CHAPTER X

LEGISLATIVE RELATIONS

SYNOPSIS

There is in a federation, a division of functions between the Centre and the regions, known as the State Governments in India. This division of functions is two-fold—from the point of view of :

(i) Territory, and

(ii) The subject-matter.

A. TERRITORIAL JURISDICTION TO LEGISLATE

From the territorial point of view, Parliament may make laws for the whole of India, or a part thereof [Art. 245(1)]. A law made by Parliament is not invalid merely because it has an extra-territorial operation [Art. 245(2)].

As explained by KANIA, C.J., in *A.H. Wadia v. Income-tax Commissioner*:[1] "In the case of sovereign legislature, questions of extra-territoriality of any enactment can never be raised in the municipal Courts as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognised by foreign Courts or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned."

Accordingly, the government can proceed under the Hindu Marriage Act against a Hindu who returns to India after marrying a second wife in a foreign country, for the Act applies to all Hindus who are domiciled in India but who may be outside India for the time being.

A State Legislature, on the other hand, may make laws only for the State concerned [Art. 245(1)]. A State Legislature has no legislative competence to make laws having extra-territorial operation. A State can legislate effectively only for its own territory. A State law can affect persons, properties or things within the State and not outside the State. A State law is not immune from challenge in a Court on the ground of extra-territorial operation. A State law having operation outside the State is not valid.

A State law is not valid if it purports to affect men and property outside the State. A State law may apply to persons within its territory, to property—moveable and immovable—situated within the State, or to acts and events which occur within its borders. To decide whether or not a State law has an extra-territorial operation, the doctrine of *territorial nexus* is invoked.

The doctrine of territorial nexus is applied to find out whether a particular State law has extra-territorial operation. It signifies that the object to which the law applies need not be physically located within the territorial boundaries of the State, but what is necessary is that it should have a sufficient territorial connection with the State. If there is a *territorial nexus* between the subject-matter of the Act and the State making the law, then the statute in question is not regarded as having *extra-territorial* operation.

Thus, a State may levy a tax on a person, property, object or transaction not only when it is situated within its territorial limits, but also when it has a sufficient and real territorial connection with it.

The principle of territorial nexus can be illustrated with reference to an old case. A company was incorporated in the United Kingdom and had its control and management exclusively situated there. A member of it carried on business

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1. AIR 1949 FC 18, 25.

in India. The company made an overall profit of which a major part accrued from India. It was held that India could levy an income-tax on the entire income of the company, and not only on the portion accruing from India, for there was a sufficient territorial nexus between the company and India for this purpose.[2]

The Bihar legislature enacted the Bihar Hindu Religious Trusts Act, 1950, for the protection and preservation of properties appertaining to the Hindu religious trusts. The Act applied to all trusts any part of which was situated in the State of Bihar. A question was raised whether the Act would apply to trust properties situated outside the State of Bihar. Applying the doctrine of territorial nexus, the Supreme Court held that the Act could affect the trust property situated outside Bihar, but appertaining to a trust situated in Bihar where the trustees functioned. The Act aims to provide for the better administration of Hindu religious trusts in the State of Bihar. This aim is sought to be achieved by exercising control over the trustees in *personam.* The trust being situated in Bihar, the State has legislative power over it and also over its trustees. The Act thus has no extra-territorial operation. The fact that the trust is situated in Bihar gives enough territorial connection to enable the Bihar legislature to make a law with regard to such a trust.

What is necessary is that the connection between the trust and the property appertaining thereto is real and not illusory and that the religious institution and the property appertaining thereto form one integrated whole.[3] "It cannot be disputed that if the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the other. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property."

In *State of Bombay v. RMDC,*[4] the respondent, the organiser of a prize competition, was outside the State of Bombay. The paper through which the prize competition was conducted was printed and published outside the State of Bombay but it had a wide circulation within the State of Bombay. Most of the activities which the gambler was expected to undertake took place within the State. A tax levied by the State of Bombay on lotteries and prize competitions was extended to the newspapers published outside the State "in a lump sum having regard to the circulation or distribution of the newspaper" in the State.

The provision was questioned on the ground that it purported to affect men residing and carrying on business outside the State. Nevertheless, it was held valid because the newspapers although printed and published outside Bombay had a wide circulation there; they had collectors in Bombay to collect the entry fee for the competition. The State sought to collect the tax only on the amount received by the newspapers from the State and, therefore, there was sufficient territorial nexus entitling the State of Bombay to impose a tax on the gambling that took place within its boundaries. Therefore, the law could not be struck down on the ground of extra-territoriality.

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2. *Wallace v. Income-tax Commissioner,* AIR 1948 P.C. 118.
Also see, *Wadia, supra,* note 1.

3. *State of Bihar v. Charusila Dasi,* AIR 1959 SC 1002 : 1959 Supp (2) SCR 601; *State of Bihar v. Bhabapritananda,* AIR 1959 SC 1073.
Also, *Ananta Prasad v. State of Andhra Pradesh,* AIR 1963 SC 853.

4. *State of Bombay v. RMD Chamarbaugwala,* AIR 1958 SC 699.

A State is entitled to levy a tax on the carriage of goods through its territory although the goods belong to, and the tax is payable by, the people outside the State.[5] Reference may also be made in this connection to the discussion under sales tax.[6]

There is no general formula defining what territorial connection or *nexus* is sufficient or necessary for application of the law to a particular object. Sufficiency of the territorial connection involves consideration of two elements, *viz.:*

(*a*) the connection must be real and not illusory; and

(*b*) the liability sought to be imposed under the Act must be pertinent or relevant to that connection.[7]

Whether in a given case there is sufficient territorial nexus or not is a question of fact, and it is for the Courts to decide in each case whether "the territorial nexus" being put forward as the basis of the application of the law is "sufficient" or not.

The Bombay State Legislature enacted a law prohibiting a bigamous marriage and made it a criminal offence to enter into such a marriage. Marriages contracted outside the State by people domiciled within the State were also prohibited. The High Court declared the Act *ultra vires* as there was no territorial nexus between the State and the marriage performed or crime committed outside the State, even when it was done by a person domiciled in the State.[8]

Article 245 does not apply when acting under a Central law [S. 68-D(3) of the Motor Vehicles Act], a State Government gives approval to a scheme for inter-State routes for the State Transport Undertaking.[9] Also, under Art. 298, a State is not confined to carrying on business within its own boundaries. It can carry on business outside its territory as well.[10]

Recently the Supreme Court has stated the principle of territorial nexus as follows:[11]

> "It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Art. 245. Generally speaking, a legislation having extraterritorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra-territorial operation of a State legislation is sustainable on the ground of territorial *nexus.* Such territorial *nexus,* when pleaded must be sufficient and real and not illusory."

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5. *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975; *infra*, Chapter XV.

6. *Infra*, next Chapter.

7. *Shrikant Bhalchandra Karulkar v. State of Gujarat*, (1994) 5 SCC 459.

8. *State of Bombay v. Narayandas Mangilal*, AIR 1958 Bom. 68.
See, *infra*, under Citizenship, Chapter XVIII.
In the following cases, State laws have been invalidated because of extra-territoriality:
E.R. Samuel v. State of Punjab, AIR 1966 H.P. 59; *K.K. Kochunni v. State of Madras*, AIR 1959 SC 725 : 1959 Supp (2) SCR 316.

9. *Khazan Singh v. State of Uttar Pradesh*, AIR 1974 SC 669 : (1974) 1 SCC 295.

10. See, *infra*, Chapter XII, for Art. 298.

11. *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.*, (2002) 5 SCC 203.

B. DISTRIBUTION OF LEGISLATIVE POWERS

The crux, the pivotal point, of a federal constitution is the division of powers and functions between the Centre and the regions. The distribution of legislative powers between the Centre and the regions is the most important characteristic of a federal constitution. The whole structure of the federal system continues to revolve around this central point.[12]

A study of the federations now extant in the world shows that there is no fixed formula, or a set pattern, for division of powers between the Centre and the regional governments. Usually certain powers are allotted exclusively to the Centre; certain powers are allotted exclusively to the regions, and there may be a common or concurrent area for both to operate simultaneously.

The foundation for a federal set up was laid in the Government of India Act, 1935. Though in every respect the distribution of legislative power between the Union and the States as envisaged in the 1935 Act has not been adopted in the Constitution, but the basic framework is the same.[13]

A basic test applied to decide what subjects should be allotted to the one or the other level of government is that functions of national importance should go to the Centre, and those of local interest should go to the regions. This test is very general, a sort of *ad hoc* formula, and does not lead to any uniform pattern of allocation of powers and functions between the two tiers of government in all federal countries. The reason for this lack of uniformity is that what is of general or national importance, and what is of local importance, cannot be decided on any *a priori* basis. Certain subjects like defence, foreign affairs and currency, are regarded as being of national importance everywhere and are thus given to the Centre. But, beyond this, what other subjects should be allotted to the Centre depends on the exigencies of the situation existing in the country, the attitudes of the people and the philosophy prevailing, at the time of constitution-making, and the future role which the Centre is envisaged to play.

The circumstances and considerations governing the scheme of division of powers in a federation vary from place to place and time to time. The pattern of division of functions in any federal country is largely conditioned by the interaction of two contending and conflicting forces—forces favouring centralisation resulting in a federal union and promoting a strong centre, and the forces supporting decentralisation, local or particularistic tendencies born of such factors as ethnic, religious, cultural, linguistic and economic, which manifest in powers being given to regional governments. The scheme which finally emerges in a federation is the resultant of the balance of these conflicting forces at the time of the constitution making.

C. THE THREE LISTS

The Indian Constitution contains a very elaborate scheme of distribution of powers and functions between the Centre and the States. The framers of the Indian Constitution took note of the developments in the area of Federal-State allo-

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12. In this connection see also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
13. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.

cation of powers in other federations. They surveyed the area of the functioning of the modern government. They noted the modern scientific and technological developments as well as the contemporary political philosophies. And, keeping all these factors in mind, they apportioned functions between the Centre and the States in a way so as to suit the peculiar circumstances and exigencies of the country.

The obvious tendency of the Indian Constitution is towards centralisation within a federal pattern and framework. The scheme of the Constitution is to secure a constitutionally strong Centre having adequate powers both in extent and nature so that it can maintain and protect the unity and integrity of the country.

The Indian Constitution seeks to create three functional areas:

(i) an exclusive area for the Centre;

(ii) an exclusive area for the States; and

(iii) a common or concurrent area in which both the Centre and the States may operate simultaneously, subject to the overall supremacy of the Centre.

The scheme of Art. 246 is as follows:

(i) Article 246(1) confers on Parliament an 'exclusive power' to make laws with respect to any of the matters in the Union List (List I in the Seventh Schedule). The entries in this List are such as need a uniform law for the whole country. The States are not entitled to make any law in this area. Art. 246(1) opens with the words: "Notwithstanding anything in clauses (2) and (3)."

This means that if any matter is within the exclusive competence of the Centre *i.e.* List I, it becomes a prohibited field for the States.

(ii) Article 246(3) confers an exclusive power on the States to make laws with respect to the matters enumerated in the State List (List II in the Seventh Schedule). These are matters which admit of local variations and, from an administrative point of view, are best handled at the State level and, therefore, the Centre is debarred from legislating with respect to these matters. Art. 246(3) opens with the words: "subject to clauses (1) and (2)".

Thus, if a particular matter falls within the exclusive competence of the States, *i.e.* List II, that represents the prohibited field for the Centre.

(iii) A unique feature of the Indian scheme of division of powers is the existence of a large concurrent field for the Centre and the States. Art. 246(2) confers a concurrent power of legislation on both the Centre and the States with respect to the matters enumerated in the Concurrent List (List III in the Seventh Schedule).

Article 246(2) runs as follows "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".

Allocation of subjects to the lists is not by way of scientific or logical definition but by way of a mere enumeration of broad categories. The power to tax cannot be deduced from a general legislative entry as an ancillary power.[14]

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14. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

The general idea underlying the Concurrent List is that there may be subjects on which Parliament may not feel it necessary or expedient to initiate legislation in the first instance because these matters may not have assumed much national importance. A State may, therefore, make necessary legislation with respect to any matter in the Concurrent List. But, if at any time, any of these matters assumes a national importance, and requires to be dealt with on a uniform all-India basis, then the Centre can step in and enact necessary legislation.

When an entry is in general terms in List II and part of that entry is in specific terms in List I, the entry in List I takes effect notwithstanding the entry in List II.[15]

Certain matters, it was felt, could not be allocated exclusively either to the Centre or the States, and though the States might legislate with respect to them, it was also necessary that the Centre should also have a legislative jurisdiction therein in order to enable it, if necessary, to secure uniformity in the law throughout the country, to guide and encourage State effort, and to provide remedies for mischief arising in the State sphere but whose impact may be felt beyond the boundaries of a single State. Instances of the first are provided by the Indian Codes of Civil and Criminal laws. These laws are at the basis of civil and corporate life of the country and have been placed in the Concurrent List so that the necessary uniformity can be preserved therein. Illustrations of the second are provided by such matters as labour legislation, and of the third by legislation for the prevention and control of epidemic diseases.

Further, even when the Centre makes a law for the whole country on a matter in the Concurrent List, a State may also make, if necessary, supplementary laws on that matter to provide for special circumstances within the State.

On the whole, therefore, the Concurrent List makes the scheme of distribution of powers somewhat flexible. The Centre can intervene in the area without any need to amend the Constitution. It permits of diversity along with a unity of approach.

The phraseology of the various clauses of Art. 246 is such as to secure the principle of Union supremacy. The legislative power conferred on the Centre under Arts. 246(1) [Union List] and 246(2) [Concurrent List] predominate over the power conferred on the State Legislature under Art. 246(3) [State List].

Under Art. 246(4), Parliament is given power to make a law on any matter in any List for any territory not included in a State. Obviously, the reference here is to the Union Territories.[16]

In the three lists of the Seventh Schedule to the Constitution, a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both. Art. 246 makes it clear that the exclusive powers conferred on Parliament or the States to legislate on a particular matter includes, the power to legislate with respect to that matter. Hence, where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. Whatever the terminology, because there can be no overlapping in the field of

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15. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
16. For Union Territories see, *supra*, Chs. V and IX.

taxation, such a tax if specifically provided for under one legislative entry effectively narrows the fields of taxation available under other related entries. It is also natural when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. For example, the State cannot under the garb of Luxury tax under Entry 62 List II impinge on the exclusive power of the union under Entries 83 and 84 of List I by merely describing an article as a luxury. That the entries on taxable events in the legislative lists are not exhaustive is also recognized and provided for in Article 248 (2) which provides for the power of Parliament to make any law imposing a tax not mentioned in either the Concurrent or State Lists.[17]

In *Chanda Devi*[18] the Supreme Court expressed too broadly that *mala fide* cannot be attributed to legislation. Colourable exercise of power or fraud on the Constitution conceptually have the same attributes of *mala fide* in its true legal sense [*e.g.* when the concerned legislature ostensibly acting on a field assigned to it enacts a law by entrenching upon the field assigned to another].

D. THE UNION LIST : LIST I

The Union List has 99 entries. Entries 1 to 81, 93 to 95 and 97 deal with general legislative powers, and entries 82 to 92, 96 and 97 deal with power to levy taxes and fees. The general entries are discussed here while the tax entries are discussed in the next Chapter.

The general non-tax entries may be broadly arranged under the following convenient heads.

(a) DEFENCE

Entries 1 to 7 are very broadly worded and give complete jurisdiction to the Centre over all aspects of defence of India.

In other Federations, only one entry is found regarding defence, but in India, as a matter of abundant caution, several entries are found in List I on this subject.

The Centre's capacity to take effective action for the defence of the country is further buttressed by the emergency provisions which are discussed later.[19]

The entries pertaining to defence run as follows:

(1) Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution, and after its termination, to effective demobilisation.

(2) Naval, military and air forces; any other armed forces of the Union.

The last words in the entry refer to armed forces other than the regular army, like the Assam rifles or the Central Reserve Police Force, the Border Security Force, the Central Industrial Security Force etc.[20] The Army Act has been enacted under this entry.[21]

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17. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
18. *General Manager, North West Railway v. Chanda Devi*, (2008) 2 SCC 108 : (2007) 14 SCALE 296.
19. *Infra*, Chap. XIII.
20. *Akhilesh Prashad v. Union Territory of Mizoram*, AIR 1981 SC 806 : (1981) 2 SCC 150.
21. *Prithi Pal Singh v. Union of India*, AIR 1982 SC 1413 : (1982) 3 SCC 140.

(2A) Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

Thus, the Centre has power to deploy its armed forces or any other force under its control in aid of the civil power in a State to maintain public order. The words "any other force" in this entry refer to a force other than an armed force.

The words "in aid of the civil power" in this entry indicate that the Central forces can be deployed to help and supplement the efforts of the State forces in restoring public order. The Central forces and the State authorities have to act in unison for this purpose.

The entry does not say that the Centre can deploy its forces in a State only at the request of the State government. It may so happen that the State Government may be unable or unwilling to request the Centre to deploy its forces to meet a serious disturbance of public order. It does not mean that the Centre should continue to look askance at a grave situation in a State and do nothing. It has a duty to intervene and power to deploy *suo motu* its armed forces if, in its opinion, the public disorder in a State has assumed the magnitude and character on an 'internal disturbance' within the meaning of Art. 355.[22]

(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.

Under this entry, Parliament has power to regulate the relationship of landlord and tenant including rent and eviction of tenants in private housing within the cantonments. Parliament has exclusive power to legislate on the subject of relationship between landlord and tenant in respect of housing accommodation situated in the cantonment areas.[23]

(4) Naval, military and air force works.

(5) Arms, firearms, ammunition and explosives.

(6) Atomic energy and mineral resources necessary for its production.

(7) Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

According to this entry, Parliament has to declare by law that the industry is necessary for the purpose of defence or for the prosecution of war. This is an important safeguard as such a declaration cannot be made by the executive alone.

This is a flexible entry. New concepts in defence and prosecution of war emerge all the time. It is a dynamic situation. An industry considered essential today for defence or war may cease to be so tomorrow and *vice-versa*. This entry can take care of this change in perception from time to time.

(b) PREVENTIVE DETENTION

(9) Preventive Detention for reasons connected with Defence, Foreign Affairs, or the security of India : persons subjected to such detention.

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22. For discussion on Art. 355, see, *infra*, Ch. XIII, under "Emergency Provisions".
23. *Indu Bhushan v. Rama Sundari*, AIR 1970 SC 228 : (1969) 2 SCC 289.

Under this entry, Parliament can make law of preventive detention with respect to three heads mentioned.

Reference may also be made to entry 3 in List III in this connection.[24] The present day National Security Act providing for preventive detention made by Parliament is based on both the Entries, *viz.*, entry 9, List I, and Entry 3, List III.[25]

Under entries 9 and 10, Parliament can enact a law providing for preventive detention of a foreigner with a view to making arrangements for his expulsion from India, as this matter falls under foreign affairs.[26]

(c) FOREIGN AFFAIRS

Entries 10 to 21 confer extensive powers on the Centre to conduct the foreign affairs of the country, to enter into treaties with foreign countries and to enact legislation to implement them. These entries are as follows:

(10) Foreign Affairs; all matters which bring the Union into relation with any foreign country.

The Centre can deal with expulsion, restriction of movements of foreigners in the country, prescribe the places of their residence and the ambit of their movement in the land, because all these matters bring India into relation with foreign countries as a country has a very deep interest in what is done to its citizens in a foreign land.

(11) Diplomatic, consular and trade representation.

(12) United Nations Organisation.

(13) Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

(14) Entering into treaties and agreements with foreign countries, and implementing of treaties, agreements and conventions with foreign countries.

This important entry confers plenary powers on the Centre to enter into treaties and agreements and enact necessary legislation to effectuate the same.

Power of entering into a treaty is an inherent part of the sovereign power of the State. Moreover, the Constitution makes no provision making legislation a condition for entry into a treaty in times either of war or peace.[27]

The power of Parliament under entries 13 and 14 is further re-inforced by Art. 253 which confers an overriding power on Parliament to make any law for the whole or any part 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. This means that if the Central Government enters into any international obligation, Parliament is fully authorised to enact legislation to implement it even if the subject-matter falls

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24. *Infra*, Sec. F.
See Also, *infra*, Ch. XXVII, Secs. B and C, under Fundamental Rights, for a full-fledged discussion on Preventive Detention.

25. *State of Andhra Pradesh v. B. Subbarajamma*, AIR 1989 SC 389 : (1989) 1 SCC 193.

26. *Hans Muller v. Supdt., Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284.
See below for entry 10, under "Foreign Affairs".

27. *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1 : AIR 2004 SC 1107.

within the State List. Thus, the treaty-implementing power in India overrides the normal Federal-State jurisdictional lines. No difficulty can arise in the area of external affairs because of the divided jurisdiction between the Centre and the States to make laws. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operated to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.[28]

In the absence of such provisions, the Centre's capacity in the international field would have been greatly impaired as it could not then pursue a strong and effective foreign policy. Had it entered into a treaty concerning a subject-matter falling within the State sphere, then either the treaty would have remained a dead letter or could be implemented by the cumbersome procedure of all the State Legislatures passing necessary legislation. These difficulties are now avoided as Parliament itself is authorised to pass legislation to implement not only any treaty but even decisions and non-obligatory recommendations of international organisations and conferences (entry 13). This gives an additional dimension to the Centre's power over 'external affairs' which is much broader than that existing in any other federation.

