

A
Background Paper*
on

***CONCURRENT POWERS OF LEGISLATION UNDER
LIST III OF THE CONSTITUTION***

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(iii)

**CONCURRENT POWERS OF LEGISLATION
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1. INTRODUCTION :

1.1 Scope of the Study

This study deals with an important aspect of Indian federalism, namely, the concurrent powers of legislation under the Constitution. The subject of federalism in any country covers a vast area, embracing legislative, executive and judicial powers, as distributed between the federal union and its units. Distribution of legislative power is only one branch of the subject; and in that branch, the topic of concurrent legislative power is only a sub-branch (so to say).

1.2 Importance of the subject

- (a) Nevertheless, the subject has its own theoretical and practical importance. Theoretically, the subject carries an appeal, because (i) it represents the vesting of power in two parallel legislatures, operating at the same time and (ii) also because such a scheme is to be found in most federations of the world, though the details vary.
- (b) The practical importance of the Concurrent list, (when adopted in any federation) lies in the fact, that the vesting of the same type of power in two parallel agencies carries, within it, the seeds of a possible conflict. This implies, that the Constitution (of the country concerned) should provide, in advance, a mechanism for resolving such conflict. In India, article 254 of the Constitution primarily seeks to incorporate such a mechanism.

1.3 Scheme of discussion

In this short paper, it is proposed, to deal, first, with the general scheme of distribution of legislative powers under the Indian Constitution; next, to state, in brief, the main principles for the interpretation of legislative entries; and thereafter, to focus on the various entries in the Concurrent list itself, concentrating on their rationale. It will then be possible to formulate the questions that can possibly arise on the present scheme.

2. DISTRIBUTION OF LEGISLATIVE POWERS UNDER THE INDIAN CONSTITUTION :

2.1 Legislative powers in the federation

The essence of federalism lies in the sharing of legal sovereignty by the Union and the federating units. And, in general, the most precise way of demarcating the respective areas of the federation and federating units is to demarcate their respective areas in regard to legislation. There are many reasons for this; but the two most important, are the following:

- (a) Demarcation of legislative power helps in defining boundaries the of the executive power also, as usually the former controls the latter.
- (b) It is easier to verbally formulate, with reasonable precision, the various topics on which the legislative power can be exercised, as the legal system of a country would usually have had occasion to deal with the topic in some form or other – say, by or through proposals for legislation, actual legislation, academic or (occasionally), in political debates or academic discussions. In other words, the topics would (in many cases) have a ring of familiarity for the practising or academic lawyer.

2.2 The scheme of distribution in India (articles 245-246)

- (a) The constitutional provisions in India on the subject of distribution of legislative powers between the Union and the States are spread out over several articles (articles 245-254). However, the most important of those provisions – i.e, the basic one – is that contained in articles 245-246.

Article 245 provides, *inter alia*, that (subject to the provisions of the Constitution).

- (i) Parliament may make laws for the whole or any part of the territory of India and
- (ii) the legislature of a State may make laws for the whole or any part of the State.

- (b) Thus, article 245 sets out the limits of the legislative powers of the Union and the States from the geographical (or territorial) angle. From the point of view of the subject matter of legislation, it is article 246 which is important. Article 246 reads as under:

- “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 1 of 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, shall 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 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”.

2.3 Article 254 – repugnancy

Since the Concurrent List^[1] – article 246 (2) – gives power to two legislatures, a conflict can arise between laws passed on the same subject by the two legislatures. To deal with this situation, article 254 of the Constitution makes the following provision:

- “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 an 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.
- (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision is repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter, including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.”

2.4 Judicial decisions (repugnancy)

Repugnancy has been explained in many judicial decisions. Important amongst these, are the following:

- (i) *Zaverbhai Vs. State of Bombay*, AIR 1954 SC 752 (Implied repeal – Essential Supplies Act)
- (ii) *Tika Ramji Vs. State of UP*, (1956) SCR 393; AIR 1956 SC 676. (U.P. Sugar Cane Act, etc.).
- (iii) *Ahmedabad Mill Owners’ Association Vs. I.G.*, AIR 1967 SC 1091.

- (iv) *Karunanidhi Vs. Union of India*, AIR 1979 SC 898; (1979) Cri LJ 773: *Karunanidhi Vs. Union of India*, (1979) Cri LJ 1876 (Mad) (FB).
- (v) *Raghubir Vs. State of Haryana*, AIR 1981 SC 2037.
- (vi) *Western Coalfields Vs. Special Area Development*, AIR 1982 SC 697.

