349.
133. A.I.R. 1975 S.C. 706.
134. A.I.R. 1975 S.C. 846.

to provide for "a rational distribution of the sugarcane to factories, for its development on organised scientific lines, to protect the industry of the cane growers and of the industry". The ground of challenge was that sugarcane was ancillary to sugar industry and sugar industry being in the Union field the U.P. Act and the rules were ultra vires the U.P. Legislature. The Supreme Court rejected the challenge. Speaking for the Supreme Court, Bhagawati J.[34] confined the meaning of the term 'industry', as discussed earlier,[35] to the process of production or manufacture. Hence what passed from the State to the Union was only the control over the process of production or manufacture with regard to the industry in question.

A process of systematic production—Gold ornaments

4.20 The Supreme Court was called upon to examine the scope of the term 'industry' in connection with the validity of the Gold Control Act, 1968[36] (45 of 1968). It was argued that goldsmith's work was a handicraft requiring application of skill and the art of making gold ornaments was not an industry within the meaning of that term in entry 52 of List II or entry 33 of List III. But Ramaswamy J.[37] speaking for the Supreme Court, held that the mere use of skill or art was not

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34. Others on the Bench were S.R. Das C.J., Venkatarama Iyer, Sinha and Imam JJ.
35. See para 2.14 ante.
36. See Harakchand v. Union of India, A.I.R. 1970 S.C. 1453.
37. Others on the Bench were M. Hidayatullah C.J., J.C. Shah, G.K. Mitter and A.N. Grover JJ.

a decisive factor. After referring to the definition of industry in Shorter Oxford English Dictionary[38] and Webster's Third New International Dictionary 1961[39] it was pointed out that acceptance of a very wide meaning of the term industries would practically absorb the power given by entry 27 of List II. Such an approach was contrary to sound principles of constitutional interpretation which should take care that the general power was not nullified by a particular power conferred by the same instrument. It was not necessary for the purpose of deciding upon the validity of the Act in question to define the expression industry precisely or exhaustively in all its aspects. "We are satisfied in the present case that the manufacture of gold ornaments by goldsmiths in India is a'process of systematic production' for trade or manufacture and so falls within the connotations of the term 'industry' in the appropriate legislative entries"[40]. Parliament was therefore, validly exercising its legislative power in respect of matters covered by entry 52 of List I and entry 33 of List III.

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38. A particular branch of production, labour, trade or manufacture.
39. Industry means (a) systematic labour especially for the creation of value, (b) a department or branch of a craft, art, business or manufacture; a division of productive and profit-making labour especially one that employs large personnel and capital especially in manufacture; (c) a group of productive or profit-making enterprises or organisations that have a similar technological structure of production and that produce or supply technically substitutable goods, services or sources of income.
40. Ibid at p.1460.

4.21 It was then argued that even if the making of gold ornaments was an industry its control by the Parliament had not been declared expedient in public interest under the Industries (Development and Regulation) Act 1951. The First Schedule to that Act in item 1. Metallurgical Industries- B. (2) referred to "semi-manufactures and manufactures". The question was whether manufacture of gold ornaments would come within the above entry. It was argued that read in the light of the heading "Metallurgical Industries" the item "semi-manufactures or manufactures" could not take in the making of gold ornaments. The court however, observed that the list of items in the First Schedule did not follow any logical pattern. The term 'manufactures and semi-manufactures' had to be construed in the light of the Brussel's Tariff Nomenclature, and so construed, the manufacture of gold ornaments would fall within the expression semi-manufactures and manufactures in item 1.B)(2). Therefore the Union Parliament was competent to pass the Gold Control Act. As a result of the above case a process of systematic production for trade or manufacture has been held to be included in the term 'industry'.

Gas industry not transferred to the Union

4.22 The meaning of the term industry came up for consideration before the Supreme Court in Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal.[41] By the Oriental Gas Company Act 1960 (West Bengal Act 15 of 1960), the State

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41. A.I.R. 1962 S.C. 1044.

of West Bengal took over for a period of 5 years the manageme. and control of the Oriental Gas Company. The Calcutta Gas Company which had the management of the Oriental Gas Company challenged the validity of the Act. It was argued that since gas industry was covered by the item 2.(3), "Fuel Gases- (coal gas, natural gas and the like)", of the First Schedule to the Industrial (Development and Regulation) Act, 1951, the West Bengal Act was ultra vires the State legislature. Speaking for the Supreme Court, Subba Rao C.J.[42] noticed that the State Act occupied a part of the field already covered by the Central Act. At the same time, gas industry seemed clearly to come under entry 25 (gas and gas works) of the State List. If the term 'industries' in entry 24 of List II was interpreted in its widest amplitude to take all industries including gas and gas work, entry 25 would become redundant. "...every attempt should be made to harmonise the apparently conflicting entries not only of different lists but also of the same list and to reject that construction which will rob one of the entries of its entire content and make it nugatory"[43]. Therefore entry 24 should be held to cover all industries in the State except gas industry which would come under entry 25 of List II. In this way meaning can be given to both entries and a reconciliation effected. Since industry had the same meaning in entries 24 of List II and 52 of List I, the declaration in

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42. Others on the Bench were B.P. Sinha C.J., N.Rajagopala Ayyangar, T.R. Mudholkar and T.L. Venkatarama Ayyar JJ.

43. Ibid at p.1050.

the Central Act will not affect a transfer of gas industry from the State field to the Union field. Hence the West Bengal Act was valid.