Entering into a treaty with a foreign country is an executive function of the Central Government. A boundary dispute between India and Pakistan in the Rann of Kutch was referred to an arbitral tribunal. The Central Government proceeded to implement the award without any legislation. It was argued on the authority of the *Berubari* case[29] that an amendment of the Constitution was called for. The Supreme Court held that while no cession of Indian territory could take place without a constitutional amendment, settlement of a boundary dispute by an arbitral tribunal could not be regarded as cession of territory. The Central Government could implement the award, treating it as an operative treaty, without any law or constitutional amendment.[30]

It is not necessary to enact a law for implementing each and every treaty. Parliament's power to enforce a treaty is not, however, free from other constitutional restrictions, *e.g.,* Fundamental Rights.[31]

Under entries 10 and 14, the Central Government can take power to okay invitations to Indian Citizens by foreign governments.[32] The legislative power in relation to treaties does not affect the executive power of the Central Government to enter into any treaty.[33]

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28. *Union of India v. Azadi Bachao Andolan,* (2004) 10 SCC 1 : AIR 2004 SC 1107.
29. *In Re Berubari,* AIR 1960 SC 845 : (1960) 3 SCR 250; see, *supra,* Ch. V.
30. *Maganbhai Ishwarbhai Patel v. Union of India,* AIR 1969 SC 783 : (1970) 3 SCC 400; also, *supra,* Ch. III.
For discussion on distribution of Administrative Powers between the Centre and the States, see, *infra,* Ch. XII.
31. See, *infra,* Chs. XX-XXXIII, for discussion on Fundamental Rights.
32. *Lakhanpal v. Union of India,* AIR 1973 Del. 178.
33. *Union of India v. Manmull Jain,* AIR 1954 Cal. 615; *supra,* Ch. III.

(15) War and peace.

(16) Foreign Jurisdiction.

It is the jurisdiction which a country exercises within another country by virtue of international law, treaty or agreement. Sometimes a country also accords exemption by legislation from its jurisdiction to those persons who have no such privilege under International Law.

Under Art. 260, the Indian Government may, by agreement with the government of any territory which is not a part of India, undertake any executive, legislative or judicial functions vested in that government.[34] However, every such agreement is subject to, and governed by, any law relating to the exercise of foreign jurisdiction in force in India, as for example, the Foreign Jurisdiction Act, 1947.

(17) Citizenship, naturalisation and aliens.

For discussion on Citizenship.[35]

(18) Extradition

This entry relates to the surrender by one State to another of persons who are fugitives from justice from that State.

(19) Admission into, and emigration and expulsion from, India : passports and visas.

For passports see under Art. 21.[36]

(20) Pilgrimages to places outside India.

(21) Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

(d) TRANSPORTATION AND COMMUNICATIONS

Means of communication are the lifeline of the nation to maintain unity and economic prosperity in the country. It is vital for the nation that a national communication network be maintained in the country. To obtain this objective, entries 22 to 31 confer on the Centre power over railways, national highways, airways etc. The relevant entries run as follows:

(22) Railways.

(23) Highways declared by or under law made by Parliamnet to be national highways.

This confers a flexible power on the Centre as Parliament can declare any highway as a national highway under a law made by Parliament.

(24) Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

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34. For Art. 260, see, *infra*, Ch. XII.
35. See, *infra*, Ch. XVIII, Part V.
36. *Infra*, Ch. XXVI.

Under this entry, only Parliament, and not the executive, can declare by making a law any inland waterways as a national waterway. The scope of this entry is limited to mechanically propelled vessels.

(25) Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by the States and other agencies.

Under this entry, States can provide education in mercantile marine subject to regulation by the Centre. The Centre can thus ensure uniformity of syllabi and standards. Also see entry 66 in this list.

(26) Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

(27) Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

Under Art. 364(2), a major port is a port declared to be so by or under a Parliamentary law. The Central Government can declare a port as a major port under S. 3(8) of the Indian Ports Act, 1908.

Article 364(1) lays down that the President may by public notification direct that any law made by Parliament or a State Legislature shall not apply to a major port or aerodrome, or shall apply to it subject to the exceptions and modifications mentioned therein. This provision thus makes it possible to apply special provisions to any particular major port or aerodrome necessitated by its special status or importance.

(28) Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

Also see entry 81 in this List.

(29) Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

(30) Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

(31) Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communications.

Amplifiers being instruments of broadcasting and communication fall under this entry.[37] Therefore, manufacture, licensing, ownership, possession, and trade in such apparatus can be regulated by the Centre.

A few modes of communications, not mentioned here, fall within the purview of the States [See State List]. A few entries pertaining to communications are to be found in the Concurrent List as well.[38]

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37. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.
38. *Infra*, Sec. F.

(e) PROPERTY OF THE UNION

(32) Property of the Union and the revenue therefrom, but as regards property situated in a State, subject to legislation by the State, save in so far as Parliament by law otherwise provides.

The expression "property of the Union" is wide enough to comprehend all kinds of property, essentially funds and buildings. This entry achieves three things at the same time:

(a) It enables, Parliament to legislate exclusively with respect to all property belonging to the Union.

(b) It subjects the Union property situated within a State to any State legislation.

(c) It, nevertheless, authorises Parliament to provide otherwise by law. If Parliament legislates, the Central law will prevail over the State law applicable to the Union property in the State.[39]

Under this entry, Parliament can legislate even with respect to agricultural land belonging to the Union and this power is not affected by entry 18, List II.[40]

Questions have been raised regarding the validity of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, enacted by Parliament. The Act provides for eviction of unauthorized occupants of public premises, *i.e.* property belonging to the Union Government as well as the public sector statutory corporation, such as, the nationalised banks. The Act provides for the eviction of those persons who have no authority in law to remain in possession of public premises. The unauthorized persons may be squatters, persons having no rights whatsoever, or persons who were in occupation by virtue of any agreement but whose right under the agreement had come to an end.

The Act does not pertain to any matter relating to rights in relation to landlord and tenants for eviction of tenants from lands which have been leased. The Act is concerned with the eviction of those persons who have no authority in law to remain in possession of the land belonging to the Union of India.

So far as the Act relates to the property of the Union Government, it falls under entry 32 List I.[41] Explaining the matter further, the Supreme Court has said:[42]

> "Entry 32 is wide enough to cover all legislations pertaining to the property of the Union of India including the legislation for eviction of unauthorized occupants from the property belonging to the Union of India".

The Act does not fall under entry 18, List III.[43]

A corporation even though wholly owned and controlled by the Union, has a distinct personality of its own and its property cannot be regarded as the property

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39. See, *infra*, Sec. G, on "Repugnancy".
Also see, Ch. XI, Sec. J(ii)(d), *infra.*

40. *Hari Singh v. Military Estate Officer*, AIR 1964 Punj. 304. For entry 18, List II, see, *infra*, Sec. E.

41. *Accountant & Secretarial Services (P.) Ltd. v. Union of India*, AIR 1988 SC 1708 : (1988) 4 SCC 324.

42. *Saiyada Mossarat v. Hindustan Steel Ltd., Bhilai*, AIR 1989 SC 406, 411 : (1989) 1 SCC 272.

43. See, *infra*, Sec. E.

of the Union. Therefore, the Act in question in its application to public sector corporate bodies does not fall under entry 32. The reason is that entry 32 relates to the "property of the Union" and, therefore, this entry cannot be construed as including within its scope the property of a government company which is a different and distinct entity from the Union Government.

The question of identifying the Public Premises Act in its application to public corporations with an entry in one of the Lists has caused some problems to the Supreme Court. In *Accountant & Secretarial Services*,[44] the Court took the view that the Act in relation to properties other than the properties belonging to the Central Government has been enacted under the Concurrent List. Then, in *Saiyada Mossarat*,[45] the Court took the view that as there is no entry in either List II or List III which would be attracted to the subject matter of speedy eviction of unauthorised occupation from properties belonging to a government company, the matter falls under the residuary power of Parliament.[46] But again in *Ashoka Marketing*,[47] the Supreme Court has reiterated its earlier view and has held that it falls under the Concurrent List, entries 6, 7, 13. So, finally, the Court's view is that the Public Premises Act insofar as it deals with the premises other than that of the Central Government has been enacted in exercise of the legislative powers in respect of matters enumerated in the Concurrent List.

(f) FINANCIAL POWERS

Items 26 to 40 and 76 confer on the Centre important powers of a financial nature. These entries run as follows:

(35) Public Debt of the Union.

(36) Currency, coinage, and legal tender; foreign exchange.

The entry embraces laws not only relating to the control of foreign exchange but also to its acquisition to better the economic stability of the country. Therefore, Parliament is empowered to make a law for promoting export of sugar to earn foreign exchange.[48]

Ss. 489A to 489D, I.P.C., fall within the exclusive legislative competence of the Centre as they relate to entry 36 read with entry 93 in List I.[49]

(37) Foreign loans.

(38) Reserve Bank of India.

(39) Post Office Savings Bank.

(40) Lotteries organised by the Government of India or the Government of a State.

This entry should be read along with entry 34 of List II.

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44. *Supra*, footnote 41.
45. *Supra*, footnote 42.
46. *Infra*, Sec. H.
47. *Ashoka Marketing Ltd. v. Punjab National Bank*, AIR 1991 SC 855, 876 : (1990) 4 SCC 406.
48. *The Lord Krishna Sugar Mills v. Union of India*, AIR 1959 SC 1124 : (1960) 1 SCR 39. For comments on the case, see, I *JILI*, 572.
49. *G.V. Ramanaiah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 531.

Parliament has now passed the Lotteries (Regulation) Act, 1998, under entry 40, to regulate the lotteries run by the States. S. 5 of the Act authorises a State Government within the State, to prohibit the sale of tickets of a lottery organised, conducted or promoted by every other State. The Supreme Court has ruled that even when a lottery is organized by a State under this Act, it still remains *res extra commercium,* i.e. it does not amount to trade and commerce.[50]

(45) Banking

There are many reasons for allocating banking exclusively to Parliament. Operations of the banks do not remain confined within the territorial limits of one State in which a bank is located, the banking activities have nation-wide implications. Further, banking has deep relationship with currency and interstate trade and commerce.

Parliament has enacted the Banking Regulation Act, 1949, to regulate banks. The over-all supervision over the banks vests in the Reserve Bank of India. S. 21A enacts that a transaction between a banking company and its debtor cannot be reopened by a Court on the ground that the rate of interest charged by the banking company is excessive. This means that the Court cannot reduce the rate of interest which the debtor has agreed to pay.

The Supreme Court has ruled that this provision falls under entry 45, List I. S. 21A applies to all types of loans given by a banking company whether to an agriculturist or to a non-agriculturist. It has nothing to do with entry 30, List II.[51]

The Supreme Court has ruled that Banking falls under item 45, List I, and not under item 30, List II.[52] Banking being included in the Union List does not fall within the purview of entry 30, List II. A bank is not a mere money lender; it performs a much broader spectrum of functions besides money lending. Banks do not fall under the scope of the State Money Lenders Act enacted under entry 30, List II, as Banking is covered by entry 45, List I. Banks do not act merely as money-lenders but perform many functions, such as, borrowing, dealing in bills of exchange, leading and advancing money etc.

The Supreme Court has ruled that banking operations include, *inter alia,* acceptance of loans and deposits, granting of loans and recovery of debts due to the Bank. Under entry 45, List I, it is Parliament alone which can enact a law regarding conduct of business by the banks. Recovery of dues is an essential function of any banking institution. Parliament can by law provide the mechanism by which money due to the banks can be recovered. Therefore, the Recovery of Debts due to banks and Financial Institutions Act, 1993, enacted by Parliament squarely falls within the ambit of entry 45, List I.[53]

(46) Bills of Exchange, cheques, promissory notes and other like instruments.

(76) Audit of accounts of the Union and of the States.

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50. *B.R. Enterprises v. State of Uttar Pradesh,* AIR 1999 SC 1867 : (1999) 9 SCC 700.

51. *State Bank of India v. Yasanji Venkateswara Rao,* AIR 1999 SC 896.
For entry 30, List II, see, Sec. E, *infra.*

52. *Associated Timber Industires v. Central Bank of India,* (2000) 7 SCC 93 : AIR 2000 SC 2689.

53. *Union of India v. Delhi High Court Bar Association,* (2002) 4 SCC 275 : AIR 2002 SC 1479.
Also see, Ch. VIII, Sec. I, *supra.*

Articles 148 to 151 of the Constitution deal with the office of the Comptroller and Auditor-General. [54]

(g) ECONOMIC POWERS

Entries 41 to 59 and 61 enable the Centre to control and regulate the economic affairs of the country to a very large extent. In reality these entries give to the Central Government a primacy in the economic sphere. These entries run as follows:

(41) Trade and commerce with foreign countries, import and export across customs frontiers; definition of customs frontiers.

The word 'import' in the entry does not include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported.[55]

The power to define customs frontiers for purposes of export and import vests in Parliament under this entry.[56]

Regulation of imports into India falls under this entry and is within the exclusive jurisdiction of the Centre.[57]

(42) Inter-State trade and commerce.

The matter has been considered later in full.[58] Also see entry 26, List II[59] and entry 33, List III.[60]

(43) Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

A law making provisions for the proper management of a mismanaged company, empowering government to appoint directors, and prohibiting proceedings for winding up the company during the period for which the government appointed directors remain in office, would fall within this entry.[61]

The underlying concept of a 'trading corporation' is buying and selling. The hard core of such a corporation is its commercial character.[62]

(44) Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

Entries 43 and 44 apply to such bodies only as are corporations in the full sense of the term and not to any other legal entity, *e.g.*, a registered society.

Under entries 43 and 44, Parliament can pass a law providing for amalgamation or merger of companies.

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54. See 'Comptroller and Auditor-General', *supra*, Ch. II, Sec. J(ii)(s).
55. *State of Bombay v. Balsara,* AIR 1951 SC 318 : 1951 SCR 682.
56. *Burmah Shell Oil v. State of Andhra Pradesh,* AIR 1960 AP 619.
57. *Mount Corporation v. Director of Industries,* AIR 1965 Mys. 143.
58. *Infra,* Chap. XV, under Freedom of Trade & Commerce.
59. *Infra,* Sec. E under "State List".
60. *Infra,* Sec. F, under "Concurrent List".
61. *Charanjit v. Union of India,* AIR 1951 SC 41 : 1950 SCR 869.
62. *Ramtanu C.H. Society v. State of Maharashtra,* AIR 1970 SC 1771 : (1970) 3 SCC 323.

Entries 43 and 44 do not authorise regulation of business of the corporations.[63] According to the Supreme Court, "A law relating to the business of a corporation is not a law with respect to regulation of a corporation."[64]

Entries 43, 44 and 45 enable the Centre to set up financial corporations in the States to provide credit to industrial undertakings therein. The entry does not include non-banking trading activities carried on by banks.[65]

(47) Insurance.

(48) Stock exchanges and futures markets.

Parliament has enacted the Forward Contracts (Regulation) Act, 1952 and the Securities Contracts (Regulation) Act, 1956, to prevent speculation in forward contracts and to regulate forward contracts in certain goods.

The inter-relation of Entry 48, List I, and Entry 26, List II, and Entry 7, List III, is discussed later.[66]

The expression "futures markets" does not mean the place or locality where transactions of sale and purchase of goods take place. As the Supreme Court has observed in *Waverly*:[67]

> "The word 'futures' means 'contracts which consist of a promise to deliver specified quantities of some commodity at a specified future time… Futures are thus a form of security, analogous to a bond or promissory note."

Thus, it means that "futures markets" are commercial activities which are not purely or mainly of local or regional concern. They are essentially interstate in character.

(49) Patents, inventions and designs; copyright, trade-marks and merchandise marks.

The Emblems and Names (Prevention of Improper Use) Act, 1950, has been enacted by Parliament to prevent the improper use of certain emblems and names for professional and commercial purposes. This Act falls under this entry and not under entry 26, List II.[68]

(50) Establishment of standards of weight and measure.

Weights and measure are a State subject (entry 29, List II),[69] but the laying down of their standards is a Central subject.

(51) Establishment of standards of quality of goods to be exported out of India or transported from one State to another.

This entry can be read in the context of Art. 301[70] which envisages free flow of goods across State borders. The idea is to make the whole of India as a single economic unit so that the country can get industrialized as soon as possible. To promote interstate trade and commerce, it is necessary to have uniform standards

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63. *R.C. Cooper v. Union of India,* AIR 1970 SC 564 : (1970) 1 SCC 248; *K.S.E. Board v. Indian Aluminium Co.,* AIR 1976 SC 1031 : (1976) 1 SCC 466.
64. *S.P. Mittal v. Union of India,* AIR 1983 SC 1 : (1983) 1 SCC 51.
65. *R.C. Cooper v. Union of India,* AIR 1970 SC 564 : (1970) 1 SCC 248.
66. *Infra,* Sec. G.
67. *Waverly Jute Mills Co. Ltd. v. Raman & Co.,* AIR 1963 SC 90 : (1963) 3 SCR 209.
68. *Sable Waghire & Co. v. Union of India,* AIR 1975 SC 1172 : (1975) 1 SCC 763.
69. See, *infra,* Sec. E.
70. For discussion on Art.301, see, *infra,* Ch. XV, under "Freedom of Trade and Commerce".

throughout the country. To promote exports it is essential to determine standards as to the quality of goods. This helps in building goodwill for the country in the foreign markets.

(52) Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

The scope of this entry is quite broad. The Centre can take any industry under its control as and when it likes. The entry is flexible as it enables Parliament to determine by law from time to time as to whether the Central control over a particular industry would be expedient in the public interest.

"Public interest' or 'national interest' are not static, but dynamic, concepts. Central control of any industry may be considered expedient to-day in public interest, but this perception may change in course of time. The entry is flexible enough to accommodate such changes in policy by the centre from time to time.

It has been held that the expression 'industry' in entry 52, List I, bears the same meaning as in entry 24, List II.[71] This means that if an industry does not fall within the purview of entry 24 in List II, it will equally not fall within the purview of entry 52 in List I.[72]

If the Centre wants to regulate any industry, Parliament will first have to declare, by law, that it is necessary for the Union to control that industry in national interest. The Centre has made an extensive use of this entry by taking a large number of industries under its control.[73]

See, in this connection, the Industries (Development and Regulation) Act, 1951, which brings a number of industries under the Central control.

Also refer to entries 24 and 27, List II, and entry 33, List III. These entries also deal with some aspects of industry, The question of interrelation of these various entries in the three Lists has been discussed later.[74]

Whatever falls within the scope of entry 33, List III, does not fall under entry 52, List I. This means that entry 52, List I, which deals with industry does not cover trade and commerce in, or production, supply and distribution of, the products of those industries falling under entry 52 of List I. For the industries falling in entry 52, List I, these subjects are carved out and expressly put in entry 33, List III.[75]

Manufacture of gold ornaments by goldsmiths has been held to be an "industry," as the manufacture of gold ornaments by goldsmiths is a "process of systematic production" for trade or manufacture. The Gold Control Act was validly enacted under this entry read with entry 33 of List III. [76]

The declaration in S. 2 of the Tea Act, 1953 in terms of List I Entry 52 empowers the Central Government to levy a duty or cess upon tea or tea leaves for

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71. For this entry, see, Sec. E, *infra.*
72. *State of Andhra Pradesh v. McDowell & Co.,* AIR 1996 SC at 1639 : (1996) 3 SCC 709.
73. See, for example. The Tea Act, 1953; The Rubber Act, 1947, etc.
For further discussion on this entry see, *infra*, Sec. G(iii), Chs. XV; Ch. XXIV, Sec. H.
74. *Infra,* Sec. G(iii).
75. *SIEL Ltd. v. Union of India,* AIR 1998 SC 3076 : (1998) 7 SCC 26; *Belsund Sugar Co. Ltd. v. State of Bihar,* AIR 1999 SC 3125 : (1999) 9 SCC 620.
76. *Harakchand v. Union of India,* AIR 1970 SC 1453 : (1969) 2 SCC 166.

the purpose of that Act and can in no manner deprive the State Legislature of its power to tax the land comprised in a tea estate.[77]

(53) Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

Under this entry, the Centre can take under its control the regulation of oilfields and development of mineral oil resources in the country.[78] Leases integrally connected with the regulation of oil resources, petroleum and its products fall under this entry.[79] The Supreme Court has elucidated the purpose of reservation of this field to parliament. The people of the entire country have a stake in natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development. If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share. This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that natural gas is included in Entry 53 of List I. Thus, the legislative history and the definition of petroleum, petroleum products and mineral oil resources contained in various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States – all these factors lead to the inescapable conclusion that natural gas in raw and liquefied form is petroleum product and part of mineral oil resources, which needs to be regulated by the Union.[80] However, the power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity, but, the power to regulate, develop or control would not include within its ken a power to levy a tax or fee, except when it is only regulatory. Generally speaking, it may be true that power to regulate would not carry with it the power to impose tax but the principle is not of universal application. Imposition of tax by way of regulatory measures is permissible while enacting a regulatory statute. A regulatory licence fee has also been held to be tax.[81]

(54) Regulation of mines and minerals development to the extent to 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 entry refers to two things, *viz.*:

(1) regulation of mines; and

(2) minerals development.

Conservation of minerals is vital for the development of mines and minerals.[82]

Mines and minerals furnish an important industrial input for economic development of the country.

This entry is purposive as the power to make a law relating to "regulation of mines and mineral development" is qualified by the latter words of a restrictive nature, *viz.* "public interest". Therefore, exercise of power under it has to be guided and governed by public interest.

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77. *State of West Bengal v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.
78. *Babubhai Jashbhai Patel v. Union of India,* AIR 1983 Guj. 1.
79. *Mustafa Hussain v. Union of India,* AIR 1981 AP 283.
80. Special Reference No. 1 of 2001 (2004) 4 SCC 489 : AIR 2004 SC 2647.
81. *State of W. B. v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.
82. *Tara Prasaad Singh v. Union of India,* AIR 1980 SC 1682 : (1980) 4 SCC 179.

