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

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INTRODUCTION

1 Scope of the Study

The term 'legislation' has been derived from the Latin words Legis meaning 'law'and Laum meaning to 'make'. Therefore, etymologically, legislation means to make the law. Legislation is considered one of the most important sources of law. It is very crucial in a democratic society, especially where there is a federal type of government or a very highly complicated form of government. Legislation when used as a source of law is denoted to be a law made by defined persons or bodies and not by any type of customary or conventional laws or judicial decisions, it is rather termed as an enacted law. There is a difference of opinion regarding the importance of legislation as a source of law. Analyticaljurists emphasize the importance of legislation on the other hand historical jurists attach noimportance to legislation. Legislative lists are of three types: State List, Union List, and Concurrent List, as mentioned under of the Indian constitution. The main purpose for the distribution of powers is to create federalism; the object for which a federal state is formedinvolves a division of authority between the national government and the separate states, therefore there is a division of power at the central and at the state level. A federal constitution tries to establish a dual polity with the union at the centre and the states at the peripheries and thereby each of them is granted sovereign powers to exercise in their fields assigned to them by the Constitution. This study deals with an important aspect of Indianfederalism, 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).

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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.

The point of concurrent powers is that there are many actions necessary to governmental operation at both the state and federal level. These include such services as maintenance and operation of the government itself, maintaining public facilities and roads, and maintaining fire departments and law enforcement. These things cost money, and this is the reason for taxation. While some people feel it is unfair or unconstitutional to essentially be taxed twice, concurrent powers afforded by the Constitution enables each governmental body providing such servicesto collect taxes from the citizens within the jurisdiction. Another way of providing services toa large and growing nation, when taxes collected are not enough, is for the government to borrow money. Borrowing money affects taxpaying citizens, as this money must eventually berepaid to the lenders, and this is often accomplished by charging higher taxes. Borrowing money is another power afforded by concurrent powers.

DISTRIBUTION OF LEGISLATIVE POWERS UNDER THE INDIANCONSTITUTION :

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

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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 thepractising or academic lawyer.

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.

(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, subjectto the provisions of clause (2), the law made by Parliament, whether passed before or after thelaw made by the Legislature of such State, or, as the case may be, the existing law, shall prevailand 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 thePresident and has received his assent, prevail in the State: Provided that nothing in this clauseshall prevent

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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 Legislatureof the State."

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.

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 eitherthe 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 twolaws 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

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valid. In such a case, the test to be adopted will be that of repugnancy, under article 254(2), of the Constitution.

(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 expressedin 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 thisview, 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. Barani Vs. Henry, AIR 1983 SC 150, paragraph 15.

(v) Hoechst Pharmaceuticals Vs. State of Bihar, AIR 1983 SC 1020, paragraphs 68, 69 and 76 (Full decisoon of the position).

(vi) Pochanna Lingappa Vs. State of Maharashtra, AIR 1985 SC 389, paragraph 26; (1985)1 SCC 425.

(vii) 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.

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

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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 constitutionallaw 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 Listdoes not make it invalid.

3.3 Decisions

The principle of "pith and substance" had come to be established by the Privy Council, whenit 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 andsubstance came to be adopted in the pre-independence period, under the Government of IndiaAct, 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 UnionList, 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

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enactment as a whole, (ii) to its main objects, and (iii) tothe 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) (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 oflegislative 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, thenthe 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.

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

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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 cannotbe allocated exclusively either to a central or to a Provincial legislature and for which, thoughit 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 somes 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 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 enactedin 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

It argues against an overvaluation of the 'problem of the State' in political debate and social theory. A number of conceptual tools are suggested for the analysis of the many and varied alliances between political and other authorities that seek to govern economic activity, social life and individual conduct. Modern political rationalities and governmental technologies are shown to be intrinsically linked to developments in knowledge and to the powers of expertise.The