4.23 On this approach, the Court also struck down section 20 of the Industries (Development and Regulation) Act, 1951, the Union legislation governing industrial development, in so far as it purported to deal with gas industry. It will be recalled that this section[44] prohibits the State or local authority from taking over the management or control of any industrial undertaking in respect of a controlled industry. It has already been submitted that the entire section 20 of the Industries (Development and Regulation) Act, 1951 is unconstitutional. The Union Parliament cannot simply prohibit the State legislatures from exercising their powers under entry 42 of List III by a mere declaration. Only by enacting legislation, against which the State laws would be held repugnant, the Union Parliament can prevent the State legislation. However, as a practical matter, the Union may have upper hand in such matters. Under article 31(3) of the Constitution it is necessary for State acquisition laws to be valid to obtain the assent of the President. The Union could refuse the assent to the State laws requisitioning property in respect of a controlled industry. But it is felt that this possibility will not cure the invalidity of section 20 of the Industries (Development and Regulation) Act.

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44. See note 7 under para 4.6 ante.

Need for a broader view of industry

4.24 The confining of 'industry' to the process of production or manufacture excluding completely the raw materia and the finished products may not always produce salutory results. Sometimes the raw materials for the process of manufacture may have to be included as ancillary to the process of industry and brought under Union control. This would not be possible if the narrow interpretation of the term industry is always adhered to. In Malankara Rubber and Produce Company Limited v. State of Kerala[45] the validity of the withdrawal of exemption from ceiling limit in the case of lands contiguous to rubber plantations by section 81 of the Kerala Land Reforms Amendment Act of 1969 was in question. It was argued that lands set apart for the future expansion of rubber plantations should not be acquired or diverted to other purposes, as the Rubber Act, 1947 had declared[46] the rubber industry to be a controlled industry. The primary purpose of the Rubber Act was to secure raw materials for the industry. Raw material was integrally connected with the end product, and if the latter was the subject-matter of legislation by the Union, any legislation by the State which might adversely affect the production of the raw materials would be an encroachment upon the Union sphere. The Supreme Court, however, seemed to rely on the decision in Tika Ramji[47] and to favour the narrow view

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45. A.I.R. 1972 S.C. 2027.
46. Section 2 of the Rubber Act, 1947.
47. A.I.R. 1956 S.C. 676.

of the 'industry' put forth by the Advocate-General of Kerala that what the Union Legislature sought to achieve by the Rubber Act was to control the industry, i.e., the manufacture of rubber and not the control of production of raw materials (latex etc.) from which rubber was produced.[48] In his judgment Mitter J.[49] observed that the Rubber Act could not be said to have empowered the Union Legislature to direct rubber manufacturer to increase his production by bringing additional land under rubber plants. Further, although it was the function of the Rubber Board under section 8 to take measures for the development of the rubber industry it did not appear that the expansion of rubber plantation or guidance in that direction by the Board was contemplated under that section.

4.25 The stand of the Supreme Court that land needed for planting with rubber plants could be treated as incidental to rubber industry only if there was a duty on the part of a rubber planter to increase the area under rubber plantation creates some difficulties. A rubber plantation attracts the provisions of the Rubber Act, 1947 passed by the Union Legislature even though the owner of the plantation was under no duty to embark upon his venture. If the question of duty is not relevant in fixing the scope of the legislative field initially, it is not clear how it becomes an important consideration when the scope of ancillary powers are considered. To say that only if there is a duty to increase

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48. Ibid at p.2042.
49. Others on the Bench were S.M. Sikri C.J., J.M. Shelat, I.D. Dua and H.R. Khanna JJ.

the rubber plantation would the land needed for it come under the Union power of legislation is to deny a reasonable meaning to the incidental power which should have been conceded to a legislature charged with the promotion of any legislative project. Incidental power which is generally taken as the power necessary for realising the main power has been taken from the area of power to the realm of duty.

4.26 It would be interesting to refer here to the famous test of incidental or ancillary powers laid down by Chief Justice Marshall in McCulloch v. State of Maryland.[50] Rejecting the narrow construction of ancillary powers[51] that a power cannot be conceded as necessary to another power unless there was absolute physical necessity that one could not exist without the other canvassed before him, Marshall C.J. held that it meant no more than what was convenient or useful or essential to the other. After pointing out the disastrous effect of the narrow construction he went on to say:-

> "But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the

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50. (1819) 4 Wheaton 316; 4 Lawyer's Edn. p.579.
51. Article I, section 8 of the Constitution of U.S. "...To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States, or in any department or officer thereof".

people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional".[52]

4.27 In striking contrast to the above approach to incidental powers, our Supreme Court has taken a stand that a means can be termed incidental not even if it is indispensable to the realisation of the power but only if there is a duty to realise the objectives envisaged by the grant of power. Though the attention of the Supreme Court was drawn to the criterion envisaged in the second Five Year Plan for the grant of exemption from land ceiling namely, "integrated nature of operations especially where industrial and agricultural work are undertaken as a composite enterprise"[53], which would have eminently been applicable in the case of rubber industry, it failed to evoke any favourable response from the Supreme Court. A narrow interpretation of the term industry, and a narrower interpretation of the ancillary powers, could frustrate the broad purpose of development and control under the Union auspices of the industry in question. It is somewhat unfortunate, as it appears from the report,

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52. (1819) 4 Wheaton 316 at 421; 4 Lawyer's Edn. 579 at 605.
53. Second Five Year Plan, p.196 quoted at page 2031 of the report.

that neither the Union government nor the Rubber Board intervened in the matter and pressed for a broader interpretation of the Union powers regarding the development and control of rubber industry.