Under Entry 54, control of the Centre can be full or partial. By passing a law, Parliament can impose full Central Control over mines and minerals, leaving no field to the State, under entry 23, List II.

Parliament has enacted the Mines and Minerals (Regulation and Development) Act, 1957, under this entry. This Act contains the following declaration in S. 2 :

> "It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided."

The Supreme Court has ruled[83] that after passing this Act, the power of the State Legislatures under entry 23, List II[84] has been completely denuded by Parliament.

This declaration and the enactment of the MM (R & D) Act have practically annihilated entries 23 and 50 in List II.[85]

In *Kesoram*,[86] judgment of a smaller bench to the extent it is contrary to the judgment of an earlier larger Bench said that a power to levy tax or fee cannot be spelt out from the said provisions of the Mines and Minerals (Regulation and Development) Act, 1957 and therefore, the MMRD Act, 1957 has not placed any limitation on the power of states to legislate in the field of taxation on mineral rights. The expression other fees and charges must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development but also taxes and the States had the power to legislate in relation thereto. Four Judges Bench (S.B. SINHA, J. dissenting) proceeded on a basis directly in conflict with the earlier and a larger Bench judgment of the court in India Cement. The majority view cannot be considered as 'law declared' within Art. 141 of the Constitution.

Raw asbestos has been held to be a mineral.[87]

(55) Regulation of labour and safety in mines and oilfields.

Regulation of labour and safety in mines and oil-fields is closely connected with and incidental to the main topics enumerated in entries 53 and 54, List I.

(56) Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

Reference may be made in this connection to the Supreme Court decision *In the matter of Cauvery Water Disputes Tribunal*.[88]

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83. *Baijnath Kedia v. State of Bihar*, AIR 1970 SC 1436 : (1969) 3 SCC 838; *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461; *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12; *State of Madhya Pradesh v. Mahalaxmi Fabric Mills Ltd.*, AIR 1995 SC 2213 : 1995 Supp (1) SCC 642; *Quarry Owners Association v. State of Bihar*, AIR 2000 SC 2870 : (2000) 8 SCC 655; *Saurashtra Cement & Chemical Industries v. Union of India*, AIR 2001 SC 8 : (2001) 1 SCC 91.

84. *Infra*, Sec. E; Ch. XI, Sec. D.

85. *Infra*, Sec. E; Ch. XI, Sec. D.

86. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

87. *Hyderabad Industries v. Union of India*, AIR 1999 SC 1847 : (1999) 5 SCC 15.

88. AIR 1992 SC 522 : 1993 Supp (1) SCC 96.
See, *supra*, Ch. IV and *infra*, Ch. XIV.

The Constitution makes a special provision for resolution of water disputes in Art. 262.[89] Parliament has enacted the Inter-State Water Disputes Act, 1956, under Art. 262 and not under this entry. This entry speaks of regulation and development of inter-State rivers and does not relate to the disputes among riparian States and adjudication thereof. Even assuming the expression "regulation and development" are broadly interpreted so as to include adjudication of disputes arising therefrom, the Act in question does not contain the necessary declaration as envisaged by entry 56.

Water resources of inter-State rivers do not belong just to one State. As an inter-State river flows through many States, its waters belong to all these States. It is, therefore, essential that the Centre has jurisdiction to regulate and develop inter-State rivers and river valleys. Under this entry, Union can take over regulation and development of inter-State rivers and river valley. But before doing so, Parliament has to enact an Act declaring that such regulation and development under the control of the Union is expedient in public interest.

(57) Fishing and fisheries beyond territorial waters.

(58) Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

(59) Cultivation, manufacture, and sale for export, of opium.

This entry is not exhaustive in regard to opium. Possession, storage and sale of opium within the country are governed by entry 19, List III.

(61) Industrial disputes concerning Union employees.

This entry is an exception to entry 22, List III, which deals with labour disputes in general.[90]

(h) CULTURAL AND EDUCATIONAL FUNCTIONS

The relevant entries under this head are:

(60) Sanctioning of cinematograph films for exhibition.

This entry relates to one particular aspect of cinematograph, *viz.*, the sanctioning of films for exhibition. All other matters relating to cinemas are included in entry 33, List II.[91]

Reference may also be made in this connection to Art. 19(1)(a) which guarantees "Freedom of Speech and Expression".[92]

(62) The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

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89. See, *infra*, Ch. XIV, Sec. E, under "Inter-State Water Disputes."
90. See, Sec. F, *infra.*
91. See, Sec. E, *infra.*
92. See, Ch. XXIV, *infra.*

This also is a flexible power as Parliament can by law declare any institution as being of national importance. With such a declaration, the institution will fall under the control of the Central Government.

(63) The institution known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University, the University established in pursuance of Art. 371E,[1] and any other institution declared by Parliament by law to be an institution of national importance.

(64) Institutions of 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.[2]

Education is an area divided between the Centre and the States as is shown by entries 63, 64, 65 and 67, List I, and entry 25, List III.[3] The interrelation between all these entries has been discussed later.[4] After the enactment of National Council for Teacher Education Act, 1993 by Parliament, the field of teacher's education and matters connected therewith stands completely occupied by Parliament and, as such, the State Legislature could not encroach upon that field.[5]

(67) Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.

Also see entries 12, List II and 40, List III.[6]

Once an institution is declared to be of national importance. Parliament is competent to make any law governing the management, administration and affairs of such an institution.[7]

(68) The Survey of India, the Geological, Zoological and Anthropological Surveys of India; Meteorological Organisations.

(69) Census.

(i) UNION SERVICES

Entries 61, 70 and 71 confer power on the Centre with respect to all aspects of Union Services. The entries are:

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1. See, *supra*, Ch. IX.
2. For a detailed discussion on this entry see, *infra*, this Chapter, Sec. G(c) under "Inter-relation of Lists".
3. See, Sec. F, *infra.*
4. *Infra*, Sec. G.
5. *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya*, (2006) 9 SCC 1 : (2006) 4 JT 201.
6. See, Secs. E and F, *infra.*
7. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

(61) Industrial disputes concerning Union employees.

(70) Union Public Services; All-India Services; Union Public Service Commission.

Also see, Art. 312.[8]

(71) Union pensions, that is to say, pensions payable by the Government of India out of the Consolidated Fund of India.

Under this entry, the Government of India can institute pensions of a contributory character in which case the burden may not be on the tax proceeds but on the person who has already contributed to a Fund.

The entry may even cover people who are not government servants. Accordingly, this entry covers pensions paid to the ex-members of Parliament.[9]

(j) ELECTIONS, PARLIAMENTARY AFFAIRS, ETC.

Entries 72 to 75 confer powers on the Centre regarding elections to Parliament and State Legislatures, matters connected with Parliament, and emoluments, etc., of some high dignitaries in the country. The entries are as follows:

(72) Elections to Parliament, State Legislature and offices of President and Vice-President; the Election Commission.

The Representation of the People Acts, 1950 and 1951, enacted by Parliament, fall under this entry. The Act of 1951 has been held valid even though it incidentally encroaches on entry 1 of List II.[10]

(73) Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of Rajya Sabha and the Speaker and Deputy Speaker of the Lok Sabha.

(74) Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House, enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

(75) Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; Salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

Also see under "Elections"[11]

(k) JUDICIAL POWERS

Entries 77-79 and 95 confer power on the Centre to make laws with respect to the Supreme Court and the High Courts. These entries run as follows:

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8. *Infra*, Ch. XXXVI, Sec. F.
9. *S.P. Anand v. Union of India*, AIR 2000 MP 137.
10. *Rameshwar Mahton v. State of Bihar*, AIR 1957 Pat. 252, for entry 1, List II, see, Sec. E, *infra.*
11. See, Ch. XIX, *infra.*

(77) Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court.[12]

(78) Constitution and organisation [including vacations] of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.[13]

(79) Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory.[14]

From careful reading of Entries 77 and 78 of List I it is clear that Entry 77 not only deals with the Constitution and organization but also with jurisdiction and powers in respect of the Supreme Court. The conscious omissions of the words jurisdiction and powers in Entry 78 and looking to the said words included in Entry 77, it is clear that the jurisdiction and powers of the High Courts are dealt with as a separate topic under the caption administration of justice under Entry 11A of List III which was in Entry 3 of List II prior to the Forty-second Constitution Amendment Act. The exclusion of jurisdiction and powers from Entry 78 is meaningful and intended to serve a definite purpose in relation to bifurcation or division of legislative powers relating to conferment of general jurisdiction of High Courts.

(91) Having regard to Entry 91 of List I, the Supreme Court has pointed out that "if the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate will belong to Parliament, and for all other instruments or documents, the power to prescribe the rate belongs to the State Legislature under Entry 63 of List II. Therefore, the meaning of Entry 44 of List III is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature in the concurrent sphere, subject to Article 254 in case of repugnancy.[15]

(93) Offences against laws with respect to any of the matters in this List.

See entry 36 above.

(95) Jurisdiction and power of all Courts except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

Entry 95 confers on Parliament plenary powers to vest jurisdiction, territorial or otherwise, on any Court (except the Supreme Court) in relation to any matter included in the Union List.[16] Vesting of jurisdiction in the Supreme Court falls under entry 77 above.

Under Art. 247, Parliament is empowered to establish any Courts for the better administration of a Union law with respect to a matter enumerated in the Union List. It may be noted that under Art. 247, Parliament is not entitled to establish Courts for administration of the Central laws in the concurrent area. Administra-

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12. For discussion on this entry, see, *supra*, Ch. IV, Sec. K.
13. For discussion on this entry, see, *supra*, Ch. VIII, Sec. H.
14. For Union Territories, see, Ch. IX, *supra*.
15. *V.V.S.Rama Sharma v. State of Uttar Pradesh*, (2009) 7 SCC 234 : (2009) 6 JT 19.
16. *Hanuman Bank v. Munia*, AIR 1958 Mad. 279. Also see, *infra*, under Sec. F, *Re The Special Courts Bill, 1978*, AIR 1979 SC 471, 499, *supra*, Ch. IV, Sec. K.

tion of State laws, whether they relate to List II or List III are outside the purview of Art. 247.

See entries 3 and 65 in List II, and 46 in List III. The matter has been discussed earlier.[17]

(l) MISCELLANEOUS ENTRIES

Some of the entries in the Union List defy the above classification and are thus grouped under this omnibus head. These entries are:

(8) Central Bureau of Intelligence and Investigation:

The idea behind the entry is that there may be a bureau to collect information with regard to any kind of crime committed by people throughout India and also investigate whether the information supplied to it is correct or not. The State Governments are thus enabled to exercise their police powers in a much more efficient manner than they might be able to do otherwise in the absence of such information.

(34) Courts of wards for the estates of Rulers of Indian States.

(80) Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the State Government in which such area is situated; extension of the powers and jurisdiction of members of police force belonging to any State to railway areas outside the State.

(81) Inter-State migration; inter-State quarantine.

(94) Inquiries, surveys and statistics for the purpose of any of the matters in this List.

Under this entry, Parliament has exclusive power concerning inquiries for purposes of any matter in List I.

(m) RESIDUARY ENTRY

(97) Any other matter not enumerated in Lists II or III, but not including fees taken in any Court.

This entry refers to the Residuary Powers of the Centre. This entry has to be read along with Art. 248. The question of the ambit and scope of the Residuary Power of the Centre is discussed in detail later.[18]

A law enacted by Parliament to provide for pensions to members of Parliament on expiry of their term falls under this entry.[19]

E. STATE LIST : LIST II

The State List contains 61 entries which may be classified as under.

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17. *Supra*, Ch. VIII, Sec. H.
18. See, *infra*, Sec. I.
Also see, Ch. XI, Sec. G, under the heading "Residuary Taxes", *infra.*
19. *Common Cause, A Regd. Society v. Union of India*, (2002) 1 SCC 88 : AIR 2002 SC 199.

(a) LAW AND ORDER, JUSTICE

Entries 1 to 4 and 64-65 may be placed in this class. Maintenance of law and order is regarded primarily a responsibility of the States. The entries run as follows:

(1) Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

The term 'public order' is of very wide import and includes an impropriety, affront or insult to the orderliness, such as wilful burning, desecrating or insulting a copy of the Constitution of India.[20] The expression 'public order' signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety.[21]

It might be of interest to note that while for purposes of legislative entries the term 'public order' is given broad meaning, for purposes of preventive detention, it is interpreted somewhat narrowly. In *Ram Manohar Lohia v. State of Bihar*, a case on preventive detention, the Supreme Court distinguished between 'public order' and 'law and order', and held the latter to be broader than the former.[22]

The Armed Forces (Special Powers) Act, 1958, has been validly enacted by Parliament as it falls under entry 2A, List I. Under the Act, the Centre can declare an area as 'disturbed area'. Thereafter, the army can exercise certain powers in the concerned area. The Army does not supplant the civil administration but acts in its aid.

The Act thus deals not with "public order"—a matter falling within the competence of the States under Entry I, List II, but with the "use of armed forces in aid of civil power" which falls under the Central legislative sphere vide entry 2A, List I. On the other hand, the Assam Disturbed Areas Act, 1955, falls in its pith and substance[23] under the State sphere vide entry 1, List II, as the Act deals with the maintenance of public order.

The State Legislature is incompetent to enact a law in relation to the Armed Forces of the Union under entry 1, List II.[24]

(2) Police, (including railway and village police) subject to the provisions of entry 2A of List I.

Railways are a Central subject (entry 22, List I), but the policing of railways is a State Subject. In order that protection of railways does not suffer by State inaction, Art. 257(3) empowers the Centre to give directions to the States as to the measures to be taken for the purpose.[25]

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20. *In Re Natarajan*, AIR 1965 Mad 11.
21. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Brij Bhushan v. Delhi*, AIR 1950 SC 129 : 1950 SCR 605; *Supdt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
22. AIR 1966 SC 740 : (1966) 1 SCR 709.
23. For the doctrine of Pith and Substance, see, *infra*, Sec. G(d).
24. *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431 : (1998) 2 SCC 109.
25. See 'Administrative Relations', *infra*, Chapter XII.

The word 'police' in this entry is wide enough to include State armed constabulary created to maintain internal peace and order which is not a combatant force like the army.[26]

The police power of the State in respect of any offence committed in a State comes within the legislative competence of the State. The State may exercise some extraterritorial jurisdiction only if a part of the offence is committed in the State and the other part in another State or some other States. In such an event the State, before an investigation to that part of the offence which has been committed in any (*sic* other) State, may have to proceed with the consent of the State concerned or must work with the police of the other State. Its jurisdiction over the investigation into a matter is limited. Keeping in view the various entries contained in List I of the Seventh Schedule, there cannot be any doubt whatsoever that in the matter of investigation of the matter (*sic* offence) committed in a State, the jurisdiction of the Central Government is excluded.[27]

(3) Officers and servants of the High Court; procedure in rent and revenue Courts, fees taken in all Courts except the Supreme Court.

(4) Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

(64) Offences against laws with respect to any of the matters in List II.

Offences created under this entry are excluded from entry 1 of List III.[28]

(65) Jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in this List.

This entry may be read along with entries 77, 78 and 95 in List I and entry 46 in List III.[29]

(b) HEALTH, LOCAL GOVERNMENT, RELIEF OF THE DISABLED, ETC.

Such social welfare activities as health etc., fall within the State purview. The relevant entries are:

(5) 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.

This entry empowers the States to legislate on any matter relating to local government, *e.g.*, municipal corporations.[30] The State Legislature can confer any of its powers on a local authority, including taxing powers. However, a State Legislature cannot confer upon a local authority which it creates any power larger than what it itself possesses.[31]

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26. *Pooran v. State of Uttar Pradesh*, AIR 1955 All. 370.
27. *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 SCC 551.
28. See, *infra*, Sec. F.
29. For comments on these various entries in List III, see, *supra*, Ch VIII, Sec. H.
30. *Mohd. Maqbool v. State of Maharashtra*, AIR 1982 Bom. 312.
31. *Corpn. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, 1120, 1134 : (1965) 2 SCR 477; *Ram Krishna Ram Nath v. Janpad Sabha*, AIR 1962 SC 1073 : 1962 Supp (3) SCR 70.

The Village Panchayat Acts which set up criminal Courts for exercising special jurisdiction can be enacted by a State Legislature under this entry read with entries 64 and 65 in this List and entry 1 in List III.[32]

A State law providing for nomination of members to kshetra samitis,[33] or a law to take over management and control of the aided schools run by the local authorities, would fall under this entry.[34]

(6) Public health and sanitation; hospitals and dispensaries.

Public health demands control of the use of such apparatus as produces loud noise by day or by night. A State can thus control the use of a sound amplifier in a public place under entry 6 as it causes detriment to tranquillity, health and comfort of others.[35]

An Act to regulate the keeping of cattle in urban areas promotes public health and sanitation and thus falls under this entry.[36] This entry which speaks *inter alia* of "public health" is relevant to furnish a ground for prohibiting consumption of intoxicating liquors.

(9) Relief of the disabled and unemployed.

(10) Burials and burial grounds; cremation and cremation grounds.

(c) LIBRARIES

Under entry 12, the States have exclusive control over Libraries, museums and other similar institutions controlled or financed by the State and ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

(d) COMMUNICATIONS

(13) Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; roadways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

The Central List contains several entries relating to communications, *viz.*, 22, 23, 24, 25, 29, 30 and 31. There are entries 31, 32 and 35 in the Concurrent List. The area of communications is thus divided between the Centre and the States.

(e) LAND AND AGRICULTURE

Entries 14 to 21 dealing with land and agriculture run as follows:

(14) Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

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32. *State of Mysore v. Gurupadappa*, AIR 1961 Mys. 257. Also, *Ram Naresh v. State of Bihar*, AIR 1979 Pat. 130.
33. *Nagendra Nath Singh v. State of Uttar Pradesh*, AIR 1982 All 226.
34. *Municipal Committee v. State of Punjab*, AIR 1966 Punj. 232.
35. *State of Rajasthan v. G. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904; *infra*, under "Rule of Pith and Substance"; *supra*, see, Entry 31, List I.
Also see under Art. 19(1)(a), "Freedom of Speech and Expression, Ch. XXIV, Sec. C.
36. *Kala Miah v. S.C. Roy*, AIR 1964 Cal. 409.

The term 'agriculture' is very wide and may include even 'forestry', but there is a separate entry, *viz*. 17A in List III covering forests.

Agriculture is the largest sector of the Indian economy. A large section of the Indian population directly or indirectly depends on agriculture. Agriculture is a multi-faceted activity. See entries 14, 15, 16, 17, 18, 21, 26, 27, 28, 30, 32, 45, List II. These are matters ancillary to or directly connected with agriculture.

All these entries relate to agriculture. While 'agriculture' has been placed in entry 14, List II, *i.e.* within the legislative competence of the States, there are several agriculture-related items to be found in List I and List III. List I has the following entries: 28, 42, 43, 44, 45, 47, 51, 52, 56, 57, 59, 63, 64, 65, 66, 69, 81, 82 and 97. This enables the Centre to make inroads in the sphere of agriculture.

Some entries in the State List relating to agriculutre have been made subject to entries in List I and List III. e.g. entries 17, 24, 26 and 27 in List II. In List III, there are the following entries having a bearing on agriculture: 9, 17, 17A, 17B, 18, 20, 23, 25, 29, 30, 33, 34, 38 and 45.

Under entry 52, List I, certain agro-industries have been taken by the Centre under its control. Under entry 34, List III, the Centre has power over "Price Control". Under entry 33, List III, the Central Parliament has enacted the Essential Commodities Act, 1955. Under it, the Centre can control production, supply, distribution of several agricultural commodities, such as, sugarcane, foodstuffs, edible oil, raw cotton and raw jute.

In so far as agriculutre depends upon water including river water, the State Legislature while enacting legislation with regard to agriculutre may provide for the regulation and development of the water resources including water supplies; irrigation and canals, drainage and embankments, water storage and water power. However, any such legislation insofar as it relates to inter-State river water and its different uses and the manner of listing it would also be subject to the provisions of entry 56, List I.[37]

(15) Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

(16) Pounds and the prevention of cattle trespass.

(17) Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

Entry 17 is wider than entry 56 of List I.[38] Unless Parliament declares the extent to which the regulation and development of inter-State rivers and river-valleys are to be centrally controlled, the State Legislature has full power to enact all legislation regarding water. A project for preventing floods is within the competence of a State.[39]

Under this entry, a State cannot pass legislation with respect to, or affecting, any aspect of the waters beyond its own territory. The State can make law with

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37. See, *In the matter of Cauvery Water Disputes Tribunal*, AIR 1992 SC at 545 : 1983 Supp (1) SCC 96, *supra*, Entry 56, List I.
38. *Supra*, Sec. D.
39. *Prasanna v. State of Orissa*, AIR 1956 Ori. 114.

respect to inter-State rivers subject to Parliamentary legislation under entry 54, List I. The Parliamentary law must make the declaration that the control of the regulation and development of inter-state rivers and river valleys is expedient in the public interest. Therefore, if Parliament enacts a law without making the requisite declaration, it will not affect the powers of the State to make legislation under entry 17 in respect of inter-State river water.

(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.