2.5 Union and State legislation

- (a) The co-existence of Central and State laws in a particular area can give rise to litigation. Such problems arise, either because the Union or a State may illegally encroach upon the province of the other (parallel) legislature, or they may arise because (though there is no encroachment, as such, on each other's sphere), the two laws clash with each other.
- (b) The two situations are, strictly speaking, different from each other; and they must be judged by two different tests. Where the subject-matter of the legislation in question falls within either the Union List or the State list only, then the question is to be decided with reference to legislative competence. One of the two laws must necessarily be void, because (leaving aside matters in the Concurrent List), the Indian Constitution confers exclusive jurisdiction upon Parliament for matters in the Union List and upon a State Legislature for matters in the State List.^[2] The correct doctrine applicable in such cases is that of *ultra vires*. Since one of the two laws must be void, the question of inconsistency between the two has no relevance. Only one law will survive; and the other law will not survive, because *ex hypothesi*, it has no life.
- (c) In contrast, where the legislation passed by the Union and the State is on a subject matter included in the Concurrent List, then the matter cannot be determined by applying the test of *ultra vires* because the hypothesis is, that both the laws are (apart from repugnancy), constitutionally valid. In such a case, the test to be adopted will be that of repugnancy, under article 254(2), of the Constitution.^[3]
- (d) It follows, that it is only where the legislation is on a matter in the Concurrent List, that it would be relevant to apply the test of repugnancy. Notwithstanding the contrary view expressed in some quarters, this appears to be the correct position. Such a view was expressed by Dr. D. Basu in his Commentary on the Constitution of India (1950) 1st edition, page 564, and it is this view, that seems to have been upheld (impliedly) by the Supreme Court in the under - mentioned decisions: -
 - (i) *Deep Chand Vs. State of U. P.*, AIR 1959 SC 648; (1959) Suppl. 2 SCR 8.
 - (ii) *Premnath Vs. State of J&K*, AIR 1959 SC 749 (1959) Suppl 2 SCR 270.
 - (iii) *Ukha Vs. State of Maharashtra*, AIR 1963 SC 1531, paragraph 20.
 - (iv) *Bar Council, U.P. Vs. State of U.P.*, AIR 1973 SC 231, 238; (1973) 1 SCC 261.
 - (v) *Barani Vs. Henry*, AIR 1983 SC 150, paragraph 15.
 - (vi) *Hoechst Pharmaceuticals Vs. State of Bihar*, AIR 1983 SC 1020, paragraphs 68, 69 and 76 (Full decision of the position).
 - (vii) *Pochanna Lingappa Vs. State of Maharashtra*, AIR 1985 SC 389, paragraph 26; (1985) 1 SCC 425.
 - (viii) *Vijay Kumar Sharma Vs. State of Karnataka*, AIR 1990 SC 2072 [For decisions in section 107, Government of India Act, 1935 see *Lakhi Narayan Das vs. Province of Bihar*, AIR 1950 FC 59.

2.6 Article 255

Notice should also be taken of article 255 of the Constitution, quoted below:

"255. Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.-

No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given -

- (a) where the recommendation was that of the Governor, either by the Governor or by the President;
- (b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;
- (c) where the recommendation or previous sanction required was that of the President, by the President. “

[See *Jawaharmal Vs. State of Rajasthan*, AIR 1966 SC 764, 769, 790: (1966) 1 SCR 890].

3. INTERPRETATION OF LEGISLATIVE ENTRIES :

3.1 Determination of nature of legislation

It is obvious, that where either the Union or the State legislature proposes to enact a law, it must, in the first place, decide whether it has legislative competence with reference to the subject matter of the law. For this purpose, the draftsman will necessarily have to examine whether the subject matter falls within the relevant list, that is to say:

- (a) the Union List or the Concurrent list (for the draftsman in the Union) or
- (b) the State List (for the draftsman in the State).

3.2 Doctrine of pith and substance

For this purpose, the test of “pith and substance” is usually applied. In no field of constitutional law is the comparative approach more useful, than in regard to the doctrine of “pith and substance”. This is a doctrine which has come to be accepted in India and derives its genesis from the approach adopted by the courts (including the Privy Council), in dealing with controversies arising in other federations. Briefly stated, what the doctrine means, is this. Where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, then the incidental encroachment by the law on the State List does not make it invalid.

3.3 Decisions

The principle of “pith and substance” had come to be established by the Privy Council, when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. In India, the doctrine of pith and substance came to be adopted in the pre-independence period, under the Government of India Act, 1935. The classical example is the *Privy Council decision in Prafulla Vs. Bank of Commerce*, AIR 1946 PC 60, holding that a State law, dealing with money lending (a State subject), is not invalid, merely because it incidentally affects promissory notes (See now Union List, entry 46). The doctrine is sometimes expressed in terms of ascertaining the “nature and true character of legislation”; and it is also emphasized, that the name given by the Legislature (to the legislation) in the short title, is immaterial. Again, for applying the “pith and substance” doctrine, regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions.