CONCLUSION

4.28 Criticisms are heard sometimes against the undue weightage in favour of the Union in sharing powers over industrial regulation. Thus the Rajamannar Committee Report pleaded that entry 7 in the Union List should be replaced by a more precise entry confining it to armament industries proper and entry 52 should be restricted to industries of national importance or all India character or of industries of the capital of more than 100 crores of rupees. It also recommended that the entire power or regulation of minor minerals development should be given to the States.[54]

4.29 It has also been commented that the Centre has gained control of over 93% of the industries in terms of the value of their output without any constitutional amendment and that this type of extension of the Union control is a fraud on the Constitution.[55]

4.30 The need for uniform policy in industrial development under Union direction and control cannot be over-emphasized.

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54. Report of the Central-State Relations Inquiry Committee (1971), p.216.

55. T.S. Rajagopala Iyengar, Centre-State Relations in India, Parasranga, Mysore University (1974), pp.15-16.

However, the interpretation placed by the courts which allows the Union declaration to absorb the independent State powers given by the legislative entries and which sometimes holds, in an unduly technical fashion, that all aspects of the State power have been transferred to the Union in the face of clear evidence to the contrary has little to commend in it. At the same time, the courts have also failed to develop a meaning of industry which would allow adequate scope for the incidental powers. It seems that an interpretation which would give recognition also to the purposes of the Constitution and the laws should be developed in this area.

# CHAPTER V

## EDUCATION

DISTRIBUTION OF POWER

5.1 The power to legislate with respect to education has been given to the States as per entry 11 of the State List which reads as follows:

> "Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of the List III".

By entry 25 of List III vocational and technical training of labour has been given to the concurrent field. Entries 63 to 66 of List I have given to the exclusive Union field certain institutions and aspects of education. These are:-

> "63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.
>
> 64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
>
> 65. Union agencies and institutions for—
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> (a) professional, vocational or technical training, including the training of police officers; or
> (b) the promotion of special studies or research; or
> (c) scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions".

Thus the subject of education is really spread over all the three Lists.

CONFLICT REGARDING THE POWER TO PRESCRIBE MEDIUM OF INSTRUCTION

5.2 Some interesting questions of conflict between the power of the State and the Union have come up. In Gujarat University v. Shri Krishna[1], a question as to how to reconcile entry 11 of List II with entry 66 of List I so far as the medium of instruction was concerned was raised. In pursuance of Gujarat University Act, 1949 as amended by Gujarat Act 4 of 1961 and the statutes issued thereunder, the University restricted admission to English medium courses in the colleges to those who had had their high school course in the English medium. The purpose of this restriction was to promote the development and study of Gujarati and Hindi and their use as a media of instruction and for examination[2]; but the effect of this restriction was that Gujarati and Hindi came to be prescribed as the exclusive media of instruction in the colleges (of course with the limited exception noted above). The question was whether the Gujarat University was statutorily right in so prescribing the medium of instruction, and whether

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1. A.I.R. 1963 S.C. 703.
2. Section 4(27) of the Gujarat University Act, 1949.

delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Article 286(1)(b). That clause, indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned".[35]

6.20 In the next case before the Supreme Court, viz., State of Travancore-Cochin v. Shanmughavilas Cashew Factory, Quilon,[36] two types of import sales were involved. In the first, certain parties at Bombay acted only as agents of the importers in Travancore-Cochin State, and in the second, the parties at Bombay imported the goods on their own behalf, and made separate sale of the goods to the parties in Travancore-Cochin State. The Supreme Court held that there was privity of contract between the Travancore-Cochin group and the foreign sellers and thus the former were importers in the first case and the travel of the goods upto Travancore-Cochin is to be

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35. Ibid at p.367-368.
36. A.I.R. 1953 S.C. 333.

treated as in the course of import of goods into India. Since there was no such privity of contract between the foreign seller and the Travancore-Cochin group in the second case, the sales by the Bombay party to the Travancore-Cochin group involved therein were not exempt from sales tax and the real importer was the Bombay party. Patanjali Sastri C.J. explained the meaning of the phrase "integrated activities" he had used in the Bombay Company case already cited, in the following words:

> "The phrase 'integrated activities' was used in the previous decision to denote that 'such a sale' (i.e. a sale which occasions the export) "cannot" be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction". It is in that sense that the two activities—the sale and the export—were said to be integrated. A purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done "in the course of the export of the goods out of the territory of India", any more than the other two activities can be so regarded".[37]

It is significant that Das J. in his dissent held that a sale or purchase in the course of import or export should also include the last purchase by the exporter with a view to export, and the first sale by the importer to a dealer after the arrival of the imported goods.[38]

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37. Ibid at p.336.
38. Ibid at p.352.