The term 'land' in entry 18 is of wide amplitude. The term 'land' covers vacant land. This term takes in land of every description, *i.e.*, agricultural land,[40] non-agricultural land, rural land, urban land or land of any other kind.[41] Land in its widest amplitude and signification would include not only the surface of the ground, cultivable, uncultivable or waste land and also every thing on or under it.[42]

The term 'land' covers 'land and buildings'. The words following 'land' only make it clear that the entry takes in not merely the tangible immovable property but also all kinds of intangible rights or interests, in or over land in the broad sense explained above.[43] Tenancy of buildings, house accommodations or leases in respect of non-agricultural property do not fall under Entry 18 of List II.[44]

Classification of land by West Bengal Primary Education Act, 1993 and West Bengal Rural Employment Act, 1976 as amended by 1992 Act into three categories (i) coal bearing land, (ii) mineral bearing land (other than coal bearing land) or quarry, and (iii) land other than (i) and (ii) are well defined classifications by reference to the user or quality and the nature of products which the land is capable of producing.[45]

The cess is levied on the land. The method of quantifying the tax is by reference to the annual value thereof. It is well known that one of the major factors contributing to the value of the land is what it produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals, Being a tax on land it is fully covered by Entry 49 in List II. The W.B. Taxation Laws (Amendment) Act, 1992 must be and is held to be *intra vires* the Constitution.[46] These observation do not take into consideration that there should be uniformity in the matter of levies of tax and fees in relation to coal which is an utilized by major industries of critical importance in different parts of the country including most of the power plants which supply electricity.

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40. *State of Punjab v. Amar Singh*, AIR 1974 SC 994 : (1974) 2 SCC 70.
41. *Accountant and Secretarial Services (P) Ltd. v. Union of India*, AIR 1988 SC 1708 : (1988) 4 SCC 324.
42. *Jagannath Baksh Singh v. State of Uttar Pradesh*, AIR 1962 SC 1563 : (1963) 1 SCR 220; *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142 : 1995 Supp (1) SCC 596.
43. *Accountant and Secretarial Services*, *supra*, footnote 41.
44. *Welfare Assn. ARP v. Ranjit P. Gohil*, (2003) 9 SCC 358 : AIR 2003 SC 1266.
45. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
46. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

Entry 18 deals with four main topics : land, transfer and alienation of agricultural land, land improvement and agricultural loans and colonisation. The words 'rights in' or "over land" confer very wide power on the State Legislature.[47]

This entry is the source of the legislative power of the States for extensive agrarian reform legislation which has been undertaken in independent India. The words 'collection of rents' empower the State Legislatures to impose any limitation on the power of landlords to collect rents, that it is to say, with respect to the remission of rents.[48] This entry confers plenary powers on the State Legislatures to enact legislation to extinguish, restrict, transfer or convey the rights in lands, or concerning land tenures including the relation of landlord and tenants, or concerning transfer and alienation of agricultural land.

A State Legislature can extinguish or restrict subsisting rights in land, or provide for statutory purchase of land by tenants in occupation, or modify or curtail the rights of landlords in the land and expand the rights of the tenants, or provide for transfer and alienation of agricultural land.[49]

Each of the expressions, 'rights in or over land' and 'land tenures', confers very wide power over land. It is comprehensive enough to take in measures of reforms of land tenures, limiting the extent of land in cultivating possession of the land-owner, and, thus, releasing land for cultivation by the tenants.[50] Therefore, a law limiting the area of land which could be directly held by a proprietor or a land-owner falls within this entry.

Legislation on resumption of jagirs relates to land and land revenue.[51] Legislation for fixing a ceiling on land holdings in the hands of an individual and for acquisition by the State of excess land, would fall under this entry as well as under entry 42 of List III.[52]

An Act to give relief to mortgagors of agricultural land by enabling them to obtain restitution of the mortgaged lands on terms less onerous than the mortgage deed required is valid, for 'rights in land' include such rights as full ownership or lease-hold.

The word "land" in the entry is not confined to agricultural land only but includes every form of land, whether agricultural or not. The expression 'Rights over land' includes general rights like full ownership or leasehold or all such rights. It also includes easements or other collateral rights, whatever form they might take.

"Mortgages" are not specifically mentioned in this entry. Though in certain aspects, mortgage includes elements of transfer of property and of contract, yet they form a "type of transactions which may properly be regarded as *sui generis*, incidental to land" and so included within item 18, except insofar as they fall un-

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47. *Jagannath Baksh Singh v. State of Uttar Pradesh*, *supra*, note 20; *Jilubhai Nanbhai v. State of Gujarat*, *supra*, footnote 42.

48. *United Provinces v. Atiqua Begum*, AIR 1941 FC 16, 25.

49. *Sri Ram Ram Narain v. State of Bombay*, AIR 1959 SC 459; *Raghubir Singh v. Ajmer*, AIR 1959 SC 475 : 1959 Supp (1) SCR 478; *Gayatri Salt Works. v. State of A.P.*, AIR 1975 A.P. 262.

50. *Atma Ram v. State of Punjab*, AIR 1959 SC 519 : 1959 Supp (1) SCR 748; *Kunhikonam v. State of Kerala*, AIR 1962 SC 723; *Krishnaraja v. A.O. Land Reforms*, AIR 1967 Mad. 352; *Mohinder Singh v. State of Punjab*, AIR 1983 P & H 253.

51. *Amarsarjit Singh v. State of Punajb*, AIR 1962 SC 1305 : 1962 Supp (3) SCR 346. For 'land revenue' see entry 45, *infra*, Chap. XI.

52. *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218; *L. Jagannath v. A.O., L.R.*, AIR 1972 SC 425.
For entry 42, List III, see, Sec. F, *infra*.

der entries 6 and 7 of List III, which again contain an express exception in the case of agricultural land.[53] "So far as land at least is concerned, item 18 would include mortgages as an incidental and ancillary subject". Mortgages are properly to be classified not under the head of contracts, but as special transactions ancillary to the entry of "land".

A question has been raised whether a law providing for fixation of fair rent of urban property falls within this entry or not. The Supreme Court has ruled that such legislation would fall more appropriately under entries 6 and 7 of List III[54] and not under this entry. Entry 18 does not encompass within its terms legislation on the relationship of landlord and tenant in regard to houses and buildings.

According to the Supreme Court, the relation of landlord and tenant, as mentioned in this entry, is with reference to land tenures which would not cover appropriately tenancy of buildings, or of house accommodation, and that that expression is only used with reference to relationship between landlord and tenant in respect of vacant lands.[55]

Leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would more appropriately fall within the scope of entry 6 read with entry 7 of List III. Non-agricultural leases of all kinds, and rights governed by such leases, including the termination of leases and eviction from property leased, would be covered by topics of transfer of property and contracts. Thus, the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, falls under entries 6 and 7 of List III and not under this entry.[56] The Bombay Town Planning Act, 1955, has been held to be validly enacted by the State Legislature under this entry as well as under entry 20 of List III,[57] as the Act deals with land.

An Act passed by a State Legislature to prohibit unauthorized occupation of vacant lands in urban areas and to provide for summary eviction of persons from such lands falls under entries 18, 64 and 65 of List II.[58] A State Legislature can enact a law under entry 18 to impose a ceiling on land.[59]

This entry cannot support a cess based on the royalty derived from mining lands.[60]

The Public Premises (Eviction of Unauthorized Occupants) Act, 1971, passed by Parliament does not fall under this entry and is thus valid.[61]

(21) Fisheries;

Under entry 57, List I, fishing and fisheries beyond territorial waters is a Central subject. The power of the States over fisheries, therefore, extends to fisheries in inland and territorial waters.[62]

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53. *Megh Raj v. Allah Rakhia,* AIR 1947 PC 72.
54. For entries 6 and 7 of List III, see, *infra*, sec. F.
55. *Indu Bhushan v. Rama Sundari,* AIR 1970 SC 228 : (1969) 2 SCC 289; *LS. Nair v. Hindustan Steel Ltd., Bhilai,* AIR 1980 M.P. 106; *Dhanapal v. Yesodai,* AIR 1979 SC 1745 : AIR 1979 SC 1745; *Accountant and Secretarial Services (P) Ltd. v. Union of India,* AIR 1988 SC 1708 : (1988) 4 SCC 325.
56. *V. Dhanpal Chettiar v. Yesodai Ammal,* AIR 1979 SC 1745 : AIR 1979 SC 1745.
57. *Maneklal v. Makwana,* AIR 1967 SC 1373 : (1967) 3 SCR 65.
58. *Maharashtra v. Kamal,* AIR 1985 SC 119 : (1985) 1 SCC 334.
59. *Gurbax Singh v. State of Rajasthan,* AIR 1992 SC 163 : 1992 Supp (3) SCC 24.
60. See, *infra*, Ch. XI.
61. *Supra*, see, under List I, entry 32.
62. *A.M.S.S.V. M.O. & Co. v. State of Madras,* AIR 1954 Mad. 291.
See A Note on Fishing Rights in Territorial Waters', 1 *JILI,* 313 (1959).

(f) TRADE, COMMERCE, INDUSTRY

Speaking generally, matters of intrastate trade and commerce fall within the State purview. The relevant entries are:

(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.

This entry is subject to entries 54 and 55 of List I.

When Parliament passes a law making the necessary declaration under entry 54, List I, and laying down its extent, the subject of Legislation to that extent becomes exclusive for Parliament. A State cannot then make a law trenching upon the field disclosed in the declaration. However, the State power is curtailed only to the extent to which regulation and control has been vested in the Centre, and beyond that the State power remains unimpaired.

In this respect, the Supreme Court has observed :[63]

> "Subject to the provisions of List I, the power of the State to enact legislation on the topic of "mines and minerals development" is plenary. To the extent to which the Union Government had taken under "its control" "the regulation and development of minerals" under Entry 54 of List I so much was withdrawn from the ambit of the power of the State Legislature under entry 23 of List II and legislation of the State which had rested on the existence of power under that entry would, to the extent of the "control", be superseded or be rendered ineffective; for here we have a case not of mere repugnancy[64] between the provisions of the two enactments but of denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make under entry 54 of List I and has made."

Parliament has enacted the Mines and Minerals (Regulations and Development) Act, 1957, "to provide for regulation of mines and the development of minerals under the control of the Union" in public interest. It has been held that the MMRD Act covers the entire field of minerals development. The result of Parliament having occupied the entire field is that the State Legislature lacks legislative competence. As a consequence thereof, where a State Law is attributable in *pith and substance*[65] to entry 23, List II, it would not be valid in as much as Parliament has occupied the entire field.[66]

The jurisdiction of the State Legislature under entry 23 is subject to the limitation imposed by the latter part of entry 52, List I.[67] If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded.

Levying of cess by several States based on the royalty derived from mining lands could be related to entry 23, List II. But this entry is "subject to the provisions of List I with respect to regulation and development" of mines and minerals

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63. *Hingir Rampur Coal Co. Ltd. v. State of Orissa,* AIR 1961 SC 459 : (1961) 2 SCR 537. Also see, *State of Orissa v. M.A. Tulloch & Co.,* AIR 1964 SC 1284 : (1964) 4 SCR 461; *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 430.

64. On 'Repugnancy', see, *infra,* Sec. H.

65. For discussion on the Doctrine of Pith and Substance, see, *infra,* Sec. G(d).

66. *Baijnath Kadio v. State of Bihar,* AIR 1970 SC 1436 : (1969) 3 SCC 838.

67. For this entry, see, *supra,* Sec. D.

under the control of the Centre. The Centre has enacted the Mines and Minerals Act, 1957. "It therefore, follows that any State Legislation to the extent it encroaches on the field covered by the M.M.R.D. Act, 1957 will be *ultra vires*."[68]

A State can charge royalty with respect to minerals under its control as this is a payment made to an owner for the right to exploit his property.[69]

(24) Industries subject to the provisions of entries 7 and 52 of List I.

The expression 'Industry' has been defined to mean the process of manufacture or production. It does not include 'raw materials' used in the industry or distribution of the products of the industry.

The word 'industry' in this entry must bear the same meaning as in entry 52, List I. This is so because the two entries are interconnected. If different meanings are given to 'industry' in different entries, it would snap the relationship between entry 24, List II and entries 7 and 52 of List I.

Ordinarily industry falls in the State sphere because of the present entry, but Parliament can by making an appropriate declaration, take any industry under its control.

This entry is in the nature of general entry. It speaks of industries but the entry is specifically made subject to entries 7 and 52 in List I.

By making a declaration in terms of entry 52 in List I in S. 2 of the Industries (Development and Regulation) Act, the Parliament has taken control of the several industries mentioned in the Schedule to the Act. Thus, the States have been denuded of their power to legislate with respect to those industries on that account.

The term "Industry" in entry 24 does not take within its scope what is contained in entries 26 and 27.[70]

The Supreme Court has ruled in *State of Andhra Pradesh v. McDowell*[71] that entry 52 in List I overrides only entry 24 in List II and no other entry in List II. Thus, entry 8, List II, is not overridden or overborne by entry 52, List I.

The State can set up a corporation to establish and develop industries within the State.[72] Thus, setting up of an industrial development corporation by a State is valid under this entry as it is a non-trading corporation.[73]

(25) Gas and gas-works.

(26) Trade and commerce within the State subject to the provisions of entry 33 of List III.

Under this entry, the State may regulate the hours, place, date and manner of sale of any particular commodity. The State Legislature can, for example, stipulate that the sale of explosives or other dangerous substances should only be in selected areas, at specified times, or on specified days, when extra precautions for the general safety of the public and those directly concerned could be arranged for. The Legislature could also say that there shall be no sales on a particular day, say a Sunday or a Friday, or on days of religious festivals and so forth.

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68. *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 630.
69. *S.M.S. Industries v. State of Rajasthan,* AIR 1958 Raj. 140. See also next Chapter.
70. *Belsund Sugar Co. Ltd. v. State of Bihar,* AIR 1999 SC 3125, 3159 : (1999) 9 SCC 620.
71. AIR 1996 SC 1561 : (1996) 3 SCC 709. Also see, *infra,* see p. 729 under entry 8.
72. *Manohar v. State,* AIR 1951 SC 315 : 1951 SCR 671. Also see, entry 42, List I.
73. *Ramtanu Co-op. Housing v. State of Maharashtra,* AIR 1970 SC 1771 : (1970) 3 SCC 323.

(27) Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

A State legislation restricting export of goods as anciliary to production and supply of essential commodities within the State would fall within this entry.[74]

(28) Markets and fairs

A law regarding cattle fairs falls under this entry.[75]

(30) Money lending and money lenders; relief of agricultural indebtedness.[76]

(31) Inns and Inn-keepers.

(32) Incorporation, regulation, and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

The relevant entries in the Central List are 43 and 44. A society registered under the Societies Registration Act is not a corporation and so would fall under this entry and not under entry 44, List I. A corporation whose powers and duties are confined only to one State falls under this entry and not under entries 43 and 44 of List I.[77]

(g) STATE PROPERTY

Entry 35 relates to "Works, lands and buildings vested in or in possession of the State."

(h) INTOXICANTS

Entry 8 relates to intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of *intoxicating* liquors.

In a previous case,[78] the Supreme Court had held that the expression "intoxicating liquors" occurring in this entry included within its compass denatured spirit as well (which is non potable), and, thus, the States would have exclusive privilege to deal in denatured spirit. But a larger Bench of the Court reviewing this ruling came to the conclusion that the expression "intoxicating liquors" means and refers to only "potable liquors"[79].

It has been ruled that though the expression "intoxicating liquors" is not qualified by the words "for human consumption", yet the very word "intoxicating" signifies "for human consumption". All aspects, such as, production, manufacture, possession, fall within the exclusive domain of the States[80]. Also, the States have no legislative power over non-potable liquors under entry 8.

A question of some importance remains undecided sofar *viz.*, does entry 8 include within its scope medicinal preparations having alcohol content beyond a

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74. *Darshan v. State of Punjab,* AIR 1953 SC 83 : 1953 SCR 319.
75. *Amritsar Municipality v. State of Punjab,* AIR 1969 SC 1100.
76. See, *infra,* Sec. G.
77. *Board of Trustees, Tibia College v. Delhi,* AIR 1962 SC 458 : 1962 Supp (1) SCR 156.
78. *State of Uttar Pradesh v. Synthetics & Chemicals Ltd.,* AIR 1980 SC 614 : (1980) 2 SCC 441.
79. *Synthetics & Chemicals Ltd. v. State of U.P.,* AIR 1990 SC 1927 : (1990) 1 SCC 109.
80. *State of Andhra Pradesh v. McDowell,* AIR 1996 SC 1561 read along with *Bihar Distillery v. Union of India,* AIR 1997 SC 1208, 1213 : (1997) 2 SCC 727.
Also see, *supra,* under entry 24, List II.

prescribed limit? The Supreme Court answered the question in the affirmative in *State of Bombay v. Balsara.*[81] But, later the Court doubted the accuracy of the above view and has suggested that the question be reconsidered by a larger bench.[82]

It has also been held that this entry cannot support any tax on liquor.[83] Only regulatory powers can be derived from the entry.[84]

The Supreme Court has declared in the instant case that the States are not authorised to impose any impost (such as vend fees) on industrial alcohol. They are entitled to impose imposts only on potable alcohol. The State can impose a levy on industrial alcohol only when there are circumstances to establish that there is *quid pro quo* for the fee imposed.[85]

A State Legislature has power to prohibit the possession, use and sale of intoxicating liquors absolutely whether indigenous or foreign. This power includes the power to impose total or partial prohibition in the State.[86]

The words 'intoxicating liquor' include not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also liquids not containing alcohol which can be used as substitutes for intoxicating drinks.[87]

It is under this entry that a State makes provision to grant by public auction the privilege to sell liquor.[88]

Under this entry, a State can enact a law relating to medicinal and toilet preparations containing alcohol. Any law to regulate manufacture, sale and possession of intoxicating liquors and drugs falls under this entry.

The words "intoxicating liquor" in this entry cannot support a tax on industrial liquor. The expression "intoxicating liquors" means liquor which is consumable by human beings as it is.[89]

Reading entries 8 and 24 in List II together, the Supreme Court has concluded in *State of Andhra Pradesh v. McDowell & Co.*[90] that entry 24 is a general entry relating to industries, while entry 8 is a specific and special entry relating *inter alia* to industries engaged in production and manufacture of intoxicating liquors. Applying the rule of interpretation that "special excludes the general", the Court has held that the industries engaged in production and manufacture of intoxciating liquors do not fall within entry 24 but do fall within entry 8. The State Leg-

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81. AIR 1951 SC 318 : 1951 SCR 682.

82. See, *Synthetics and Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109; *Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. State of Gujarat,* AIR 1992 SC 872 : (1992) 2 SCC 42; *State of Rajasthan v. Vatan Medical & General Store,* AIR 2001 SC 1937 : (2001) 4 SCC 692.
The question has not been reheard and decided by the Supreme Court so far.

83. For powers of taxation, see, Ch. XI, *infra.*

84. *Synthetics & Chemicals, supra,* footnote 79.

85. *Ibid.*
For a difference between 'fee' and 'tax', see, next Chapter.

86. *N.K. Doongaji v. State of Madhya Pradesh,* AIR 1975 M.P. 1; *Khoday Distilleries Ltd. v. State of Karnataka,* (1995) 1 SCC 574; *Sunny Markose v. State of Kerala,* AIR 1966 Ker. 379.

87. *State of Bombay v. Balsara,* AIR 1951 SC 318; *Benudhar Saikia v. Bhattacharya,* AIR 1961 Ass. 16.

88. *Nashirwar v. State of Madhya Pradesh,* AIR 1975 SC 360 : (1975) 1 SCC 29. See *infra*.

89. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109.

90. AIR 1996 SC 1627 : (1996) 3 SCC 709.

islature is therefore fully competent to make a law prohibiting the manufacture and production of intoxicating liquors.

Entry 8 is not subject to entry 52, List I. This means that making of a declaration by Parliament as contemplated by entry 52, List I. "does not have the effect of transferring or transplanting... the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List". As a matter of fact, the Parliament cannot take over the control of the industries engaged in the production and manufacture of intoxicating liquors by making a declaration under entry 52 of List I, since the said entry governs only entry 24, List II, but not entry 8 in List II.

It may however be pointed out that the industries based on fermentation and alcohol have been declared by Parliament acting under entry 52, List I, and placed in the First schedule to the Industries (Development and Regulation) Act, 1951.

But control over industries engaged in manufacture or production of potable liquors does not vest in the Centre but falls under the State domain because of entry 8, List II.

(i) ENTERTAINMENTS

The entries falling under this head are as follows:

(33) Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, 'entertainments and amusements'.

Sanctioning of cinematograph films is excluded from entry 33 as it falls under entry 60, List I.

(34) 'Betting and gambling'.

Prize competitions not requiring a substantial amount of skill have been held to be a gambling transaction falling within entry 34.[91] The Supreme Court has observed in *R.M.D.C.* : "Thus a prize competition for which a solution was prepared before-hand was clearly a gambling prize competition, for the competitors were only invited to guess what the solution prepared before-hand by the promoters might be…"

The game of rummy has been held to be mainly and preponderantly a game of skill.[92] Any competitions involving substantial degree of skill is not gambling. Horse-racing has been held to be "a game where winning depends substantially and preponderantly on skill". Horse-racing is a sport which primarily depends on the special ability acquired by training".[93]

This entry includes lotteries as these are regarded as a form of gambling. In lotteries, there is an element of chance and absence of skill and, therefore, lotteries fall under gambling.[94] A State Legislature is competent under this entry to

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91. *State of Bombay v. R.M.D.C.*, AIR 1957 SC 699 : 1957 SCR 874; *R.M.D.C. v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *J.N. Gupta v. State of West Bengal*, AIR 1959 Cal 141.
92. *State of Andhra Pradesh v. K. Satyanarayana*, AIR 1968 SC 825 : (1968) 2 SCR 387.
93. *K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153 : (1996) 2 SCC 226.
94. *State of Bombay v. RMDC.*, AIR 1957 SC 699 : 1957 SCR 874; *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 : (1999) 9 SCC 700.

legislate in respect of sale or distribution within the State, of tickets of lotteries organised by any agency other than the Government of India, or of a State.[1]

Entry 34 is of a very general nature but because of entry 40, List I, "Lotteries organised by the Government of India or the Government of a State" have been taken out from the State Legislative field comprised in entry 34, List II. No State Legislature can therefore make a law touching lotteries organised by the Government of India, or of a State, even though there may be no Parliamentary law made under entry 40, List I.[2] A State can conduct lotteries subject to the Central law.