The under mentioned decisions illustrate the above proposition:-

- (i) *State of Rajasthan Vs. G. Chawla*, AIR 1959 SC 544, 547 (Ancillary matters).
- (ii) *Southern Pharmaceuticals Vs. State of Kerala*, AIR 1981 1865, paragraph 15 (incidental encroachment, to be disregarded).
- (iii) *Prem Vs. Chhabra*, (1984) 2 SCC 302, paragraph 8.

4. RATIONALE OF THE SCHEME OF DISTRIBUTION OF POWERS :

4.1 Four salient features

Four salient features mark the scheme of distribution of legislative powers under the Indian Constitution.

- (1) There is a three-fold distribution of legislative power-represented by three lists – Union, State and Concurrent.
- (2) The supremacy of federal laws is maintained in two situations (which are the principal situations of practical importance):
 - (a) in determining the extent of legislative power of the federation and the units, (if a doubt arises as to the list in which a particular subject of legislation falls, the *non obstante* clause in article 246 achieves federal supremacy);
 - (b) in determining the question whether a federal law will prevail or a State law will prevail; (if both have an impact on a particular human activity, and are in conflict with each other, then the federal law prevails).
- (3) If a particular topic does not find an express mention in the three legislative lists, then the power to legislate thereon (i.e., the residuary law-making power) is vested in the federation.
- (4) In certain situations (even apart from emergencies), the federation may come to be vested with legislative power, even on state subjects.

[Mr. Justice, E. S. Venkataramiah and P. M. Bakshi, *Indian Federalism* (1992), pages 72-73, para 7.1].

4.2 Genesis in the 1935 Act: Joint Select Committee Report

- (a) At this stage, it seems necessary to mention, that the entire scheme of distribution of legislative powers under the present Indian Constitution is based on the Government of India Act 1935.
- (b) Further, so far as the Concurrent List is concerned, it is desirable to quote what the Joint Committee on Indian Constitutional Reforms said, with reference to the corresponding list, as contemplated in the proposals that led to the Act of 1935 :-

[Joint Committee on Indian Constitutional Reforms (1934) pages 30-31, para 51, quoted in Mr. Justice E. S. Venkataramiah and P. M. Bakshi, *Indian Federalism*(1992) page 85 para 7.13].

“Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a central or to a Provincial legislature and for which, though it is often desirable that provincial legislation should make provision, it is equally necessary that the central legislature should also have a legislative jurisdiction

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 mischief arising in the provincial sphere, but extending, or liable to extend beyond the boundaries of a single province”.

4.3 Uniformity

The above enunciation by the Joint Select Committee^[4] was not intended to be exhaustive. Nevertheless, it would be convenient to give some concrete examples of the three main objectives of a Concurrent List as envisaged by the Joint Select Committee.

Take, first, the aspect of uniformity in the main principles of law. This consideration accounts for the following entries in the Concurrent List in the present Indian Constitution.

- Entry 1. Criminal law.....
- Entry 2. Criminal Procedure
- Entry 5. Marriage and divorce etc.
- Entry 7. Transfer of property other than agricultural land
- Entry 8. Registration of deeds and documents
- Entry 9. Actionable wrongs
- Entry 10. Bankruptcy and insolvency
- Entry 11. Trusts and trustees
- Entry 12. Administrator's general and official trustees
- Entry 12A. Administration of justice etc. (inserted in 1976)
- Entry 13. Evidence etc.
- Entry 14. Civil procedure etc.
- Entry 15. Contempt of court etc.
- Entry 16. Lunacy etc.
- Entry 28. Charities etc.

4.4 Encouraging local effort

The Joint Select Committee also stressed the need to “guide and encourage provincial effort”. This consideration forms the background and rationale for several legislative measures enacted in India, wherein the Union has laid down the policy and guidelines, – thereby promoting further efforts by the States. The following can be regarded as examples of such approach.

- (a) The Probation of Offenders Act, 1958.
- (b) The Family Courts Act, 1984.
- (c) The Consumer Protection Act, 1986.
- (d) The Environment (Protection) Act, 1986.

4.5 Problems extending beyond the State

Finally, as envisaged by the Joint Select Committee^[5] on Indian Constitutional reforms, some entries in the Concurrent List take into account the fact, that (in future), a need may arise to enact legislation providing for mischief's arising in the provincial sphere, which extend, (or are likely) to extend, beyond the boundaries of a single province. Examples of entries in the Concurrent List, which illustrate this consideration, are the following:

- Entry 3. Preventive detention
- Entry 5. Marriage etc.
- Entry 15. Vagrancy; nomadic and migratory tribes
- Entry 21. Commercial and industrial monopolies, etc.
- Entry 25. Education, including Universities, etc.
(This entry was revised in 1977).