6.21 The crux of the matter, therefore, is that only a sale which occasions the movement of the goods as a result of a covenant or incident of the contract of sale would qualify for the immunity. Hence purchase of goods for export after securing order from foreign purchasers[39], sale of goods to licensed exporter who in turn sold to foreign purchaser[40], local purchase of tobacco which preceded export sale[41], sale of tea by auction (along with export quota) to agents of foreign buyers[42], sale of coffee by the Coffee Board to registered exporters who in turn sold to foreign buyers[43] and sale to State Trading Corporation, though on f.o.b. terms, where the State Trading Corporation entered into separate but identical contract of sales with the foreign purchasers[44], were all held not to qualify as the sale that occasioned export. They were all only sales for export but not export sales. Similarly, import of non-ferrous items for supply to the Directorate General of Supplies and Disposals on the basis of import licences, even when import licences were secured on the recommendation of

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39. State of Madras v. Guruviah Naidu & Co. Ltd., A.I.R. 1956 S.C. 158.
40. State of Mysore v. Mysore Shipping and Manufacturing Co. Ltd., A.I.R. 1958 S.C. 1002.
41. East India Tobacco Co. Ltd. v. State of A.P., A.I.R. 1962 S.C. 1733.
42. Ben Gorm Nilgiri Plantation Co.,Coonoor v. Sales Tax Officer, Special Circle, Ernakulam, A.I.R. 1964 S.C. 1752.
43. Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras, A.I.R. 1971 S.C. 870.
44. Mod: Serajuddin v. State of Orissa, A.I.R. 1975 S.C. 1564; State of Punjab v. New Rajasthan Mineral Syndicate, A.I.R. 1975 S.C. 1652.

D.G.S.& D., did not qualify as a sale in the course of import. The movement of the goods in the course of import was not occasioned by the contract of sale with the D.G.S.& D. but by the purchase from the foreign sellers. There was no privity of contract between the foreign seller and the D.G.S.& D.[45]

6.22 Though the general trend of the decisions is that only one sale can occasion export or import, sometimes transactions involving two sales have been held to qualify for exemption. Thus in B.K. Wadeyar, Sales Tax Officer, Fourth Division Licence Circle v. M/s. Daulatram Rameswarlal[46], where the assessee sold the goods to an Indian purchaser who had agreed to sell to foreign buyers, there were two sales resulting in the export. But the first sale being on f.o.b. basis, the property in the goods remained with the assessee and passed to the foreign buyer only after the goods had reached the export stream. This was sufficient to qualify even the first sale as being in the course of export.

6.23 In K.G. Khosla & Co. v. Deputy Commissioner of Commercial Taxes, Madras[47] there was a contract with the D.G.S.&D. for the supply of axle bodies which were to be inspected in Belgium as well as, after arrival, in India. Though it was argued that the movement of the goods was occasioned by the purchase from the foreign seller, and not by the sale to the

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45. Binani Bros. v. Union of India, A.I.R. 1974 S.C. 1510.
46. A.I.R. 1961 S.C. 311.
47. A.I.R. 1966 S.C. 1216.

D.G.S.& D. which was a separate one after the import was completed, the Supreme Court held that the import sale was not completed in Belgium. The terms in the contract according to which no diversion of the goods was possible as well as the term for inspection and rejection in India indicated that the movement of the goods was occasioned by the sale completed in India after inspection. Therefore the sale to the D.G.S.& D. qualified as in the course of import.

6.24 Export and import implies the existence of two termini between which the goods are expected to move. If the goods move only from one and do not cross the other, the sale cannot qualify as being in the course of import or export. In other words, there cannot be an export which does not end up in an import in a foreign country, and there cannot be an import into India which is not commenced with an export from a foreign country. Hence sale of aviation petrol to an aircraft for consumption on a foreign flight[48] and sale of coal to ships for consumption in the course of its foreign voyage[49] do not qualify as in the course of export.

6.25 As regards sale in the course of inter-State trade, a purchase within the State for sale outside the State does not qualify for the exemption, as the inter-State movement of the goods are not occasioned by the purchase within the State.[50]

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48. Burmah-Shell Oil Storage and Distributing Co. of India Ltd. v. Commercial Tax Officer, A.I.R. 1961 S.C. 315.
49. State of Kerala v. Cochin Coal Co. Ltd., A.I.R. 1961 S.C. 408.
50. E. Narasimhan & Son v. State of Orissa, A.I.R. 1961 S.C. 1344.

6.26 But where the goods were transported outside the State as required by the contract of sale, it was held that the sale transaction involved the movement of the goods and such sales were exempt.[51] Where, according to the sales, goods were moved from Bihar to Bengal, and the documents of title were transferred in Bengal, such sales could come under inter-State sale under section (3)(b) of the Central Sales Tax Act, 1956 only if the goods were actually in movement when the title deeds were transferred.[52] Where vehicles were moved from the factory where they were made to store-rooms in different States, and where appropriation of goods in pursuance of the sale was made only at the regional store-rooms, the movement of the goods from the factory to the store-rooms could not be said to be occasioned by any covenant or incident in the contract of sale to attract liability for tax on inter-State sale under section (3)(a) of the Central Sales Tax Act, 1956.[53] In State of Bihar v. Tata Engineering & Locomotive Co. Ltd.[54] the question was whether trucks etc. delivered in Bihar as per orders issued from the Bombay office but moved to different parts of India, would qualify for exemption. As the purchasers were required by the terms of the contract to remove the goods from Bihar to other States it was held that the sale was an inter-State sale.

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51. Cement Marketing Co. of India v. State of Mysore, A.I.R. 1963 S.C. 980.
52. Tata Iron & Steel Co. Ltd. v. S.R.Sarkar, A.I.R.1961 S.C.65.
53. Tata Engineering & Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes, A.I.R. 1970 S.C. 1281.
54. A.I.R. 1971 S.C. 477.

A critique of the law

6.27 The Supreme Court has proceeded on the basis that the meaning of the phrase "in the course of" in "in the course of inter-State sale" and "in the course of export or import" is the same.[55] The purpose of the restriction on State's power to levy a sales tax on inter-State sales would seem to be to promote the unhampered flow of trade and commerce throughout the territory of India and thus to make the economic unity of the nation. It is not necessary to emphasise the importance of the achievement of a common market for the whole of India. The purpose of the restriction on the State's power to levy a tax on a sale in the course of export is to foster foreign trade. The fostering of foreign trade is necessary to create a favourable balance of trade, foreign exchange etc. which are essential for the economic existence of the nation. The purposes of the restrictions being different, though related in some measure, it is not clear why different meanings may not be given to the same phrase "in the course of" in the inter-State and export contexts.