Parliament has now enacted the Lotteries (Regulation) Act, 1998, to regulate lotteries conducted by the States. For further discussion on this topic, see under Arts. 298, 301 and 19(1)(g) discussed later in the book.[3]

The State 'organised' lotteries are to be distinguished from the State 'authorised' lotteries. While the former fall under the purview of Parliament under entry 40, list I, the latter fall within the purview of the State Legislature under entry 34, list II.[4]

Prize chits fall under entry 7, List III, and not under entry 34, List II.[5]

(j) ELECTIONS AND LEGISLATIVE PRIVILEGES

Entries pertaining to this head are:

(37) Elections to the Legislature of the State subject to the provisions of any law made by Parliament. Reference may be made to entry 72, List I, for Parliament's power in this respect.

(38) Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

(39) Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

(40) Salaries and allowances of Ministers for the State.

(k) STATE PUBLIC SERVICES

(41) State Public Services; State Public Service Commission.[6]

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1. *J.K. Bharati v. State of Maharashtra*, AIR 1984 SC 1542 : (1984) 3 SCC 704.
2. *H. Anraj v. State of Maharashtra*, AIR 1984 SC 781 : (1984) 2 SCC 292; *State of Haryana v. Suman Enterprises*, (1994) 4 SCC 217; *Iqbal Chand Khurana v. State of Bihar*, AIR 1994 Pat. 134; *State of Goa v. State of Maharashtra*, AIR 1997 Kant 161; *Girdhari Singh Bapna v. Union of India*, 1997 Raj 24.
3. See, Chs. XII, XV and XXIV, *infra.*
4. *State of Haryana v. Suman Enterprises, supra; Govt. of Manipur v. State of Punjab*, AIR 1997 P&H 28.
5. *Srinivasa Enterprises v. Union of India*, AIR 1981 SC 504 : (1980) 4 SCC 507.
6. For discussion on Public Service Commission, see, Ch. XXXVI under 'Services', *infra.*

Under this entry, the State Legislature has power to abolish and create offices, enhance or reduce emoluments, increase or diminish tenure and prescribe conditions of service for civil services.[7]

An order compulsorily retiring certain government servants was found to be defective and so was invalidated. The State Legislature passed a law to remove the defects in the said order so as to validate it. The law was held valid under entry 41, List II, read with Art. 309.[8]

A State Act providing for reservation of vacancies and posts in public services for socially and educationally backward sections of society is in pith and substance a law in respect of State Public Services and is thus relatable to entry 41, List II.[9]

(42) State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

Under entry 42, a State Legislature is entitled to pass a law awarding pensions to ex-members of the Legislature[10]

(l) FINANCE AND TAXATION

Entry 43 relates to the Public debt of the State.

A number of entries, *viz.*, 45 to 63 deal with the taxing powers of the States which are discussed in the next Chapter.

Entry 66 runs as follows : "Fees in respect of any of the matters in this List, but not including fees taken in any Court".

The concept of 'fee' as distinguished from 'tax' is discussed in the next chapter.[11]

(m) MISCELLANEOUS

A few entries which defy the above classification may be noted here.

(7) 'Pilgrimages, other than pilgrimages to places outside India.'

(22) 'Courts of wards subject to the provisions of entry 34 of List I: encumbered and attached estates.'

Entry 44 relates to 'Treasure Trove.'

Entry 64 says : "Offences against laws, with respect to any of the matters in this List.

Entry 65 runs as follows : "Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List."

For comments on this entry, see, *supra*, Ch. VIII, Sec. F.

(n) COMMENTS

A persual of the entries in List II shows that many of these entries have an inter-face with several entries in List I and III. According to the Sarkaria Commis-

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7. *A.J. Patel v. State of Gujarat,* AIR 1965 Guj. 23; *Narayan v. State of Mysore*, AIR 1968 Mys 73.
8. *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250 : (1976) 4 SCC 750.
9. *K. Kumardhan Singh v. Union of India,* AIR 2000 Gau 50.
10. *Lily Thomas v. State of Tamil Nadu,* AIR 1985 Mad 240.
11. see, *infra*, Ch. XI, Sec. H.

sion, the following different patterns of inter-connection can be discerned in the constitutional scheme.

(1) Certain aspects of a subject being of local concern, have been put in List II, but certain other aspects of the same subject being of national importance have been put in List I. See, for example, entry 13; entry 32, List II read with entry 44, List I.

(2) Some subjects of legislation in List II have been made expressly subject to certain entries in List III.[12] For example, entries 26 and 27 in List II are made subject to entry 33, List III.

(3) Certain entries in List II have been made subject to entries in List I. Thus, entry 2 in List II is subject to entry 2A in List I; entry 33, List II is made subject to entry 60, List I.

(4) Certain entries in List II have been made subject to laws made by Parliament. For example, entry 37, List II is made subject to a law made by Parliament.

(5) Certain matters in List II can become the subject of exclusive Parliamentary legislation when Parliament makes a declaration of "public interest" or "national interest" by law. Thus, entry 17, List II is subject to entry 56, List I; entry 23, List II is subject to entry 54, List I. Entry 24, List II is expressly made subject to entries 7 and 52, List I.

By making appropriate declaration in terms of entries 62, 63, 64 and 67, List I, the Centre can take over wholly or partially the field of such entries as 12 and 32 in List II and entries 25 and 40, List III.[13]

F. CONCURRENT LIST : LIST III

The Concurrent List comprises 52 items. The States are competent to legislate with respect to matters in this List, subject to the rule of repugnancy contained in Art. 254.[14]

The rationale underlying the Concurrent List is that there may be certain matters which are neither of exclusively national interest, nor of purely State or local concern. These matters are such that both the Centre and the States may have common interest therein.

On the one hand, problems and conditions may vary from State to State requiring diverse remedies suited to their local peculiarities. Where diversity is needed, the States know what is best for them. Then, some subject-matters of legislation may be multi-faceted and so they cannot be assigned exclusively either to the Centre or the States. On the other hand, there may be circumstances when a Central law may be needed on a subject in this area.

According to the Sarkaria Commission the need for Central legislation may arise for the following reasons:[15]

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12. For entries in List III, see, Sec. F. *infra.*
13. See below.
14. For discussion on Art. 254, see, *infra*, Sec. H.
15. REPORT OF THE SARKARIA COMMISSION, 65.

(1) Need to secure uniformity in regard to main principles of law throughout the country in the larger interests of the nation.

(2) The subject matter of legislation may have interstate, national and even international, aspects and the 'mischief' emanating in a State may have impact beyond its territorial limits.

(3) It may be important to safeguard a Fundamental Right, or secure implementation of a constitutional directive.

(4) Co-ordination may be necessary between the Union and the States, and among the States, as may be necessary for certain regulatory, preventive or developmental purposes, or to secure certain national objectives.

When Parliament makes a law on a matter in the Concurrent List, there is a corresponding attenuation in the legislative power of the States because a State Law repugnant to a Central Law is invalid. However, subject to any law made by Parliament with respect to any matter in List III, the State Legislature can also make a law in relation to that matter.

(a) BASIC LAWS

The first fourteen entries relate to the basic procedural and substantive laws and administration of justice.

India is a federal country but, unlike other federations, a great amount of uniformity in the basic laws has been achieved over a period of time.[16] These matters have been placed in the Concurrent List so that a uniform texture and framework of laws may be maintained throughout the country, and yet, if necessary, local variations may be taken care of by provisions made by the States. These entries run as follows:

(1) Criminal law including all matters included in the Indian Penal Code at the commencement of the Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

This entry is couched in very broad terms. The words following the expression "Criminal Law" enlarge the scope of the entry to any matter which can validly be considered to be criminal in nature. Use of the expression "including all matters included in the Indian Penal Code" is an unequivocal indication of the comprehensive nature of this entry. The legislature is empowered to make laws not only in respect of the matters covered by the Indian Penal Code but any other matter which could reasonably and justifiably be considered similar in nature.

Any law dealing with crime is criminal law under entry 1. Both the Centre as well as the States can enact criminal law.

Terrorist or disruptive activity is criminal in content, reach and effect. Parliament can enact a law dealing with terrorism under entry I, List III, so long as it does not refer to "public order" falling under entry 1 of List II. "Public Order" in

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16. For a historical account of the development of law in India, see, JAIN, OUTLINES OF INDIAN LEGAL HISTORY, Chs. XXII -XXV (1990).

List II is different from terrorism. Therefore, Parliament is entitled to enact the TADA Act.[17]

According to the Supreme Court, the ambit of "Criminal Law" in this entry has been first enlarged by including the Indian Penal Code and then from this enlarged ambit, all offences against laws with respect to any of the matters specified in List I or List II have been specifically excluded. The reason for inclusion or exclusion is that offences against laws with respect to any matter specified in List I or List II have been given a place in entries 93 of List I and 64 of List II.

A Central law to be valid under this entry must satisfy two conditions:

(1) The law must relate to criminal law;

(2) The offence should not be such as has been, or could be, provided against by laws with respect to any matter specified in List II.

The Indian Penal Code is a compilation of penal laws providing for offences relative to a variety of matters falling under various entries in various Lists. Thus, Ss. 489A to 489D of the I.P.C. deal with offences relating to currency and coinage—a matter falling under entry 36, List I, read with entry 93.[18]

(2) Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of the Constitution.

This entry is abundantly comprehensive to cover legislation making 14 years' imprisonment compulsory for certain categories of offenders.[19]

(3) Preventive Detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

This entry is complementary to entry 9, List I dealing with "security of India". The term 'security of a State' includes serious and aggravated forms of public disorder, while the term 'public order' includes relatively minor breaches of peace of a local significance.[20]

This entry does not confer any power to put a person in preventive detention for the maintenance of "law and order". Some significant restrictions are imposed on the institution of preventive detention by Arts. 21 and 22.[21] The power of preventive detention is a drastic power. To avoid the power of preventive detention being abused, it is necessary that Parliament should have power to enact a law for the purpose on a uniform basis providing for necessary safeguards.

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community.[22] This Act can be justified under this entry. The expression "security of State" has been broadly interpreted so as to include "economic security" as well. According to the Supreme Court, "A State with a

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17. *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, 753-755 : 1994 Cri LJ 3139 (SC).
18. *G.V. Ramanaiah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 351.
19. *Maru Ram v. Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107.
20. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; see, *supra*, Sec. E. For further discussion on this point, see Ch. XXVII, Secs. B and C, *infra.*
21. See, Chs. XXVI and XXVII, *infra.*
22. See, Ch. XXVII, Sec. B, *infra*, for this law.

weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonisers." The Court has observed further:

> "In the modern world, the security of a State is ensured not so much by physical might but by economic strength—at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of the State."[23]

(4) Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

The subject-matter of this entry has an inter-State aspect, and this aspect can be effectively dealt with on a uniform basis by a law passed by Parliament. The law made by a State Legislature do not have operation beyond the State's territorial limits.[24]

(5) Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law.

The Legislature, under this entry, can modify the personal laws, such as, Hindu Law or Muslim Law.[25] Parliament can enact a law, under this entry, to deal with matters of wills, intestacy and succession of agricultural property in spite of its trenching upon entry 18, List II, *e.g.*, S. 14 of the Hindu Succession Act.[26] A different opinion has been expressed by the Rajasthan High Court which has ruled (reading entries 5 and 6 together) that S. 22 of the Hindu Succession Act does not apply to agricultural land as entry 6 takes such land out of the purview of entry 5.[27]

(6) Transfer of Property other than agricultural land; registration of deeds and documents.

The words 'transfer of property' are wider than the meaning given to them in the Transfer of Property Act. Transfer of agricultural land is a State matter and falls under entry 18, List II, and not under the present entry.

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

Along with this may also be read the comments on entry 18, List II.[28]

The present entry excludes contracts relating to agricultural land, but not contracts relating to non-agricultural land. A contract between a landlord and a tenant for payment of rent in respect of agricultural land, irrespective of the form it might take, is a contract relating to agricultural land and is excluded from the scope of this entry.[29]

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23. *Attorney General for India v. Amratlal Prajivandas*, AIR 1994 SC 2179 : (1994) 5 SCC 54.
24. See, *supra*, Sec. A., on Territorial Nexus.
25. *Ameerunnissa v. Mehboob*, AIR 1953 SC 91 : 1953 SCR 404.
26. *Shakuntala v. Beni Madhav*, AIR 1964 All. 165; *Kashi Nath v. Umapada*, AIR 1968 Cal. 83; *Hari Dass v. Hukmi*, AIR 1965 Punj. 254.
27. *Jeewanram v. Lichmadevi*, AIR 1981 Raj 16.
28. *Supra*, Sec. E.
29. *Supra*, Sec. E.

Prize chits have an element of chance of draw of lot to choose the successful bidder. There is an element of draw of luck in such chits. Nevertheless, a law banning prize chits has been held to fall under this head as dealing with a special species of contracts with sinister features and it does not fall under entry 34, List II.[30] Similarly an Act banning chit funds, in pith and substance, has been held to deal with a special kind of contract and, thus, falls under this entry. Neither prize chits nor chit funds deal with money-lending, the subject-matter of entry 30, List II.[31]

Premises tenancy legislation pertaining to houses and buildings is referrable not to entry 18, List II, but to entries 6, 7, and 13 of List III. The subject of housing accommodation and control thereof falls within these entries. Leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and fall under this entry. Rent control legislation enacted by the State Legislatures falls under entries 6, 7 and 13 of this List.[32]

The Public Premises (Eviction of Unauthorized Occupants) Act, 1971, insofar as it applies to the premises of the corporations, falls under entries 6, 7 and 13 of List III and not under entry 18, List II.[33]

(8) Actionable wrongs

In view of entry 1 above, this entry may be regarded as referring to torts. These are civil wrongs as contra-distinguished from criminal wrongs which are the subject-matter of entry 1. It is necessary to have a uniform law on this subject just as there is a uniform criminal law.

(9) Bankruptcy and insolvency.

(10) Trust and Trustees.

An Act to regulate the administration of public religious and charitable trusts would fall within entry 28 read with entry 10.[34] In case the trust is incorporated, it would fall under entries 43 and 44 of List I (if extending to more than one State), or entry 32 of List II if extending to one State only.[35]

An Act to provide for administration of higher secondary educational institutions registered under the Societies Registration Act was held to fall under entry 11 of List II (now entry 25, List III), and not under entries 10 and 28 of List III, even though it incidentally trenches upon or affects a charitable institution, or the powers of trustees of an institution.[36]

(11) Administrators-general and official trustees.

An Administrator-General may have concern with the properties and assets situated in several States, belonging to the same deceased person. Parliament has enacted the Administrators-General Act, 1963.

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30. *Srinivasa Enterprises v. Union of India,* AIR 1981 SC 504 : (1980) 4 SCC 507.
31. *Shriram Chits & Investments (P.) Ltd. v. Union of India,* AIR 1993 SC 2063 : 1993 Supp (4) SCC 226.
32. *Indu Bhusan Bose v. Rama Sundari Devi,* AIR 1970 SC 228 : (1969) 2 SCC 289; *Jaisingh Jairam Tyagi v. Mamanchand,* AIR 1980 SC 1201 : (1980) 3 SCC 162; *Dhanpal Chettiar v. Yesodai Ammal,* AIR 1979 SC 1745 : (1979) 4 SCC 214; *Accountant and Secretarial Services (P.) Ltd. v. Union of India,* AIR 1988 SC 1708 : (1988) 4 SCC 324.
33. *Accountant and Secretarial Services (P) Ltd. v. Union of India, ibid.*
Also see under entry 32, List I, *supra,* Sec. D.
34. *Servants of India Society v. Charity Commr,* AIR 1962 Bom. 12.
35. *The Tibbia College case,* AIR 1962 SC 458 : 1962 Supp (1) SCR 156; *supra,* Secs. D and E.
36. *Katra Education Society v. State of Uttar Pradesh,* AIR 1966 SC 1307 : (1966) 3 SCR 328.

(11-A) Administration of justice, constitution and organisation of all Courts, except the Supreme Court and the High Courts.

The power conferred by this entry includes the power of creating new Courts, reorganizing the existing Courts and defining, enlarging, altering, amending and diminishing the jurisdiction of the Courts and diminishing their jurisdiction territorially and pecuniarily.

Entry 11A of List III relating to administration of justice, has a wide meaning and includes administration of civil as well as criminal justice. The expression administration of justice has been used without any qualification or limitation, and is wide enough to include the powers and jurisdiction of all the Courts including the High Courts except the Supreme Court. The semicolon (;) after the words administration of justice in Entry 11A has significance and meaning. The other words in the same entry after administration of justice only speak in relation to Constitution and organization of all the Courts except the Supreme Court and High Courts. It follows that under Entry 11A the State Legislature has no power to constitute and organize the Supreme Court and High Courts. It is an accepted principle of construction of a Constitution that everything necessary for the exercise of powers is included in the grant of power. The State Legislature being an appropriate body to legislate in respect of administration of justice and to invest all Courts within the State, including the High Court, with general jurisdiction and powers in all matters, civil and criminal, it must follow that it can invest the High Court with such general jurisdiction and powers including the territorial and pecuniary jurisdiction and also to take away such jurisdiction and powers from the High Court except those, which are specifically conferred under the Constitution on the High Courts. Hence the City Civil Court with unlimited jurisdiction and taking away the same from the High Court, does not fall within constitution and organization of the High Court under Entry 11A of List III, The State Legislature is empowered to constitute and organize City Civil Court and while constituting such Court the State Legislature is also empowered to confer jurisdiction and powers upon such Courts inasmuch as administration of justice of all the Courts including the High Court is covered by Entry 11A of List III, so long as Parliament does not enact a law in that regard under Entry 11A.[37]

The Bombay Legislature created an additional civil Court for Greater Bombay having jurisdiction to try all suits of a civil nature not exceeding a certain value. The law was challenged on the ground that it conferred jurisdiction on the Court not only in respect of matters upon which the State Legislature was competent to legislate but also in regard to matters in respect of which only Parliament could legislate. But the argument was rejected. The Supreme Court argued that under this entry, the State Legislature has the power of investing the Courts with general jurisdiction.[38]

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37. *Jamshed N. Guzdar v. State of Maharashtra,* (2005) 2 SCC 591 : AIR 2005 SC 862.

38. *State of Bombay v. Narottamdas Jethabhai,* AIR 1951 SC 69 : 1951 SCR 51; *Jamshed N. Guzdar v. State of Maharashtra,* AIR 1992 Bom 435; Also see, *State of Tamil Nadu v. G.N. Venkataswamy,* AIR 1995 SC 21 : (1994) 5 SCC 314; *New Laxmi Oil Mills v. Bank of India,* AIR 1998 MP 161; *State of Uttar Pradesh v. Deepchand,* AIR 1980 SC 801 : (1980) 2 SCC 332; see also *M. P. Gangadharan v. State of Kerala,* (2006) 6 SCC 162 : AIR 2006 SC 2360.

The State can confer additional jurisdiction on revenue Courts to recover public debts as arrears of land revenue. A State Act invested the collector with the power of deciding the controversy between the State and the defaulter and to recover the debt as arrears of land revenue. The collector was characterised as a revenue Court.[39]

From the scope of this broad entry, the area covered by Entry 65, List II, must be excluded, otherwise entry 65 would become otiose.[40] By virtue of this entry, Parliament can secure a measure of uniformity in the administration of justice, and constitution and organisation of Courts subordinate to the High Court, in the States.

The subject-matter of this entry is complementary to the subject-matter of entries 1, 2 and 13 in this List.

Parliament can constitute special Courts under this entry.[41] Parliament can confer appellate powers on the Supreme Court from the special Courts under Art. 138(1) read with Art. 246(1) and entry 77 of List I.[42]

The Debt Recovery Tribunal which has been established by the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, passed by Parliament falls under entry 11A read with entry 46, List II. "Administration of justice" is a term of very wide amplitude and connotation. It cannot be marginalised only to organizing Courts.[43]

(12) Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

(13) Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution; limitation and arbitration.

Legislation regulating landlord-tenant relationship in houses and buildings, according to some High Courts, falls under items, 6, 7 and 13 of this List and not under entry 18 of List II.[44]

(14) Contempt of Court, but not including contempt of the Supreme Court.

See entry 77 in List I.

Under this entry, Parliament has enacted the Contempt of Courts Act, 1971. Contempt of a High Court may be committed beyond the territorial limits of the State in which the High Court exercises its jurisdiction. Such a situation can be dealt with only under a Central law and not under a State law because of the doctrine of territorial *nexus* discussed earlier.[45] Contempt of Court has national

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39. *Director of Industries, U.P. v. Deepchand*, AIR 1980 SC 801; *State of Tamil Nadu v. G.N. Venkataswamy*, AIR 1995 SC 21 : (1994) 5 SCC 314; *New Laxmi Oil Mills v. Union of India*, AIR 1998 MP 161.

40. *State of Bombay v. Narottamdas Jethabhai*, *supra*, footnote 38.

41. *In Re, The Special Courts Bill, 1968*, AIR 1979 SC 478 : (1979) 1 SCC 380.
Also see, Ch. IV, *supra*, Sec. F(g); entry 95, List I, *supra;* Sec. D; Ch. XXI, *infra;* Ch. XXVI, *infra*.

42. *Ibid.*

43. *Mudit Entertainment Industries Pvt. Ltd. v. The Banaras State Bank Ltd.*, AIR 2000 All 181.
Also see, Ch. VIII, Sec. I.

44. *Milap Chand v. Dwarka Das*, AIR 1954 Raj. 252; *Kedarnath v. Nagindra Narayana*, AIR 1954 Pat. 97; *supra*, Sec. E.