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characteristics of liberal problematics of government are investigated, and it is argued thatthey are dependent upon technologies for 'governing at a distance', seeking to create locales, entities and persons able to operate a regulated autonomy. The analysis is exemplified throughan investigation of welfarism as a mode of 'social' government. As post-war 'welfare states' in the West and centralised 'party states' in the East have come under challenge, contemporarypolitical debate has become suffused by images of the state as malign and potentially monstrous. Only 'beyond the State', it appears, can a life worthy of free human individuals begin. Criticising the excesses, inefficiencies and injustices of the extended State, alternativeshave been posed in terms of the construction of a 'free market' and a 'civil society' in which aplurality of groups, organizations and individuals interact in liberty. This concern has been paralleled in social theory, where analysts have challenged liberal pluralist and economic determinist theories of power, and argued that the specific form of the state is of crucial importance, not only in understanding geo-political relations, but also in comprehending modern forms of exercise of power over national territories.[2]

But the political vocabulary structured by oppositions between state and civil society, public and private, government and market, coercion and consent, sovereignty and autonomy and thelike, does not adequately characterise the diverse ways in which rule is exercised in advancedliberal democracies. Political power is exercised today through a profusion of shifting alliancesbetween diverse authorities in projects to govern a multitude of facets of economic activity, social life and individual conduct. Power is not so much a matter of imposing constraints uponcitizens as of 'making up' citizens capable of bearing a kind of regulated freedom. Personal autonomy is not the antithesis of political power, but a key term in its exercise, the more so because most individuals are not merely the subjects of power but play a part in its operations.

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. 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.

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5. POST CONSTITUTION AMENDMENTS :

5.1 Significance of the amendments

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

The provision for amendment of the Indian Constitution carries multifarious significance aslisted below:

- **Adaptability in Governance**: The Constitution lays down **fundamental principles of governance.** A diverse and constantly evolving country like Indiacannot be governed by a set of fixed rules. The amendment of the constitution enables to bring changes in governance as per needs and situations.

- **Accommodating New Rights**: With rising awareness, various sections of society are **becoming assertive of their rights**. For example, of late, the LGBT community has been demanding their rights. The amendment enables providing for such rights.

- **Evolution of New Rights**: New interpretations of the Constitution led to the **evolution of new rights**. For example, a new interpretation of the Right to Life and Personal Liberty gave rise to the Right to Privacy. The amendment enables accommodating such rights.

- **Addressing Emerging Issues**: It enables addressing new **emerging trends like bans, vigilantism, etc.**

- **Bringing Social Reform**: It enables the **eradication of outdated socio-cultural practices** to usher in modernity.

Criticism of the Amendment Procedure

The procedure for amendment of the Indian constitution has been criticized on the following grounds:

- There is **no provision for a special body** for amending the Constitution such as the **Constitutional Convention or Constitutional Assembly**. The constituent power is vested in the Legislative Body itself i.e. the Parliament and the State Legislatures (in a few cases).

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- There is **no provision for a special process for amending the Constitution.** Except for the requirement of Special Majority, the process of amendment is similar to that of a legislative process.

- The **power to initiate an amendment lies only with the Parliament.** The states have no such powers (except for passing a resolution to create or abolish state legislative councils).

- A major part of the Constitution **can be amended by the Parliament alone.** Only in a few cases, the consent of the state legislatures is required, and that too, only halfof them.

- **Lack of provision for holding a joint sitting** of both Houses of Parliament fora **constitutional amendment bill,** sometimes, leads to the situation of a deadlock.

- The provisions relating to the amendment procedure, **being too sketchy,** leave a wide scope for **creating disputes and taking the matters to the judiciary.**

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 werenot being adequately dealt with (or could not be adequately dealt with) by the Sates [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 tobe considered is, whether the addition should be made in the Union List or in the State List orin the Concurrent List.

(b) Precisely such a question seems to have arisen, after it became apparent, that the problemof 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

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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.

Conclusion

Legislation is therefore regarded as the most important source of law in the prevalent times. Hence it is considered to be the codified form of law which is commanded by the sovereign tothe common masses, and it becomes a predicament situation to regard legislation as the authoritative source of law.

Legislation is one of the foremost and most important source of law in today's world. Most countries in today's world regard legislation as an essential source of law and follow this system of lawmaking. Although some lacunae and loopholes are there which exists in the present form but then too the difficulties such faced are relatively less than that faced from theother sources of law viz. **custom and precedent** as legislation as a source of law tries to bringuniformity by avoiding the ambiguity.