- Entry 33. Trade and commerce etc. in certain products and goods.
 Entry 35. Mechanically propelled vehicles etc.
 Entry 38. Electricity

Incidentally, the wisdom of including "Electricity" in the Concurrent List (entry 38) is amply demonstrated by the successive statutory measures enacted on the subject in India after independence beginning with the Electricity (Supply) Act, 1948, supplemented or modified by a mass of recent legislation in the subject.

5. POST CONSTITUTION AMENDMENTS :

5.1 Significance of the amendments

After the commencement of the Constitution, several amendments of the Constitution, relevant to the Concurrent List, have been passed. In this short Chapter, it is proposed to discuss a few of them, in order to explore how far these amendments bring out the function and importance of the Concurrent List.

5.2 Chart of amendments

In order to make the discussion concrete, a chart of post 1950 amendments which are relevant to the entries in the Concurrent List has been prepared and is presented below :-

CHART OF CONSTITUTIONAL AMENDMENTS RELEVANT TO THE CONCURRENT LIST

(The entries numerically referred to below, are entries so numbered in the Concurrent List)

Entry	Amending Act	Source of the amended portion
Entry 11A, Administration of justice etc.	42 nd Amendment (1976)	Portion transferred from State List entry 3 (on the same subject)

[See (i) *Indu Vs. State of W.B.* AIR 1986 SC 1783
 (ii) *In re Special Courts Bill, 1978*, AIR 1979 SC 478, para 44]

Entry 17A - Forests, Entry 17B – Protection of wild animals and birds	42 nd Amendment (1976)	Transferred from State List, entries 19 and 20
Entry 20A – Population etc.	42 nd Amendment (1976)	Newly inserted

Entry 25 – Education etc.	42 nd Amendment (1976)	Portion transferred from State List, entry 3 (on the same subject)
Entry 33 – Trade, Commerce etc.	3 rd Amendment (1954)	Scope expanded, by adding certain items
Entry 33A – Weights and measures etc.	42 nd Amendment (1976)	Transferred from State List, entry 29
Entry 40 – Archaeological sites etc.	7 th Amendment (1956)	Verbal changes made
Entry 42 – Acquisition and requisitioning of property	7 th Amendment (1956)	Wording revised, and scope enlarged.

5.2 Transfer from State List

It will be seen from the above Chart, [\[6\]](#) that on a fairly large number of occasions in the past, it became necessary to amend the Constitution, by transferring, to the Concurrent List, certain matters from the State List. Obviously, it was thought that the matters in question were not being adequately dealt with (or could not be adequately dealt with) by the States [Entries 11A, 13A, 17B, 25 and 33A].

5.3 New Entries

- (a) Changed conditions – political social or economic – may necessitate the insertion of new entries in a legislative list. When such a situation arises, the concrete question that may fall to be considered is, whether the addition should be made in the Union List or in the State List or in the Concurrent List.
- (b) Precisely such a question seems to have arisen, after it became apparent, that the problem of population explosion might need specific legislative sanction, for enacting into law the policy to be adopted on the subject. The relevant amendment was made in 1976, by introducing, in the Concurrent List, a new entry 20A – relating to “population” and family planning. Presumably, it was considered that instead of the Union undertaking the exclusive responsibility of promoting legislation on the subject, it would be better to give the power to the Centre as well as to the States. As a result, entry 20A was inserted in the Concurrent list. There seems also to have been a thinking, that though the subject was of national importance, yet there might be occasions for State-wise variations in legislative policy.
- (c) In any case, the insertion of any new entry in a legislative list -whether Concurrent List or any other list – illustrates the validity of the proposition, that no draftsman can visualise all possible future contingencies and fully encapsulate them in a supposedly exhaustive linguistic formula.
- (d) Incidentally, reverting to the specific topic of “population and family planning”, long before entry 20A was inserted in the Concurrent List, Parliament had already enacted the Medical Termination of Pregnancy Act, 1971, apparently by recourse to Concurrent List, entry 1, “Criminal law”. In effect, the Act substantially modifies the rigorous operation of sections 312 – 316 of the Indian Penal Code (relating to causing miscarriage and its aggravations and variations).

5.4 Minor amendments in there Concurrent List

The other amendments, effected in the Concurrent List, analysed in the Chart given above, are of a minor or verbal character.

[See Concurrent List, entries 33, 40 and 42].

^[1] Paragraph 2.2, *supra*.

^[2] Paragraph 2.2, supra.

^[3] Paragraph 2.3, supra.

^[4] Paragraph 4.2 supra.

^[5] Paragraph 4.2, supra.

^[6] Para 5.2, supra.