45. See, *supra*, Sec. A.

dimensions. S. 11 of the Act provides that a High Court shall have jurisdiction to try a contempt of itself, or of any subordinate Court whether the contempt is committed within the territorial jurisdiction of the High Court or outside it.

Reference may also be made in this connection to the discussion held earlier under Art. 129 and Art. 215 which confer power on the Supreme Court and a High Court to punish for contempt of itself respectively.[46]

(b) PUBLIC WELFARE

Certain public welfare activities, and the inter-State aspects of Public health fall in this List. The relevant entries are:

(15) Vagrancy; nomadic and migratory tribes.

The problems relating to these tribes have national dimensions as these tribes are not confined to a single State but are spread over several states.[47]

(16) Lunacy and mental deficiency including places for the reception or treatment of lunatics and mental deficients.

(17) Prevention of cruelty to animals.

(18) Adulteration of foodstuffs and other foods.

The evil of adulteration has national aspect. Food adulterated in one State may be consumed by the people in some other State. The widespread evil of adulteration can be effectively dealt with only by a national law.

The Prevention of Food Adultertion Act, 1954 has been enacted by Parliament under this entry. The Act has been enacted to curb the widespread evil of food adulteration in the country and avert danger to human life arising out of sale of unwholesome food articles.[48]

(19) Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

Entry 59 of List I, is not exhaustive in regard to opium. Control by licence or otherwise, of the possession, storage and sales of opium falls under the present entry and not under entry 59, List I.[49]

Control of production, trade and use of drugs and poisons is an important component of the subject-matter of this entry. A closely associated aspect of entry 19 is drug-trafficking and drug addiction. This evil has not only local but global dimensions.

(23) Social security and social insurance: employment and unemployment.

The term 'social security' broadly includes insurance against industrial accidents, sickness and the like.

There arises an important question in relation to this entry, viz., when a law is passed to put into effect any welfare scheme for a section of the society, on whom can the liability to contribute for the scheme be placed?

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46. *Supra*, Ch. IV, Sec. C(i) and Ch. VIII, Sec. C(a), *supra*.
47. See, *supra*, Ch. IX, Sec. C.
48. *Gandhi Irwin Salt Manufacturers Ass. v. State of Tamil Nadu,* AIR 1996 Mad. 109.
49. *Laxminarayan Khemhand v. State of Madhya Pradesh,* AIR 1961 MP 13.

The Supreme Court has stated that "the burden of the impost may be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the Scheme made thereunder." The state cannot in an Act under entry 23, List III, place the burden of an impost by way of contribution for giving effect to the Act and the scheme made thereunder for the social security and social welfare of a section of the society upon a person who is not a member of such section of society nor an employer of a person who is a member of such section of society.

In the instant case,[50] a scheme for the welfare of the fishermen was introduced. Liability to contribute for the scheme was placed on the purchasers/exporters of fish. This was held to fall outside the ambit of entry 23, List III.

(27) Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

This entry specifically covers a situation created by partition of the country into India and Pakistan at the time of Independence. In this connection, entry 41 in this List may also be noted.

The West Bengal Land Development and Planning Act falls under this entry as one of its purposes is to resetttle the immigrants from Pakistan.[51]

(28) Charities and charitable institutions, charitable and religious endowments and religious institutions.

The subject-matter of this entry is not of local interest but of nation-wide interest. These institutions may have their properties and beneficiaries scattered in more than one State. Also, their activities may spread over several States. Only a Central law can effectively cope with such a situation.

This entry includes both public and private religious endowments.

(29) Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

(30) Vital statistics including registration of births and deaths.

(c) FORESTS

Forests (entry 17-A) and 'Protection of wild animals and birds' (entry 17-B) have been transferred from List II to List III because of the importance of conservation of forests and wild life and also because the States were not doing enough in this respect. The process of deforestation has been going on apace in India and it needs to be checked.

The term 'forests' in entry 17A includes 'forest produce' in its primary and natural state lying in the forest.[52] Parliament has enacted the Forest (Conservation) Act, 1980, with a view to check indiscriminate diversion of forest land for non-forestry purposes. Through this Act, the Centre has occupied only one aspect of forests, *viz.*, "conservation of forests". Except to the extent covered by this Act, legislative competence with respect to all other aspects of forests remains with the States.

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50. *Koluthara Exports Ltd. v. State of Kerala*, (2002) 2 SCC 459 : AIR 2002 SC 973.
51. *Benoy v. State of West Bengal*, AIR 1966 Cal. 429.
52. *J.C. Waghmare v. State of Maharashtra*, AIR 1978 Bom. 119.

(d) LABOUR

Certain aspects of labour legislation fall within this List. The relevant entries are:

(22) Trade unions; industrial and labour disputes.

(24) Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

An Act regulating the hours of employment of persons employed in the business of shops or commercial establishments,[53] the Minimum Wages Act,[54] a law to provide for compulsory saving of a part of bonus payable to an industrial worker,[55] a law fixing minimum bonus,[56] fall under entries 22 and 24 of this List.

Sec. 2(f) of the Industrial Disputes Act defines industry "to mean any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen". In the *Niemla* case,[57] the Supreme Court rejected the argument that the definition was very broad-based and comprised industrial as well as non-industrial concerns and so fell outside the scope of entry 22. The Court held that the definition was justified under both entries 22 and 24.

A law for bettering conditions of labour engaged in manufacturing beedis and cigars falls under this entry and not under entry 24 in List II, or entries 7 and 52 of list I. It is an Act for labour welfare and not for industries.[58] A law providing for workers' participation in joint management councils of industrial undertakings falls under entries 22 and 24 of List III as it prevents industrial disputes and leads to labour welfare.[59]

The Industrial Disputes Act is enacted as a social security and social insurance measure. The Act relates to entries 22, 23 and 24 of List III.[60]

(e) EDUCATION

This subject has been transferred from List II to List III. There were many reasons for transferring "Education" from the State to the Concurrent List. The desired socio-economic goals can be achieved in the country through education. Parliament can secure uniformity in standards and syllabi of education so very necessary to acheive national integration. Parliament can minimise disparities in the levels and standards of education as between the various States.

Entry 25 now runs as: "Education including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

The use of the expression "subject to" means that out of the general heading "Education", the matters contained in entries 63-66 in List I have been carved

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53. *Manohar v. State,* AIR 1951 SC 315 : 1951 SCR 671.
54. *Narottam Das v. State of Madhya Pradesh,* AIR 1964 MP 45.
55. *Milkhi Ram v. State of Punjab,* AIR 1964 Punj. 513.
56. *Jalan Trading Co. v. Mill Mazdoor Sabha,* AIR 1967 SC 691 : (1967) 1 SCR 15.
57. *Niemla Textile Finishing Mills v. The Second Punjab Tr.,* AIR 1957 SC 329 : 1957 SCR 335.
58. *M.G. Beedi Works v. Union of India,* AIR 1974 SC 1832 : (1974) 4 SCC 43.
59. *Monogram Mills v. State of Gujarat,* AIR 1976 SC 2177 : (1976) 3 SCC 294.
60. *CMCH Employees' Union v. CM College, Vellore Ass.,* AIR 1988 SC 37 : (1987) 4 SCC 691; see also *Hindustan Times v. State of U.P.* (2003) 1 SCC 591 : AIR 2003 SC 250.

out. It means that if a matter is covered by any of the entries 63-66 in List I, the power to legislate on that matter lies exclusively with Parliament, even though that matter may otherwise fall within the broader field of "education". This means that, entry 66, List I, and entry 25, List III, should be read together.

In the absence of any Parliamentary Act, State still has competence to enact a statute laying down reservation for entry in any courses of study including the medical courses.[61]

Under entry 66, List I, the Centre has power to see that a required standard of higher education in India is maintained.

The question of interrelationship of entry 25, List III with the entries in List I is discussed below.[62]

(f) ECONOMIC POWER AND PLANNING

The entries relating to this head run as follows:

20. Economic and social planning.

This is a very vague phrase and its full implications are not clear. There has not been much case-law on the scope of this entry. This is a conspicuous entry and no parallel entry is to be found in any other federal constitution.

The entry denotes the modern trend of political thought that the state is an instrument to promote the socio-economic welfare of the people. This obligation on the various governments has been emphasized in the Preamble to the Constitution[63] as well as in the Directive Principles of State Policy,[64] *e.g.*, Arts. 38 to 42, 43A, 45 to 48A.

Planning cannot be carried on either by the Centre or by the States in isolation. It has to be an inter governmental co-operative effort.[65] Hence the entry has been placed in the Concurrent List.

There are many entries in the three Lists pertaining to Planning as it is a multi-faceted activity. If this entry is interpreted broadly, then its scope may be so pervasive as to eat up many entries in the State List as, at the present time, economic and social planning dominates the total governmental functioning. If, however, the entry is interpreted narrowly, and all specific State entries are taken out of it, then it may not mean much except perhaps co-ordination of various activities.

Planning has emerged as an important activity of the Central and the State Governments. There is the Planning Commission to formulate five year plans and supervise their implementation by the various governments.[66] This entry provides the juristic basis to the formulation of national plans which comprehend the entrie range of developmental activities cutting across the delimitation of powers between the Centre and the States.

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61. *Saurabh Chaudri v. Union of India,* (2003) 11 SCC 146 : AIR 2004 SC 361.
62. See, *infra*, Sec. G(c).
63. See, *supra*, Ch. I. Also see, Ch. XXXIV, under "Directive Principles", *infra.*
64. *Infra*, Ch. XXXIV, for discussion on Directive Principles.
65. See, Ch. XIV, Sec. G, *infra*, under Co-operative Federalism.
66. For Planning Commission, see, *infra*, Ch. XIV, Sec. G.

The entry has been invoked to uphold the Bombay Town Planning Act, 1954, as a measure of social planning.[67]

20-A. Population control and family planning.

21. Commercial and industrial monopolies, combines and Trusts.

The scope of this entry is not curtailed by entry 26, List II.

Monopolies in respect of any commercial or trading venture can be created under this entry in favour of government.[68] Unethical commercial or industrial practices can be effectively regulated by a Central law as such practices have inter-State dimensions, implications and ramifications.

It has been held by the Supreme Court that the Motor Vehicles Act which provides a machinery for the creation of government monopoly in motor transport has been validly enacted by Parliament under entries 21 and 35 of this List.[69]

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 and such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, cotton seeds;

(e) raw jute.

Wheat, wheat products, paddy, sugar and sugarcane fall under the term 'foodstuffs'.[70] The term 'foodstuffs' does not mean only the final food product which is consumed but also includes raw food articles which may after processing be used as food by human beings,[71] *e.g.*, turmeric, cashew nuts.

Entry 33 deals with production of "foodstuffs". Seeds are a vital commodity having direct connection with the production of foodstuffs to which it relates. The item of seeds of foodstuffs has direct bearing with the production of foodstuffs. Consequently, it is competent for Parliament as well as the State Legislatures to make laws in relation to seeds of foodstuffs. "Surely seeds of foodcrops and seeds of fruits and vegetables relate to foodstuffs."[72]

This entry is also linked to entries 26 and 27, List II. For a discussion on the inter-relation of this entry with entries 26 and 27 of List II, see later under the 'Pith and Substance' Rule.[73]

There also remains the problem of mutual relationship between entry 33, List III, and entry 14, List II, pertaining to agriculture, as production of foodstuffs

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67. *Maneklal v. Makwana*, *supra*, under entry 18, List II, Sec. E.

68. *H.C. Narayanappa v. State of Mysore*, AIR 1960 SC 1073 : (1960) 3 SCR 742.
Also, *State of Tamil Nadu v. Hind Stone*, AIR 1981 SC 711 : (1981) 2 SCC 205.

69. *Kondala Rao v. A.P.S.R.T. Corp.*, AIR 1961 SC 82 : (1961) 1 SCR 642.
This Act has now been replaced by the Motor Vehicles Act, 1989.

70. *Nathuni v. State of West Bengal*, AIR 1964 Cal. 279; *Bijay Kumar Routrai v. State of Orissa*, AIR 1976 Ori. 138.

71. *K. Janardhan Pillai v. Union of India*, AIR 1981 SC 1485, 1488 : (1981) 2 SCC 45.

72. *Raghu Seeds & Farms v. Union of India*, AIR 1994 SC 533 : (1994) 1 SCC 278.

73. *Infra*, Sec. G(d).

falling under the present entry forms a big slice of agriculture. Agricultural marketing in respect of the agricultural commodities mentioned herein also falls under the present entry. The scope of the entry thus becomes very broad.

A State law providing for a temporary take-over of management of tea units has been held to fall under this entry for in pith and substance,[74] the Act relates to production of tea in the State. The Tea industry has been brought under Central control under entry 52, list I.[75]

Entry 33, List III, provides the Central Government with a mechanism for ensuring that unreasonable restrictions are not imposed on trade, commerce and intercourse thereby adversely affecting the economic unity of the country. The problems regarding production, supply and distribution of essential commodities have national dimension and entry 33 enables the Central Government to efficiently manage essential commodities.[76]

This entry supplements, to some extent, the Central power under entry 52, List I. Under cl. (*a*), even though control of certain industries may be taken over by the Union under entry 52, List I, yet the trade, commerce, production *etc*. of such industry fall in the Concurrent area. This means that insofar as the field is not occupied by the laws made by the Union, the States are free to legislate.

As things stand now, the Centre has great economic potentiality. Under entry 52, List I, it can control any industry; under entry 54, List I, it can control mines and minerals to any extent it likes; under entry 33, List III, it can control the products of the controlled industries, imported goods of the like nature, and important raw materials like cotton, jute and foodstuffs. It can regulate inter-State trade and commerce under entry 42, List I, and can exercise price control under entry 34, List III. Besides, there are a number of other important powers with it, like planning, labour, foreign trade, *etc*.

33A. Weight and measures except establishment of standards.

Fixation of weights and measures directly affects inter-State trade and commerce. Parliament can introduce uniformity in this respect throughout the country.

34. Price Control.

This entry is closely related to entry 33 in this List.

36. Factories.

The Factories Act enacted by Parliament makes provisions for the health, safety and welfare of the workers in factories.

37. Boilers.

The Boilers Act secures uniformity throughout India in all technical matters connected with boilers to prevent accidents.

38. Electricity.

It is necessary to have uniform standards all over India in respect of production, supply and distribution of electricity. Adequate supply of electricity is the key to the rapid industrialisation in the country.

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74. For discussion on the Rule of Pith and Substances, see, Sec. G(d), *infra.*
75. *Tufanialonga Tea Co. v. State of Tripura,* AIR 1999 Gau. 109.
76. Also see in this connection, Ch. XV, *infra,* entitled "Freedom of Trade and Commerce".

The purpose of Electricity (Supply) Act, 1948, is to rationalise the production and supply of electricity. The provision for incorporation of the electricity board is only incidental to production, supply and distribution of electricity. The Act, therefore, falls under this entry and not under entries 43 and 44 of List I.[77]

(g) COMMUNICATIONS

Some forms of communication like ports, shipping, *etc*., fall within this List. The relevant entries are:

(31) Ports other than those declared by or under law made by Parliament or existing law to be major ports

Major ports are included in entry 27, List I. All other ports fall under this entry.

(32) Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

In this connection, reference may be made to entries 24 and 30 in List I. Regulation of shipping and navigation on inland waterways has a very close and substantial connection with shipping and navigation of interstate waterways. Under entry 24, List I, Parliament can declare by law that a particular inland waterway shall be a national waterway. To the extent of such a declaration, the power of the State Legislatures under entry 32 would be superseded.

(35) Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied:[78]

Other corresponding entries are 24 and 30 in List I and 13 in List II. 'Principles of taxation' denote rules of guidance in the matter of taxation. See entry 57 in List II.[79]

The main purpose underlying this entry is to enable Parliament to regulate the exercise of the taxation power of the States with respect to mechanically propelled vehicles.[80] If the principles laid down in a parliamentary law enacted under this entry come in conflict with a law made by a State under entry 57 of list II, the State law will be invalid because of the rule of repugnancy contained in Art. 254(1).[81] If Parliament enacts no law under this entry, then the power of the States to tax such vehicles remains unimpaired.

(h) MISCELLANEOUS

The entries defying the above classification are brought together under this heading. These entries run as follows:

(26) Legal, medical and other professions

The Central enactments such as the Indian Medical Council Act, 1956, the Indian Nursing Council Act, 1947, the Dentists Act, 1948, the Chartered Account-

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77. *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031 : (1976) 1 SCC 466.
78. *State of Assam v. Labanya Probha*, AIR 1967 SC 1575 : (1967) 3 SCR 611.
79. *Sita Ram v. State of Rajasthan*, AIR 1974 SC 1373 : (1974) 2 SCC 301.
80. For taxing powers of the States, see, Ch. XI, Sec. D, *infra.*
81. See, *infra*, Sec. H., for discussion on Art. 254(1).

ants Act, 1949, and the Pharmacy Act, 1948, fall under this entry, or the parallel entry 16 in List III in the Government of India Act, 1935.

(39) Newspapers, books and printing presses.

A law to suppress the printing of objectionable matters in newspapers falls within this entry.[82]

(40) Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

Also see, entry 67, List I, in this connection.

(41) Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

The word 'disposal' in the entry is wide enough to cover extinguishment of a mortgage. The term 'management' is broad enough to include allotment and grant of leases, as well as cancelling or varying the terms of leases already effected.[83]

Entry 18, List II, does not control the ambit of the present entry. Evacuee legislation would be valid even if it includes certain provisions relating to relations between landlord and tenant.[84]

(42) Acquisition and Requisitioning of Property.

Before 1956, entries 33, List I and 36, List II, provided for acquisition and requisitioning of property, the former for the purposes of the Union and the latter for the purposes other than those of the Union. Entry 42, List III, provided for "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State, or for any other public purpose, is to be determined, and the form and the manner in which such compensation is to be given".

Legislation in respect of acquisition of property is an independent and separate matter which falls only under Entry 42 of List III and not incidental to any specific head of legislation under any other entry. Property includes an undertaking. Therefore, the argument that acquisition of a sugar undertaking, is beyond the competence of the State Legislature has been rejected. The concept of acquisition of an undertaking is an entirely different matter from the control and regulation of industries.

The further argument that a sugar undertaking is a going concern and cannot constitute property within the meaning of Entry 42 of List III has also been rejected. Power to legislate for acquisition of property in Entry 42 of List III includes the power to legislate for acquisition of an undertaking. The expression "undertaking" means a going concern with all its rights, liabilities and assets as distinct from the various rights and assets which compose it.[85]

These triple entries dealing with the same subject-matter caused problems. To obviate difficulties and simplify constitutional position, the Seventh Amendment was enacted. It deleted entry 33, List I and entry 36 in List II and gave its present

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82. *Shantilal v. State of Bombay*, AIR 1954 Bom 508.
Also see, Ch. XXIV, Sec. C, under "Freedom of Speech and Expression".
83. *Sardara Singh v. Custodian*, AIR 1952 Pepsu 12.
84. *Samsudin v. Asst. Custodian*, AIR 1953 Sau. 73.
85. *Shri Krishan Gyanaday Sugar Ltd. v. State of Bihar*, (2003) 4 SCC 378 : AIR 2003 SC 3436.

shape to entry 42, List III. The existing position is more flexible insofar as a State Government is competent to acquire property for a Union purpose and *vice versa.*

A law to acquire an electrical undertaking falls under entry 38, List III, and the present entry.[1]

Under this entry, Parliament can legislate to acquire coal-bearing land belonging to the States to effectuate its power to regulate and develop mines and minerals under entry 54, List I.[2] An Act treating cash grants as property and providing compensation for their discountinuance falls under this entry. The word 'acquisition' in the entry implies not only vesting of title in the property in question in the State but also 'deprivation' of property.[3] The word 'property' in the entry is to be interpreted broadly and it comprises tangibles as well as intangibles.[4] A State law to acquire road transport undertakings,[5] or some sugar mills,[6] fall under this entry.

Entry 42 is an independent power. It is not incidental to the power to legislate under any other topic. Property can be acquired under entry 42 and not as an incident of the power to legislate in respect of a specific head of legislation in any List.[7] The entry is wide enough to empower the Centre to acquire property even belonging to the States.[8]

The Bihar Private Educational Institutions (Taking Over) Act, 1987, has been held valid as an exercise of power by the State under entry 42, List III. The Act deals with nothing but acquisition of property. Entry 66, List I, does not come into the picture. Entry 25, List III, may also be relevant.[9]

(43) Recovery in a State of claims in respect of the taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that State.

The legislative power extends to recovering all claims in respect of taxes and other public demands.[10]

(45) Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

Under this entry, Parliament is authorised to make a law with respect to inquiries for the purpose of a matter in List II, even though it cannot make law with respect to that matter.[11]

Parliamentary legislation covering Central inquiries against State Ministers can be validly enacted under entry 9, List I, and entry 45, List III, and the residu-

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1. *Bharat Hydro Power Corp. Ltd., Guwahati v. State of Assam,* AIR 1998 Gau. 49.
2. *State of West Bengal v. Union of India,* AIR 1963 SC 1241.
3. *Ranojirao v. State of Madhya Pradesh,* AIR 1965 MP 77.
4. *N.E. Supply Co. v. State of Madras,* AIR 1971 Mad. 351; *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.
5. *Sita Ram v. State of Rajasthan,* AIR 1974 SC 1373 : (1974) 2 SCC 301.
6. *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh,* AIR 1980 SC 1955 : (1980) 4 SCC 136.
7. *Ibid.*
8. *Babubhai Jashbhai Patel v. Union of India,* AIR 1983 Guj 1.
9. *L.N.M. Institute of Economic Development and Social Change v. State of Bihar,* AIR 1988 SC 1136 : (1988) 2 SCC 433.
10. *M.A. Kamath v. Karnataka State Financial Corp.,* AIR 1981 Kant. 193.
11. *Ram Krishna Dalmia v. Justice Tendolkar,* AIR 1958 SC 538 : 1959 SCR 279.

ary power.[12] The language used in entry 45, List III, *viz.*, "any of the matters specified" is broad enough to cover anything reasonably related to any of the enumerated items even if done by holders of Ministerial offices in the States. In the alternative, the Supreme Court has ruled that even if neither entry 94, List I, nor entry 45, List III, would cover inquiries against Ministers in the States relating to acts connected with Ministers' powers, Art. 248, read with entry 97, List I (known as the residuary power), must necessarily cover an inquiry against Ministers on matters of public importance whether the charges include alleged violations of criminal law or not.[13]

Parliament has enacted the Commissions of Inquiry Act, 1952, under this entry.[14]

(46) Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in the Concurrent List.