6.28 In instances where the purchase immediately preceding the export and the export sale are inseparably connected, the attempt to separate them would seem to be an unduly technical exercise, particularly, where the State Trading Corporation or

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55. K.G. Khosla & Co. v. Dy. Commissioner of Commercial Taxes, Madras, A.I.R. 1966 S.C. 1216; State of Bihar v. Tata Engineering & Locomotive Co. Ltd., A.I.R. 1971 S.C. 477.

Minerals and Metals Trading Corporation comes in to channellise export and import trade. The interposition of the S.T.C. or M.M.T.C. between the exporter and the foreign buyer has resulted in the position that only the sale by the S.T.C. is treated as export sale.[56] This development is not conducive to the promotion of foreign trade. It is worth-mentioning that, in the Second Travancore Cochin Case,[57] Das J. in his dissenting judgment included the last purchase preceding the export also in the phrase "in the course of export". In Ben Gorm Nilgiri Plantation Co., Coonoor v. Sales Tax Officer, Special Circle, Ernakulam,[58] the dissenting judgment of Wanchoo and Ayyangar JJ. was based on a more liberal view of the phrase "in the course of export". While the majority[59] held that "there was between the sale and the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that sale and export were integrally connected",[60] the minority judges were prepared to hold that when in pursuance of a contract, or understanding, between the buyer and the seller, the latter was to export the goods bought, and the goods were in fact exported, the preceding sale should also qualify for exemption as being in the course of export.

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56. Mohammed Serajuddin v. State of Orissa, A.I.R. 1975 S.C. 1564; State of Punjab v. New Rajasthan Mineral Syndicate, A.I.R. 1975 S.C. 1652.
57. A.I.R. 1953 S.C. 333.
58. A.I.R. 1964 S.C. 1752.
59. Gajendragadker C.J., J.C. Shah and S.M. Sikri JJ.
60. Ibid at p.1758.

6.29 In Coffee Board v. Joint Commercial Tax Officer, Madras[61] Sikri C.J. in his dissenting judgment went to the heart of the matter. The learned judge pointed out that keeping in view the importance of export trade to the country's economy, there was a need to adopt a broader view of what "occasions" export. Referring to the meaning of the word "occasions" in Shorter Oxford Dictionary he said it also meant "to bring about, especially, in an incidental or subsidiary manner" in addition to, "induce: to be the cause of". In the context of the promotion of foreign trade the wider meaning of the word 'occasion' would be more appropriate. In Mohammed Serajuddin v. State of Orissa[62] H.R. Khanna J. in his dissenting judgment held that, on general principles, the singular may on occasions include the plural, and there was nothing wrong to read the word "sale" in "sale in the course of export" as including its plural. Therefore, if more than one sale was integrally connected with the export within the spirit of the holding in the first Travancore-Cochin Case, there was nothing wrong, as in the instant case, in allowing the exemption to two sales holding that the two sales together had occasioned the export.

6.30 The Law Commission in its second report considered the suggestion of the Ministry of Commerce and Industry to include the last purchase preceding the export also for exemption, but did not accept it on the supposed illogicality

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61. A.I.R. 1971 S.C. 870.
62. A.I.R. 1975 S.C. 1564.

it might result in when an exemption could be claimed on that basis for the first sale after import.[63] Could the life of a sales tax law be more logical than the needs of revenue or the regulation of trade and commerce? However, Dr.N.C. Sen Gupta in his dissenting note had pleaded for a more liberal interpretation of the phrase "in the course of export or import".[64] He adopted as correct the Attorney General's argument summarised by the Chief Justice in the first Travancore-Cochin Case in the following terms:

> "In addition to the sales and purchases of the kind described above, the exemption covers the last purchase by the exporter and the first sale by the importer, if any, so directly and proximately connected with the export sale or import purchase as to form part of the same transaction. This view was sponsored by the Attorney General".[65]

It is respectfully submitted that the rigid interpretation ought to be revised for promoting foreign trade in the economic interests of the country.

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63. Law Commission of India, Second Report (1956), para 9: "The Ministry of Commerce and Industry has mentioned the desirability of including the last purchase preceding the export as a transaction in the course of export on the ground that the exemption of such transactions from tax will stimulate exports. It was not, however, suggested that a similar exemption should be granted to the first sale following the import. It appears to us to be somewhat illogical that the last purchase preceding the export should be exempt whereas the first sale following the import should not be exempted. We are, therefore, unable to accept this suggestion". Dictionary and logic cannot dictate conclusions for economic problems involving intense international competition to promote exports and limit imports by every country in the world.