Thus, Parliament as well as a State Legislature may legislate with regard to the jurisdiction and powers of the High Courts in respect of intestacy and succession under this entry read with entry 5.[15]

(i) COMMENTS

From the above enumeration and classification of the entries in the various Lists, it would appear that the Central Government has been vested with vast powers contained in the Union and the Concurrent Lists. In addition, Centre's power has been extended by several devices adopted in the phraseology of the entries.

Firstly, some of the entries in the Union List are so phrased that their scope can be expanded by the Centre itself.[16]

Secondly, some of the entries in the State List are subject to some of the entries in the Union List,[17] or the Concurrent List,[18] or a law made by Parliament.[19]

Thirdly, some entries in the Concurrent List are made subject to the entries in the Union List,[20] or laws made by Parliament.[21]

Thus, the dimensions of several entries in the Union List or the Concurrent List are expansive. Moreover, the residuary power has been left with the Centre.[22]

However, it will be wrong to suppose that the States' powers are insignificant. Like other federal countries, the Constitution of India places the main responsibility for many primary nation-building and social-service activities on the

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12. For discussion on "Residuary Powers", see, *infra*, Sec. I.
13. *State of Karnataka v. Union of India*, AIR 1978 SC 68 : (1977) 4 SCC 608.
For further discussion on this matter, see, *Infra* Ch. XIII, Sec. B.
14. For a detailed disussion on this Act, see, M.P. JAIN, *C*ASES & MATERIALS ON INDIAN ADM. LAW, *III*, 2465-2644 (1999).
15. *In Re, G.F. Muirhead*, AIR 1959 Mys. 83.
16. Entries 52, 53, 54, 56, 62, 63, 64, and 67 in List I.
17. Entries 11, 13, 17, 22, 23, 24, 32 and 54, List II.
18. Entries 11, 13, 26, 27 amd 57, List II.
19. Entries 12, 37 and 50, List II.
20. Entries 19, 32, List III.
21. Entries 31, 33(*a*) and 40, List III.
22. See, *infra*, Sec. I.

States, *e.g.*, public health falls within the State sphere, the Union having only limited powers of an inter-State nature;[23] relief of the disabled and unemployable,[24] housing, agriculture[25] and irrigation are exclusively State functions. Therefore, for many socio-economic services, the Centre has no direct responsibility as these lie within the exclusive legislative sphere of the States. Many matters of social security, social insurance, relief and rehabilitation of displaced persons fall within the Concurrent List,[26] and, therefore, the States share the burden along with the Centre in these areas.

The Centre and the States also share power in some other areas outside the Concurrent List, as for example, communications, economic powers, etc., some aspects of which fall in List I and others in List II. To give an example: Parliament is authorised to legislate with regard to mines and minerals to the extent to which it declares it expedient in public interest to control the area:[27] to the extent there is no such declaration, the matter lies with the States.[28] Similarly with regard to industries, the power is divided between the Centre and the States, although the major responsibility in this area rests with the Centre.

It will also be seen that by the process of interpretation, the Supreme Court has sought to protect State powers from being overridden by the exercise of Central powers.[29]

COMPOSITE LEGISLATION

Many a time, a legislature may enact composite legislation which may be based on more than one legislative entry. There is no bar against Parliament or the State Legislatures enacting a statute, the subject-matter of which calls for exercise of powers under two or more entries in the same List or different Lists.[30] A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation.

The Supreme Court has observed in *Ujagar Prints v. Union of India*:[31] "In deciding the validity of a law questioned on the ground of legislature incompetence the State can always show that the law was supportable under any other entry within the competence of the Legislature. Indeed in supporting a legislation sustenace could be drawn and had from a number of entries. The legislation could be composite legislation drawing upon several entries."

Such a rag-bag legislation is particularly familiar in taxation.[32] For example, the Karnataka Tax of Entry of Goods Act, 1979, was held referable to entry 35, List III and entry 52 of List II.[33]

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23. List I, entry 28; List II, entry 6; List III, entry 29.
24. List II, entry 9.
25. List II, entry 14.
26. List III, entres 23, 24, and 27.
27. Entry 54, List I.
28. Entry 23, List II.
29. *Infra,* Sec. G.
30. *Harikrishna Bhargava v. Union of India,* AIR 1966 SC 619; *State of Andhra Pradesh v. NTPC Ltd.,* (2002) 2 SCC 203 : AIR 2002 SC 404.
31. AIR 1989 SC 516 : (1989) 3 SCC 488.
32. See, *infra,* next Chapter.
33. *Arun Manikchand Shah v. State of Karnataka,* AIR 1996 Kant. 386.

G. PRINCIPLES OF INTERPRETATION OF THE LISTS

According to a famous aphorism, federalism connotes a legalistic government. There being a division of powers between the Centre and the States, none of the governments can step out of its assigned field; if it does so, the law passed by it becomes unconstitutional. Questions constantly arise whether a particular matter falls within the ambit of one or the other government. It is for the Courts to decide such matters for it is their function to see that no government exceeds its powers.

The Supreme Court has observed regarding the Centre-State distribution of powers that "the constitutionality of the law becomes essentially a question of power which in a federal constitution... turns upon the construction of the entries in the legislative lists." The ultimate responsibility to interpret the entries lies with the Supreme Court in the scheme of the Indian federal system. Further the Court has reiterated the proposition that "these subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power".[34]

If the matter is within the exclusive competence of the State Legislature *i.e.* List II, then the Union Legislature is prohibited from making any law with regard to the same. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the State Legislatures. The concept of occupied field is relevant in the case of laws made with reference to entries in List III has to be applied only to the entries in that list. The express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective.[35]

Since the inauguration of the Indian Constitution, a large number of cases involving interpretation of the various entries in the three Lists have come before the Courts. Keeping in view the fact that the Constitution has three elaborate Lists enumerating more than 200 entries, questions regarding interpretation of these entries, and their mutual relationship, are bound to arise from time to time. There have been quite a few significant controversies in this area.

A point which deserves to be noted is that, hitherto, most of the disputes regarding division of powers have been raised by private parties. The matter arises when a person raises a plea in a Court that a particular legislation affecting his rights falls outside the legislative ambit of the Legislature which has enacted it, and, therefore, it is unconstitutional. In other federations, inter-governmental legal controversies are quite frequent, but such has not been the case in India so far. There have been only a few inter-governmental controversies.[36]

The entries in the lists give outline of the subject matter of legislation and should, therefore be given widest amplitude.[37]

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34. *Federation of Hotel & Restaurant v. Union of India,* AIR 1990 SC 1637 : (1989) 3 SCC 634.
35. *Hindustan Lever v. State of Maharashtra,* (2004) 9 SCC 438 : AIR 2004 SC 326.
36. *State of West Bengal v. Union of India,* AIR 1963 SC 1241; see, Ch. XI, Sec. J(ii)(d), *infra; State of Rajasthan v. Union of India*, AIR 1977 SC 1361; see, Ch. XIII, Sec. D, *infra*; *State of Karnataka v. Union of India*, AIR 1978 SC 68 : (1977) 4 SCC 608; see, Ch. XIII, Sec. C, *infra*; *In re, Cauvery Water Dispute Tribunal,* AIR 1992 SC 522 : 1993 Supp (1) SCC 96 (11) ; see, Ch. XIV, Sec. E, *infra.*
37. *Karnataka Bank Ltd. v. State of Andhra Pradesh,* (2008) 2 SCC 254 : (2008) 1 SCALE 660.

It needs to be underlined, however, that the judicial interpretative process has been such as to uphold most of the impugned legislation and it is only rarely that Courts declare a law invalid on the ground that the legislature has exceeded its powers. The Courts have developed several norms to interpret the entries in these Lists.

The doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. The whole doctrine resolves itself into the question of the competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. The court reiterated this statement,[38] and has emphatically pointed out that for invoking the doctrine of "colourable legislation" the legislature must be shown to have transgressed the limits of its constitutional power *patently*, *manifestly* and *directly*.[39] The motive of the legislature is irrelevant to castigate as a "colourable legislation",[40] The question of *bonafide* or *malafide* is irrelevant and hence not involved in considering the charge of "colourable legislation."[41] On the other hand, if the legislature lacks competency the question of motive does not arise at all. If Parliament has the requisite competence to enact the impugned Act, the enquiry into the motive which persuaded Parliament into passing the Act would be of no relevance.[42]

In the *Kerala Scheduled Tribes* case,[43] the Supreme Court has expressed that the 'right question' test which has been applied in many cases as a test to find out whether an administrative Agency has validly exercised its power, namely, whether it has posed to itself the right question should be applicable to find out whether the Courts have exercised their jurisdiction properly or not when the validity of a statute is under attack went on to observe what would be the right question in such cases viz. whether the statute has been enacted to achieve the constitutional course set out not only in Part III of the Constitution but also in Parts IV (Directive Principle) and IV-A (Fundamental Duties). If the question is answered in the affirmative in the facts and circumstances of the particular case, then the statute is safe.

(i) EACH ENTRY TO BE INTERPRETED BROADLY

The entries in the three Lists are not always set out with scientific precision or logical definition. It is practically impossible to define each item in a List in such a way as to make it exclusive of every other item in that List.

The framers of the Constitution wished to take a number of comprehensive categories and describe each of them by a word of broad and general import. For

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38. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46 : (2009) 9 JT 579.
39. *Ibid.*
40. *STO v. Ajit Mills Ltd.*, (1977) 4 SCC 98.
41. *K.C.Gajapati Narayan Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1.
42. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
43. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46.

example, in matters like 'Local Government', 'Education', 'Water', 'Agriculture', and 'Land', the respective entry opens with a word of general import, followed by a number of examples or illustrations or words having reference to specific sub-heads or aspects of the subject-matter. The effect of the general word, however, is not curtailed, but rather amplified and explained, by what follows thereafter. The legislative entries are, however, not exhaustive, and do not cover, for example, all taxable events. This is recognized and reflected in the residuary powers of taxation saved under Art. 248(2) and List I Entry 97. For instance, a State cannot under the garb of luxury tax under List II Entry 62 impinge on the exclusive power of the Centre under List I Entries 84 and 83 by merely describing an article as a luxury for the same taxable events as covered under Entries 84 and 83.[44]

An important principle to interpret the entries is that none of them should be read in a narrow, pedantic sense; that the 'widest possible' and 'most liberal' construction be put on each entry, and that each general word in an entry should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.[45]

The first principle in relation to the legislative entries is that they should be liberally interpreted, that is, each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. Second principle is that competing entries must be read harmoniously, that is, to read the entries together and to interpret the language of one by that of the other.[46]

The justification for this approach is that the entries set up a 'machinery of government'; they demarcate the area or 'heads' or 'fields' of legislation within which the respective legislature can operate and do not confer legislative power as such. Legislative power on the Centre and the States is conferred by Art. 246 and not by the entries in the three legislative lists.[47] Therefore, these entries must be given the widest scope of which their meaning is fairly capable.[48] The Supreme Court has enunciated this rule in the following words:[49]

> "It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power by Art. 246 and other related Articles of the Constitution. Therefore, the power to make the amendment Act is derived not from the respective entries but under

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44. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

45. *Hans Muller v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284; *Navinchandra Mafatlal v. Commr. of Income-tax, Bombay*, AIR 1955 SC 58 : (1955) 1 SCR 829; See also *Welfare Assn. ARP v. Ranjit P. Gohil*, (2003) 9 SCC 358 : AIR 2003 SC 1266.

46. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

47. *Premchand Jain v. Chhabra*, AIR 1984 SC 981 : (1984) 2 SCC 302; *J.K. Bharati v. State of Maharashtra*, AIR 1984 SC 1542 : (1984) 3 SCC 704; *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781 : (1990) 2 SCC 71.

48. *United Provinces v Atiqua Begum*, AIR 1941 FC 16; *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 1044; *Waverly Jute Mills v. Raymon and Co.*, AIR 1963 SC 90; *Harakchand Ratanchand Banthia v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166; *Synthetics and Chemicals v. State of Uttar* Pradesh, AIR 1990 SC 1927; *Indian Aluminium Co. Ltd. v. Karnataka Electricity Board*, (1992) 3 SCC 580, 599; *P.N. Krishan Lal v. Govt. of Kerala*, (1995) Supp. (2) SCC 187.

49. *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142, at 148 : 1995 Supp (1) SCC 596.

> Art. 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the *vires* of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude."

The entries in the same List are not mutually exclusive and each entry comprises within its scope all matters incidental thereto. The entries demarcate the area over which the concerned legislature operate. In the words of the Supreme Court, the entries "are to be regarded as *enumeratio simplex* of broad categories" and that "the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given."[50] Thus, the main topic in an entry is to be interpreted as comprehending all matters which are necessary, incidental or ancillary to the exercise of power under it.

The Supreme Court has often emphasized that the various entries in the three Lists are not powers but are fields of legislation. The power to legislate is given by Art. 246. The entries demarcate the area over which the concerned legislature can operate, and that the widest import and significance must be given to the language used in these entries. Each general word in an entry should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended therein.[51]

The Supreme Court has enunciated this principle of interpretation of the entries as follows:[52]

> "The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them ... In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

Thus, power to legislate includes power to legislate retrospectively as well as prospectively.[53] If a law passed by a legislature is struck down by the Courts for one infirmity or another, the legislature can cure the infirmity by passing a law,

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50. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.

51. *Baldev Singh v. Commr. of Income-tax*, AIR 1961 SC 736 : (1961) 1 SCR 482; *Balaji v. I.T.O.*, AIR 1962 SC 123 : (1962) 2 SCR 983; *Maru Ram v. Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107; *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85, at 91; *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927, 1951.

52. *The Elel Hotels and Investment Ltd. v. Union of India*, AIR 1990 SC 1664, at 1669 : (1989) 3 SCC 698.

53. *S.T. Swamiar v. Commr., HRE*, AIR 1963 SC 966; *Udai Ram v. Union of India*, AIR 1968 SC 1138 : (1968) 3 SCR 41; *Tirath Ram v. State of U.P.*, AIR 1970 SC 405; *Krishna Chandra v. Union of India*, AIR 1975 SC 1389; *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250; *Misri Lal Jain v. State of Orissa*, AIR 1977 SC 1686 : (1977) 3 SCR 714.

as so to validate the earlier law. Such legislation is necessarily to be regarded as subsidiary or ancillary to the power of legislation on the particular subject.[54]

For example, entry 30, List II, runs as: "Moneylending and money-lenders : relief of agricultural indebtedness". This entry has been broadly interpreted so as to include relief against loans by scaling down, discharging, reducing interest and principal, and staying the realisation of debts. "The whole gamut of moneylending and debt liquidation is thus within the State's legislative competence." Narrowly interpreted, the entry would refer only to agricultural indebtedness. But by giving a broad interpretation, it could include debts by non-agriculturists as well.[55]

The principle has been recently expounded by the Supreme Court as follows:[56]

> "Thus, it is settled principle of interpretation that legislative Entries are required to be interpreted broadly and widely so as to give power to the legislature to enact law with respect to matters enumerated in the legislative entries. Substantive power of the legislature to enact law is under Art. 246 of the Constitution and legislative Entries in the respective Lists 1 to 3 of the Seventh Schedule are of enabling character, designed to define and delimit the respective areas of legislative competence of the respective legislature".

In the same case, the Supreme Court has explained that the widest possible construction must be put upon the words used in a legislative entry. Words should be given their "ordinary, natural and grammatical meaning" subject to the rider that in construing words in a constitutional enactment, conferring legislative power under Art. 246, construction should be put upon the words in the entries in the respective lists so that the same may have effect in their widest amplitude. The rule of widest construction of an entry, however, would not entitle the legislature to make a law relating to a matter which has no rational connection with the subject-matter of the concerned entry.[57]

The reading down of provision to uphold its Constitutionality is applicable in the process of interpretation.[58]

In the context of an entry relating to taxation it has been pointed out that the incidence of tax would be relevant in construing whether a tax is a direct or an indirect one, but irrelevant in determining the subject matter of the tax.[59]

(ii) HARMONIOUS INTERPRETATION OF ENTRIES

The three Lists are very detailed and the constitution-makers have made an attempt to make the entries in one List exclusive of those in other Lists. But, as no drafting can be perfect, at times, some conflict or overlapping between an en-

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54. *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 : (1964) 1 SCR 897; *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975; *Misri Lal Jain v. State of Orissa, supra*.

55. *Fateh Chand Himmat Lal v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670; *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1; *Saiyedbhai Kadarbhai v. Saiyed Intajam Hussen*, AIR 1981 Guj. 154.

56. *R.S. Rehchand Mohota Spg. & Wvg. Mills Ltd. v. State of Maharashtra*, AIR 1997 SC 2591, 2596 : (1997) 6 SCC 12.

57. *Union of India v. Shah Goverdhan L. Kabra Teachers College*, (2002) 7 SCALE 435.

58. *P. Tulsi Das v. Government of Andhra Pradesh*, (2003) 1 SCC 364 : AIR 2003 SC 43.

59. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

try in one List and an entry in the other List comes to surface. This gives rise to the question of determining inter-relationship between such entries.

To meet such a situation, the scheme of Art. 246 is to secure the predominance of the Union List over the other two Lists, and that of the Concurrent List over the State List. Thus, in case of overlapping between an entry in the Union List and an entry in the State List, the former prevails to the extent of overlapping; the subject-matter falls exclusively within the Union jurisdiction and the States cannot legislate on it. In case of any overlapping between an entry in the Union List and an entry in the Concurrent List, the former prevails over the latter and the subject-matter again is treated as being exclusively Central, so as to debar the States from legislating on it, to the extent of overlapping. If there is an overlapping between an entry in the Concurrent List and one in the State List, the former prevails and the subject would fall within the Concurrent List, thus, giving both Parliament and the State Legislatures jurisdiction to legislate with respect to it rather than making it exclusively a State matter.

This result is inherent in the wordings of Article 246. Art. 246(1) confers exclusive power on Parliament to legislate relating to matters in List I 'notwithstanding anything in clauses (2) and (3).' This is known as the *non-obstante* clause and its effect is to make the Union power prevail in case the Union and State powers overlap.

The *non-obstante* clause has been further stregthened by clauses (2) and (3) of Article 246. According to Clause (2), 'notwithstanding anything in clause (3)', Parliament is entitled to legislate regarding matters in the Concurrent List, and the State legislatures may legislate in the field 'subject to Cl. (1)'. Thus, in case of overlapping between the Union and the Concurrent Lists, the power of the States is subject to the Union List. Further, Cl. (3) of Art. 246 authorises the States to legislate regarding matters in the State List but 'subject to clauses (1) and (2)', which means subject to the Union List and the Concurrent List.

Some of the entries in the different Lists may overlap or may appear to be in direct conflict with each other. In such a situation, the principle of supremacy of the Union List over the State List, as enunciated above, is not to be applied automatically or mechanically as soon as some conflict of legislative jurisdiction becomes apparent. The *non-obstante* clause is the ultimate rule which is to be invoked only as a last resort, in case of *inevitable* or *irreconcilable* conflict between the entries in different Lists.

Before applying the rule, however, the Court should make an attempt to reasonably and practically construe the entries so as to reconcile the conflict and avoid overlapping. This is the rule of harmonious interpretation of the various entries. An effort is to be made by the Court to reconcile all concerned and relevant entries. To harmonise and reconcile conflicting entries in the Lists, it may be necessary to read and interpret the relevant entries together, and, where necessary, restrict the ambit of the broader entry in favour of the narrower entry so that it is not eaten up by the former. It may be necessary to construe a broad entry in a somewhat restricted sense than it is theoretically capable of. If one entry is general, and the other limited or specific, then the former may be restricted to give sense and efficacy to the latter which may be treated as particularised and something in the nature of an exception to the general entry. It has been held that though scope of List II Entry 54 was widened by insertion of Art. 366(29-A)

powers of States to levy such tax is subjected to a corresponding restriction as a consequence of Constitutional limits imposed on sales tax under Art. 286(3) and S. 3 and Sch. 2 proviso, ADE Act, 1957.[60]

This principle of interpretation was lucidly explained by LORD SALMOND in *Governor-General in Council v. State of Madras*,[61] in relation to the Government of India Act, 1935, but which remains as valid to-day as it was at that time. LORD SALMOND observed:

> "..... it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial [now State] Legislative List a meaning which it can properly bear".

In the words of the Supreme Court:[62]

> "It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction."

It is only when reconciliation between the conflicting entries should prove impossible, then, and only then, the *non-obstante* clause, in Art. 246, mentioned above, is to be invoked to give primacy to the Federal power over the State or Concurrent power.[63] The *non-obstante* clause "ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship". The rationale of such an approach is that the framers of the Constitution could not have intended that there should exist any conflict among the Lists, and, therefore, it is necessary to adopt a process of construction which would give effect to all entries and not nullify or render otiose any entry.