64. Ibid at p.10.

65. Ibid.

Sales tax and duties of customs including export duties

6.31 It has been noticed that a tax on sale or purchase in the course of export or import cannot be levied by the Union Parliament or by a State. As interpreted by the Supreme Court,[66] a sale in the course of export is one that occasions the export. So interpreted there will be nothing to distinguish between a tax on the sale which occasions the export and an export duty. An argument that the specific prohibition in clause (1)(b) of article 286 was redundant in view of the fact that the power to levy the export duties have been given to the Union Parliament by entry 83 of List I, Schedule 7 was rejected by Patanjali Sastri C.J. in the Travancore-Cochin Case referred to above. In Province of Madras v. M/s. Boddu Paidanna & Sons[67] Gwyer C.J. noted that the power of the Federal Legislature to levy an excise duty in respect of an article produced in a province and the power of the province to levy a tax on the first sale thereof were distinct in law though from the point of view of the manufacturer, who would be called upon to pay both, it would appear to be the same or overlapping. Patanjali Sastri C.J. referred to this conflict and held that on a similar argument, in the absence of the specific prohibition in article 286(1)(b) the States could also claim to impose a sales tax on export sales. But the prohibition imposed on the States against the levy of sales

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66. State of Travancore-Cochin v. Bombay Co. Ltd., A.I.R. 1952 S.C. 366.
67. A.I.R. 1942 F.C. 33.

tax on export sales has avoided any possible conflict between States power to levy sales tax and the Union's power to levy export duties.

INCOME TAX AND OTHER TAXES

Tax on income and tax on land and building

6.32 By entry 82 of the Union List taxes on income other than agricultural income belong to the Union. According to entry 49 of the State List taxes on lands and buildings are leviable by the States. Apparent conflicts have occurred between these two powers and between their predecessor entries[68] in the Government of India Act 1935. When the annual value of land and building is selected as the basis for the State tax and it is also used as the basis for measuring income for purposes of income tax an apparent conflict arises. This apparent conflict has been resolved by treating the annual value differently in the two taxes.[69]

6.33 In a tax on land and buildings, annual value is used as a basis for assessment of the tax irrespective of the actual income derived from the property. No attempt is made to get at the actual income from the property. Annual value is used for determining the importance or value of the property

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68. 54- Taxes on income other than agricultural income in the Federal List and 42- taxes on lands and buildings in the Provincial List.
69. Sir Byramjee v. Province of Bombay, A.I.R. 1940 Bom.65 (F.B.) and Ralla Ram v. Province of East Punjab, A.I.R. 1949 F.C. 81.

to be taxed. But in a tax on income, annual value is used as a standard to get at the actual income even though this might be involve some arbitrariness. The difference between the two uses of annual value may be seen in Ralla Ram v. Province of East Punjab.[70] The estimated annual value which was the basis of the tax on land and buildings under the Punjab Urban Immovable Property Tax Act, 1940 provided for only two deductions, 10% of the cost of repairs and maintenance, and the actual land revenue paid on the building. At the same time the Income Tax Act which also adopted the annual value of property for ascertaining the income provided for deductions in respect of cost or repairs, insurance premia, interest on mortgages and charges, land revenue, collection charges and vacancies. The attempt to get the actual income as accurately as possible is obvious.

Income tax and professional tax

6.34 By entry 60 of the State List, the States may levy a tax on professions, trades, callings and employments. The 'income' adopted as measure for levying the professional tax would appear to be in conflict with income tax which is also based on income. But the two taxes are distinct in as much as a tax on income can be imposed only if there is income, whereas a tax on profession can be imposed if a person carries on a profession irrespective of the income derived therefrom.[71]

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70. A.I.R. 1949 F.C. 81.
71. Seervai, Constitutional Law of India (1968), p.927.

7.13 Similar to the above decision has been the decision of the Supreme Court in Rajahmundry Electric Supply Corporation v. State of Andhra[14]. Here the case had all the ingredients of a drama. The validity of the Madras Electricity Supply Undertakings (Acquisition) Act, 1949, (43 of 1949), which received the assent of the Governor-General on 18-1-1950 and the certification by the President under article 31(6) of the Constitution on 12-4-1950 was in question. The petitioner said in the Madras High Court that the concerned legislation was bad because it was on corporations while the State said it was on electricity. The Madras High Court had held that the Act was in pith and substance a law with respect to electricity (entry 31 of the Concurrent List), and not a legislation with respect to corporations under entry 33 of List I. Under the power to legislate with respect to corporation the Federal Legislature had power to create, protect and destroy an artificial person, but the power did not extend to its function and activities. In the present case the Act did not affect the corporate status of any electricity undertaking, but only its business concerning electricity. Hence the Act was within the competence of the Madras Legislature.

7.14 On appeal to the Supreme Court the petitioner said the law was neither on corporation nor on electricity but on acquisition, a contention accepted by the Supreme Court. After

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14. A.I.R. 1954 S.C. 251; 1954 S.C.J. 310 on appeal from (1951) 2 M.L.J. 277. A.I.R. 1951 Mad. 979.

which had made provision for taxing loans received by a member of a controlled company as dividend to prevent evasion of tax was challenged on the ground that the Act was outside the scope of entry 82 of List I and hence beyond the legislative competence of Parliament. Ramachandra Iyer J. held that competence to legislate regarding income tax included a power to legislate in order to check the evasion. Even if it were held that the Act in question imposed a tax not on income but on a loan and was thus outside the ambit of entry 82 of List I, the Act could be sustained under the residuary powers under entry 97 of List I read with article 248.

7.22 The validity of annuity deposit for income tax assessees introduced by the Finance Act, 1964 (5 of 1964) as chapter XXIIA of the Income Tax Act, 1961 was challenged in Hari Krishna v. Union of India.[26] The assessee argued that since the law was passed as part of the Income Tax Act, entry 82 of the List I must justify the legislation. This line of argument is clearly welcome to a student of legislative conflicts because it compels Parliament to preciseness and a firm decision at the beginning to see that the law did come under a definite entry and discourages sloppy legislation on the shelter of the residuary item of the Union List. Shah J. held for the majority that the power to legislate for the annuity deposit must be within the competence of Parliament primarily under List I, entry 82, but if not, certainly under

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26. A.I.R. 1966 S.C. 619.

amendment, one writer has pointed out that acquisition or cession following war and declaration of peace would be covered by the power to declare war and make peace along with the treaty-making power, and that the power to acquire or cede territory in times of peace would be covered by the power to deal with foreign affairs and to make treaties. Even if the power could not be held as incidental to the above powers, the power to acquire and cede territory would be included in article 248 and entry 97 of List I.[34]

As the sole ground to sustain Union legislation

7.27 In Jadab Singh v. Himachal Pradesh Administration[35] the validity of the Himachal Pradesh Legislative Assembly (Constitution and Proceedings) Validation Act, 1958 (56 of 1958) was called in question. The Assembly of Himachal Pradesh originally constituted under the Part C States Act, 1951 could not validly function after the formation of the new State under the Himachal Pradesh and Bilaspur (New State Act), 1954. Though the members were deemed continue to represent their constituencies, a notification under section 76 of the Representation of People Act, 1951 was not issued. Still the Assembly was summoned which passed certain enactments relating

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34. H.M. Seervai, Constitutional Law of India, Bombay (1968), pp.110-111 and 121. There is also a view that in the Berubari Opinion, the Supreme Court gave form more importance than substance. But since it is not relevant to the topic under discussion further elaboration is avoided.

35. A.I.R. 1960 S.C. 1008.

8.24 Justice Subba Rao also explained away in an unsatisfactory way, it is submitted, the American, Australian and Canadian cases cited before him in support of the stand of the Union of India.

8.25 Thus, it is submitted that the reasons of Justice Subba Rao to deny the power in question to the Union are all of doubtful validity.

Criticism of the majority judgment

8.26 Some writers have also criticised the decision of the majority.[20] One writer has said that the majority judgment did not fully appreciate the scope of the doctrine of immunity of instrumentalities in U.S.A. The core of the doctrine still applies to protect state activities of strictly governmental character from federal taxation. There is greater need, according to this opinion, for protection of the States in India from the power of eminent domain of the Union and the majority judgment has not adequately met the possibility of mutual acquisition of the same property between Union and the State going on infinitely. It is therefore, suggested that the minority view of Subba Rao J. seems to be preferrable.

8.27 The core of the doctrine which this writer says is applicable in U.S.A. with regard to the state immunity from Union taxation has been recognised in article 289 of the

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20. G.C. Venkata Subba Rao, Indian Constitutional Law, Vol.I, Madras Law Journal Office, Madras (1970), pp.148-149.

Constitution. The need for an immunity from eminent domain is not strong as in the case of taxation, unless one is to concede the reductio ad absurdem argument (the argument that the Union and the State could go on acquiring the same property in succession ad infinitum). Why the requirement of Presidential assent envisaged in article 31(3) cannot break the chain is not made clear.

8.28 Another writer has concluded that the majority judgment "is a glaring example in this country of a judgment guided by an a priori assumption, namely, that, in case of a conflict between national and State power, the former must prevail"[21]. He observes that any pragmatic assumption of the need for the national strength vis-a-vis the States ought not to erode into the legal interpretation of the provisions of the Constitution which will reduce the States into a position of existence by the sufferance of the Union.[22] He also thinks that the supremacy of the federal power in the U.S.A. has been possible as there is only an enumeration of the federal power with no competing enumeration for the states' side and there is the supremacy clause of article VI in favour of the federation. In India with treble enumeration and no supremacy clause as in the U.S.A. it would be illegitimate to make any a priori assumption of the federal supremacy.[23] It may be pointed out

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21. Durgadas Basu, Commentary on the Constitution of India, 6th Edn. Vol.A, S.C. Sarkar & Sons, Calcutta (1973),p.389.
22. Ibid, at p.394.
23. Ibid, at p.390.

He held that there was such a direct conflict between the provisions so as to make it impossible to give effect to both. The provincial law void to that extent.[25]

10.13 The judiciary will try to limit the scope of the conflicting provisions to the barest minimum. In Tansukh Raj Jain v. Nilratan Prasad Shaw,[26] a conflict was alleged between certain sections of Motor Vehicles Act, 1939 and the Bihar Amendment made thereto. According to the Union law appeals could be preferred against certain orders issued in connection with the stage carriage permits. In the case of non-appealable orders revision could be preferred to the State Transport Authority. But according to the provisions of the Bihar (Amendment) Act, the State Government could revise any order of any authority on petition made to it. Raghubar Dayal J.[27] held that literally read the Bihar provision covered all appealable and revisionable cases under the Central provision. To that extent there was direct conflict and the State section was void. But that would not prevent the State Government from exercising its powers of revision after the process of appeal or revision under the Central Act was over. In the case on hand the State Government revised the Appellate Authority's order and the action of the State Government was held valid. Thus, the Court restricted the scope of repugnancy

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25. This result is correct only if the characterisation of the laws is correct. It seems that the Provincial Act should have been held to be in pith and substance within the Provincial List and there was only incidental encroachment on the concurrent field.
26. A.I.R. 1966 S.C. 1780.
27. Gajendragadker C.J.,K.N.Wanchoo, M.Hidayatullah, J.R. Mudholkar JJ. were the other judges on the Bench.

latitude in upholding or striking down laws on the ground of repugnancy. Only rarely is there any discussion of the policies involved in the enactments before a conclusion about repugnancy is reached. In Deep Chand v. State of U.P.[37], in coming to the conclusion that the State law and the Union law occupied the same field (though the effect of this finding was nullified by confining the State and Central law to different period of time), K. Subba Rao J. observed that if the State laws were allowed to co-exist with the Union law the uniformity secured by the latter in matters of road transport nationalisation would be frustrated. But such instances where policy considerations are referred to are rare. It is submitted that in questions of repugnancy, particularly those decided under the exhaustive code and covering the field tests, it is desirable that the judges refer to the policy perspective involved rather than merely giving a conclusion one way or other.

PREVALENCE AND REPEAL OF STATE LAW

State law that prevails over the Union law

10.24 Section 107(2) of the Government of India Act, 1935 provided that a Provincial law with respect to one of the matters in the Concurrent List, which had obtained the assent of the Governor-General, would prevail in that Province over a Federal law or existing law with respect to that matter. The Federal Legislature had power to pass subsequent

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37. A.I.R. 1959 S.C. 648.

11.6 When there is an incidental encroachment into the concurrent field of a law in pith and substance in the exclusive field, such an encroaching provision will be read an exception to the provisions of the law in the concurrent field. But if the incidentally encroaching provisions are characterised as belonging to the concurrent field, a case for dealing with such provisions on the basis of repugnancy might arise. This may be seen from the cases relating to Madras and Bombay Prohibition Acts. In the case of the Madras Prohibition Act, 1937 certain provisions regarding special presumptions at the trial of prohibition offences, and of search, seizure and arrest were alleged to be repugnant to the Indian Evidence Act, 1872 and to the Code of Criminal Procedure, 1898 respectively. These provisions which had no general application outside the Act were held purely ancillary to the exercise of power under entry 31 of the Provincial List and hence not to involve a

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(f.n.6 contd.)

(Shreveport Case), 234 U.S.342. "Wherever the inter-state and intra-state transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the Nation, would be supreme in the national field", at p.351-352. "This is not to say that Congress possesses the authority to regulate the internal commerce of a state as such, but that it does possess the power to foster and protect inter-state commerce and to take all measures necessary or appropriate to that end, although intra-state transactions of inter-state carriers may thereby be controlled". (p.353).

question of repugnancy.[7] However, in Ukha Kolhe v. The State of Maharashtra[8] the Supreme Court characterised similar provisions in the Bombay Prohibition Act, 1949 as referrable to the concurrent powers under entries 2 and 12 of the Concurrent List and dealt with them applying the principle of repugnancy. The different, but doubtful characterisation in this case was perhaps prompted by the fact the Bombay Act had received the President's assent under article 254 of the Constitution.

11.7 The exclusive power to legislate in respect of persons entitled to practice before the Supreme Court (entry 77 of List I) and High Court (entry 78 of List I) may be reconciled with entry 26 (legal, medical and other professions) of List III by excluding the former two from the latter.[9] In Bar Council of U.P. v. State of U.P.,[10] the validity of the Indian Stamp (U.P.) Amendment Act, 1970, whereby a stamp duty of Rs.250/- was payable on the certificate of enrolement issued by the State Bar Council was challenged. This stamp duty was in addition to the fee of Rs.250/- payable under the Advocates Act to the Bar Council. It was held that the fee payable to the Bar Council was a fee based on entries 77, 78 and 96 of List I, whereas the stamp duty payable to the State was a tax

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7. A.S. Krishna v. State of Madras, A.I.R.1957 S.C. 297.
8. A.I.R. 1963 S.C. 1531.
9. O.N. Mohindroo v. Bar Council of Delhi, A.I.R.1968 S.C.888.
10. A.I.R. 1973 S.C. 231.

but also the one immediately preceding that should be exempted from State sales taxes, particularly in view of the export trading being channelised through State agencies like State Trading Corporation and the Metal and Mineral Trading Corporation etc.

12.8 In the case of residuary powers it is seen that those powers have added a new dimension to the Union power particularly to the taxing power. The decision of the Supreme Court in Union of India v. H.S. Dhillon[2] has opened a new era in the interpretation of the entries in the three Lists in the Seventh Schedule. Contrary to the old notion that the residuary power is the last resort, the procedure to be followed hereafter, when such questions are raised, will be to find out whether, the particular power comes within the State List. If not, it belongs to the Union. The enumeration in entries 1 to 96 of the Union List is only illustrative of the residuary power of the Union and may be of some use in determining the scope of the State List entries. By this epoch-making decision, the Supreme Court has really brought in a logical approach to the problem of Union-State powers which was in fact suggested at the time of the Constitution making but was not adopted. The residuary powers are bound to play an increasing role in the years to come.

12.9 The question of the extent to which Union and State should be immune from the legislative jurisdiction of the

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2. A.I.R. 1972 S.C. 1061.

Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any Part thereof with respect to any of the matters enumerated in the Provincial Legislative List:

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void.

(3) A Proclamation of Emergency—

(a) may be revoked by a subsequent Proclamation;

(b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and

(c) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall 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.

Power of Federal Legislature to legislate for two or more Provinces by consent

103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

Residual powers of legislation

104.-(1) The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion.

Application of Naval Discipline Act to Indian naval forces

105.-(1) Without prejudice to the provisions of this Act with respect to the legislative powers of the Federal Legislature, provision may be made by Act of that Legislature for applying the Naval Discipline Act to the Indian naval forces and, so long as provision for that purpose is made either by an Act of the Federal Legislature or by an existing

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

## LIST II

## PROVINCIAL LEGISLATIVE LIST

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.

2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province; markets and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport,

purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

## LIST III
## CONCURRENT LEGISLATIVE LIST
### PART I

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the

use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

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