This rule, it may be appreciated, is favourable to the States because List II is subject to both List I as well as List III. This becomes obvious from the following discussion. In this connection, the Supreme Court has stated that the relevant entry in List I, should not be so construed as to rob the relevant entry in List II or List III of all its content and substance. It is only when it proves not possible to reconcile the entries that the *non-obstante* clause "notwithstanding anything in clauses (2) and (3)" occurring in Art. 246(1) has to be resorted to.[64]

An entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. In case of apparent conflict, it is the duty of the Court to iron out the crease and avoid conflict by reconciling the conflict. If any entry overlaps or is in apparent conflict with another entry, every attempt shall be made to harmonise the same. Although Parliament cannot legislate on any of the entries in the State List, it may do so incidentally while

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60. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
61. AIR 1945 PC 98, at 100.
62. *Harakchand Ratanchand Banthia v. Union of India,* AIR 1970 SC 1453 : (1969) 2 SCC 166. Also see, *Hoechst Pharmaceuticals Ltd. v. State of Bihar,* AIR 1983 SC 1019 : (1983) 4 SCC 45.
63. *Waverly Jute Mills v. Rayman Co.*, AIR 1963 SC 90 : (1963) 3 SCR 209; *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031; *The Elel Hotels and Investment Ltd. v. Union of India,* AIR 1990 SC 1664, 1668 : (1989) 3 SCC 698.
64. *Ajay Kumar Singh v. State of Bihar,* (1994) 4 SCC 401.

essentially dealing with the subject coming within the purview of the entry in the Union List. Conversely, the State Legislature also while making legislation may incidentally trench upon the subject covered in the Union List. Such incidental encroachment in either event need not make the legislation *ultra vires* the Constitution. The doctrine of pith and substance is sometimes invoked to find out the nature and content of the legislation. However, when there is an irreconcilable conflict between the two legislations, the Central legislation shall prevail. But every attempt would be made to reconcile the conflict.[65]

Entry 86 in List I proceeds on the principle of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land has been held to be *intra vires* the powers of the State Legislature and not trenching upon Entry 86 in List I.[66]

(iii) INTER-RELATION OF ENTRIES

The working of the above rule of harmonious interpretation may be illustrated by referring to some well-known relevant cases.

In re the C.P. and Berar Act[67], the leading case in which the principle of harmonious interpretation of the conflicting entries was propounded for the first time, has been discussed below under the 'Taxing Powers'.[68]

In *State of Bombay v. Balsara*,[69] a conflict was sought to be made out between entry 41, List I and entry 8, List II. Arguing for a broader view of the Central entry, it was suggested that 'import' of intoxicating liquors would not end with mere landing of goods on the shore but would also imply that the imported goods reach the hands of the importer who should be able to possess them. Therefore, it was said that the State could not prohibit the possession and sale of intoxicating liquors as that would amount to a power to prohibit their import into the country, as one is a necessary consequence of the other.

To reconcile the two entries, the Supreme Court gave a limited meaning to the word 'import' in the Central entry in order to give effect to the State entry. The Court held that 'import' standing by itself, could not include sale or possession of the article imported into the country by a person residing in the territory in which it was imported. The State entry has no reference to import and export but merely deals with production, manufacture, possession, transport, purchase and sale of intoxicating liquors. The State Legislature could, therefore, prohibit the possession, use and sale of intoxicating liquors. Thus, entry 8 (List II) has been given effect by narrowing down the scope of the Central entry which could otherwise nullify the State power if it were to be broadly interpreted.

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65. Special Reference No. 1 of 2001, In re (2004) 4 SCC 489 : AIR 2004 SC 2647.
66. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
67. *Gwyer, C.J., In re C.P. & Berar Act No. XIV of 1938*, AIR 1939 FC 1. Also, *Waverly Jute Mills v. Raymond Co.*, AIR 1963 SC 90 : (1963) 3 SCR 209.
68. *Infra*, next Chapter.
69. AIR 1951 SC 318 : 1951 SCR 682.

Similarly, it has been held that the power conferred by entry 26, List III, is general and that the power conferred by entry 78, List I, is limited to persons entitled to practise before the High Courts, and so the general power must be read subject to the spcific power. Consequently, a State Legislature cannot enact any legislation with respect to "persons entitled to practise before the High Courts". The legislative power relating to persons entitled to practise before the Supreme Court and the High Courts is carved out of the general power relating to professions in entry 26, List III, and given exclusively to Parliament. On a conjoint reading of Entry 66 of List I and Entry 25 of List III of the Seventh Schedule to the Constitution it is clear that although the State has a wide legislative field to cover, the same is subject to Entries 63, 64, 65 and 66 of List I and once it is found that any State legislation does not entrench upon the legislative field set apart by Entry 66 List I, the State Act cannot be faulted.[70]

Apart from the legal practitioners practising before the Supreme Court and the High Courts, the legislative power with respect to other practitioners would fall under entry 26 of List III.[71]

Method of taxing luxury goods invariably has been by subjecting them to the extant fiscal regimes of excise duties, sales tax, customs duties, etc. at heavier rates and not under List II Entry 62 and no distinction is made in Art. 366 or Entries 83 and 84 of list I as to the nature of the goods which may be the subject matter of sale excise or import, even if they are articles of luxury.[72]

(a) INDUSTRY

The inter-relation between entries 52 of List 1, 24 and 27 of List II, and 33 of List III becomes important as all these entries deal with various aspects of industry.

The subject of 'industries' has been enumerated in the general entry 24, List II. This, however, is expressly made subject to entries 7 and 52 in List I. Thus, the States can be denied competence to legislate with respect to industries to the extent Parliament by law makes the requisite declaration under entries 7 and 52 of List I.

Under entry 7, Parliament may by law declare any industry "necessary for the purposes of defence or prosecution of war". Under entry 52, List I, Parliament may by law declare Union control of any industry to be expedient in public interest. When such a declaration is made, Parliament can legislate in respect of that industry to the exclusion of the State Legislatures. The State Legislatures are denuded of their power to legislate under entry 24, List II to the extent Centre assumes control over the concerned industry.[73]

Entry 52, List I deals with industry and does not cover the matters mentioned in Entry 33, List III.

Under entry 52, a declaration in abstract is not enough. Parliament has to pass a law, containing the declaration specifying the industry and indicating the nature

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70. *State of A.P. v. K. Purushotham Reddy*, (2003) 9 SCC 564 : AIR 2003 SC 1956.
71. *In Re Lily Isabel Thomas*, AIR 1964 SC 855 : (1964) 6 SCR 229; *O.N. Mohindroo v. Bar Council*, AIR 1968 SC 888 : (1968) 2 SCR 709.
72. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
73. *State of Andhra Pradesh v. McDowell & Co.*, AIR 1996 SC 1627 : (1996) 3 SCC 709.

and extent of the Union control over the concerned industry. If this is done, then to the extent covered by the declaration and the concomitant legislation, the State Legislative competence with respect to that industry is curtailed. This becomes clear from the following observation of the Supreme Court in *Ishwari Khaitan*[74] "...the State Legislature can be denied legislative power under entry 24 of List II to the extent Parliament makes declaration under entry 52 and by such declaration, Parliament acquires power to legislate only in respect of those industries in respect of which declaration is made and to the extent as manifested by *legislation incorporating the declaration* and no more."

For this purpose, Parliament has enacted *inter alia* the Industries (Development and Regulation) Act under which many industries have been taken under Central control.

The pith and substance of the IDR Act is to provide the Central Government with the means of implementing their industrial policy. The Act brings under Central control the development and regulation of number of important industries which affect the country as a whole and whose development is governed by economic factors of all-India import.[75]

Parliament has taken the tobacco industry under its control under entry 52, List I, and has enacted the Tobacco Board Act, 1975. Refusing to give a restricted meaning to the term 'industry' in entry 52, the Court upheld the validity of the Act. Accordingly, the State Legislature was denuded of its power to make any law in relation to growing of tobacco or sale or purchase of raw tobacco as such a provision had already been made in the Tobacco Board Act.[76] But, recently, the Court has changed its view. In a 3 : 2 decision, the Court has overruled the earlier ITC decision. The Court has now ruled that the State Legislature is competent to levy market fee on the sale of tobacco in a market area. The majority has interpreted the word 'industry' in entry 52, List I restrictively as excluding pre-manufacture activity. This means that raw materials for an industry do not fall under entry 52, List I. In arriving at this decision, the majority seeks to serve three objectives, *viz.* : (1) the powers of the state ought not be whittled down; (2) the concept of federalism should be preserved; (3) Central supremacy should also be upheld.[77]

The responsibility for development of small scale industries rests with the States under entry 24, List II.

The State power to levy 'vend-fee' on denatured spirit under entry 8, List II, is not excluded by Parliamentary legislation under entry 52, List I, with regard to ethyl alcohol. Had there been only entry 52 in List I and entry 24 in List II, Parliament might have had an exclusive power to legislate in respect of industries notified by it because entry 24 is subject to 52. But there are other entries as well, as

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74. *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh,* AIR 1980 SC 1955 : (1980) 4 SCC 136; see, footnote 85, *infra.*

Also see, *Viswanathiah & Co. v. State of Karnataka,* (1991) 3 SCC 358.

A few other Acts are the Cardomon Act, 1965; The Central Silk Board Act, 1958; The Coffee Act, 1942; The Rubber Act, 1947; The Tea Act, 1953; The Coir Industry Act, 1953; The Coconut Development Board Act, 1979.

75. *Khoday Distilleries Ltd. v. State of Karnataka,* (1995) 1 SCC 574 : AIR 1996 SC 911.
For the doctrine of pith and substance, see, Sec. G(iv), *infra.*

76. *I.T.C. Ltd. v. Agricultural Produce Market Committee,* (1985) Supp SCC 476.

77. *I.T.C. Ltd. v. Agricultural Produce Market Committee,* AIR 2002 SC 852 : (2002) 1 SCALE 327.

for example, entry 26 in List II and entry 33 in List III, which make it clear that the power to regulate the notified industries is not exclusively with Parliament.[78]

Interpreting entries 24 and 25 of List II harmoniously, the Supreme Court has held that 'gas works' being a specific entry (entry 25) would not fall under the general entry 24. If the word 'industry' in entry 24 were to include 'gas and gas works', then entry 25 would become redundant. Therefore, adopting the principle of harmonious interpretation, from the wide field covered by entry 24, *i.e.*, the field of entire industry, the specific industry, *i.e.*, 'gas and gas works' covered by entry 25, should be excluded. On that interpretation, 'gas industry' would not fall under entry 52 of List I either, for the term 'industry' in entries 52 and 24 should be given a uniform interpretation.[79] This means that 'gas and gas works' fall within the exclusive field allotted to the States.

(b) SUGAR

Sugar has been declared to be a "controlled" industry under entry 52, List I. The State of U.P. enacted an Act to regulate the supply of sugarcane to the sugar factories. The U.P. Act was challenged as being *ultra vires* the State on the ground that sugar being a 'controlled' industry, sugarcane also fell within the scope of Parliament. The word 'industry', it was contended, has a very wide import and includes not only the process of manufacture but also all things which are necessarily incidental thereto, *viz.*, acquisition of the raw materials of the industry and the disposal of the finished products thereof and so sugarcane, as the raw material of the sugar industry, fell within the Parliamentary sphere.

Applying the principle of reconciling the entries in the various Lists,[80] the Supreme Court held in *Tika Ramji v. State of Uttar Pradesh*,[81] that the U.P. Act was valid. Entries 52 of List I and 24 of List II indicate that generally industries fall within the exclusive sphere of the States except those industries which are controlled by Parliament. Entries 27 of List II and 33 of List III indicate that the production, supply and distribution of products of the controlled industries fall within the Concurrent jurisdiction under entry 33(*a*) of List III.

Industry in the wide sense comprises of three different aspects:

(*i*) raw materials which are an integral part of the industrial process;

(*ii*) the process of manufacture or production; and

(*iii*) the distribution of the products of the industry.

But, in the context of the various entries, the word 'industry' actually connotes aspect (*ii*) mentioned above, *i.e.*, the process of manufacture or production. The raw materials being goods would be comprised in entry 27 of List II and the products of the industry being goods would also fall under the same entry. The products of the controlled industry however would fall under entry 33, List III.

The sugar industry being controlled, legislation with regard to its process of manufacture falls within the exclusive jurisdiction of Parliament. Distribution, supply and production of the product of this controlled industry, *viz.*, sugar as a

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78. *State of Uttar Pradesh v. Synthetics & Chemicals Ltd.*, AIR 1980 SC 614 : (1980) 2 SCC 441, *supra.* Also see, *State of Haryana v. Jage Ram*, AIR 1980 SC 2018 : (1980) 3 SCC 599.
79. *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044 : 1962 Supp (3) SCR 1.
80. *Supra*, Sec. G(iii).
81. AIR 1956 SC 676 : 1956 SCR 393.

finished product, falls within entry 33 of List III. Sugarcane, its raw material, being 'goods' falls within entry 27 of List II, but being food-stuff could also fall within entry 33 of List III, and in either case, the State Legislature may legislate with respect to it. It may be interesting to note that under the Sugarcane Control Order, promulgated by the Central Government, the Centre controls the price of sugarcane at which it is supplied to the sugar mills. Obviously, this is possible because sugarcane being food-stuff is a concurrent matter. The U.P. Act and the Central Order can stand together for while the former regulates only the supply and purchase of sugarcane required by the sugar mills, the latter regulates the price of sugarcane and so they did not overlap. The Supreme Court has not defined 'industry' as such or stated exhaustively all its ingredients.

On the basis of the interpretation of the various entries in the *Tika Ramji* case, the position appears to be as follows. Ordinarily, the States have a comprehensive regulatory power covering all aspects of any industry falling within the State sphere. The States can regulate raw materials for such industries under entry 27, List II, as 'goods', and also the finished products of the same. As regards the Centrally-controlled industries, the process of manufacture falls within the Central domain under entry 52, List I; control over finished products of these industries falls under the Central as well as State jurisdiction under entry 33 in List III. Accordingly, molasses being the product of the sugar industry, which is a controlled industry, falls under entry 33(a) of List III and the State has power to enact a law to regulate the same.[82]

As the raw materials of these industries, power lies mainly with the States under entry 27, List II, except for the commodities specified in entry 33, List III, which the Centre may also regulate. Regulatory power regarding centrally controlled industry would thus appear to be somewhat fragmented insofar as some raw materials pertaining to these industries may fall outside the Central purview which may create problems of Central-State co-ordination. Failure by a State to ensure adequate supply of raw-materials to an industry may hamper the same and the Centre may be unable to take any corrective measures.

The Supreme Court has rejected the argument that Parliament has no competence to enact any law relating to control of sugarcane as that subject falls within the exclusive legislative jurisdiction of the States; the same being part of agriculture. Under entry 33, List III, the Centre can regulate the cultivation and sale of sugarcane as it is a foodstuff.[83]

The proposition that the goods produced by a 'controlled' industry does not fall under entry 52, List I, but under entry 33, List III, has been reiterated by the Courts in several cases. The Courts have argued that to interpret entry 52, List I, too broadly would render entry 33 in List III otiose and meaningless. This means that in respect of products of a 'controlled' industry, both the States as well as the Centre have competence to enact laws subject to Art. 254.[84]

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82. *Sushant Elhence v. State of Uttar Pradesh*, AIR 1998 All. 332.

83. *A.K. Jain v. Union of India*, AIR 1970 SC 267 : (1969) 2 340.

84. *MSCO Pvt. Ltd. v. Union of India*, AIR 1986 SC 76 : (1985) 1 SCC 51; *Viswanathan & Co. v. State of Karnataka*, (1991) 3 SCC 358; *Indian Aluminium Co. Ltd. v. Karnataka Electricity Board*, (1992) 3 SCC 580; *Sita Ram & Bros. v. State of Rajasthan*, JT 1994 (6) SC 629; *Shriram Industrial Enterprises Ltd. v. Union of India*, AIR 1996 All. 135; *New India Sugar Mills v. State of Bihar*, AIR 1996 Pat. 94.
For discussion on Art. 254, see, Sec. H, *infra*.

In order to solve some serious problems created by the owner of certain mills for cane growers and the labour employed in the mills, and with a view to ameliorate the economic situation in the State of Uttar Pradesh, the State Legislature passed an Act acquiring 12 sugar mills. The constitutional validity of the Act was challenged. In *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh*,[85] the Supreme Court held that in spite of sugar being a centrally controlled industry under entry 52, List I, the State of Uttar Pradesh can pass legislation acquiring some sugar mills and vesting them in the State Sugar Corporation. The Supreme Court held that a mere declaration under entry 52, List I, unaccompanied by law is incompatible with the entry. A declaration for assuming control of specified industries coupled with law assuming control is a prerequisite for legislative control under entry 52, List I. "Therefore, the erosion of the power of the State Legislature to legislate in respect of the declared industry would not occur merely by declaration but by the enactment consequent on the declaration prescribing the extent and scope of control."

To demarcate the power of the State Legislature, the scope of the legislation made by the Centre ought to be assessed as that will indicate the extent of the control assumed by the Centre. The extent of Central control over sugar is contained in the Industries (Development and Regulation) Act through which the Centre has made the requisite declaration. To the extent the Centre has acquired control over the sugar industry under this Act, the State Legislature is denuded of its power to legislate under entry 24, but not beyond that.

On the question of inter-relation between entry 52, List I, and entry 24, List II, the Supreme Court observed: "..... legislative power of the States under entry 24, List II, is eroded only to the extent control is assumed by the Union pursuant to a declaration made by Parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder, the State Legislature will have power to legislate in respect of declared industry, without in any way trenching upon the occupied field."[86]

As regards the impugned law, the Court held that in pith and substance it was for acquisition of the scheduled undertakings by transfer of ownership to the corporation and, therefore, does not come in conflict with the said Central Act.[87] The impugned State Act refers to entry 42, List III, under which both the Centre and the States can acquire property. The Central Act (IDRA) is not at all concerned with the ownership of the industrial undertakings in declared industries and it does not occupy the field of acquisition and it can apply effectively even to an undertaking acquired by the State.[88]

The power of the State Legislature to acquire an undertaking declared to be a controlled industry in the Industries (Development and Regulation) Act has been confirmed by the Supreme Court in several cases. The State of Nagaland acquired the ownership of a company manufacturing plywood. The Supreme Court ruled following its ruling in *Ishwari Khetan* that the IDR Act did not prohibit

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85. AIR 1980 SC 1955 : (1980) 4 SCC 136.
Also, *State of Haryana v. Chanan Mal*, AIR 1976 SC 1654 : (1977) 1 SCC 340.
86. *Ibid.*, at 1969.
87. For the Rule of Pith and Substance, see, *infra*.
88. For the Rule of Occupied Field see, *infra*, under "Repugnancy", Sec. H.

acquisition of ownership of any unit in the controlled industry.[89] The Act to acquire a company falls under entry 42, List III, and not under entry 24, List II. Similarly, a State law acquiring shares of a Cement Corporation was held to fall under entry 42, List III, as it related to the acquisition of property.[90]

The point to note is that by the declaration the whole of the industry does not pass under the Central control totally. The Centre gets competence only to the extent mentioned in the provisions of the Central Act. Beyond that, the States retain control over the declared industry. As the declaration by the Centre trenches upon the State legislative competence, it has to be construed strictly.

In *Viswanathiah,*[91] the Supreme Court has further explained the mutual relationship of the various entries in the three lists pertaining to industry. "Industry" comprises three steps (i) raw materials; (ii) the process of manufacture or production; and (iii) the distribution of the products of the industry. The Court has ruled in the instant case, that State legislation with regard to "raw materials" is permissible under entry 27 List II, notwithstanding a declaration by Parliament under entry 52, List I. States can legislate upon the process of manufacture or production under entry 24, List II, subject to any declaration under entry 52, List I. As regards the distribution of the products of the industry is concerned, ordinarily the States are competent to legislate under entry 27, List II, but if it is a controlled industry, the matter falls under entry 33, List III, and both can legislate in regard thereto.[92]

(c) FORWARD CONTRACTS

Parliament can validly enact the Forward Contracts (Regulation) Act, 1952, which seeks to prevent speculation in forward contracts, where the intermediate buyer and seller do not pay the actual price, but only the difference, and where no delivery is required to be given.

The words "futures markets" in entry 48, List I, mean not only the "place of business" but also "business", for in modern commerce, more often bargains are concluded through correspondence. Therefore, the law relating to forward contracts is a legislation on "futures markets".

Entry 26, List II, being general and broad, and entry 48, List I, being specific, therefore, the general entry should be interpreted restrictively so that the specific entry is kept alive. The words 'trade and commerce' in entry 26 could not be interpreted so broadly as to make the words 'futures markets' in entry 48 nugatory or futile. Entry 7 of List III, is also general in its terms and cannot prevail as against a specific entry like entry 48 in List I or entry 26 in List II.[93]

(d) EDUCATION

Education is a divided area between the Centre and the States, the relevant entries being List I, entries 63, 64, 65, 66, and List III, entry 25.

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89. *Mahesh Kumar v. Nagaland,* AIR 1998 SC 1561 : (1997) 8 SCC 176. Also see, *Indian Aluminium Co. v. Karnataka Electricity Board,* AIR 1992 SC 2169 : (1992) 3 SCC 580; *Dalmia Industries Ltd. v. State of Uttar Pradesh,* AIR 1994 SC 2117 : (1994) 2 SCC 583. *Somasundaram Corporation (Pvt.) Ltd. v. State of Tamil Nadu,* AIR 1999 Mad. 192.

90. *Dalmia Industries Ltd. v. State of Uttar Pradesh,* AIR 1994 SC 2117 : (1984) 2 SCC 583.

91. *B. Viswanathiah & Co. v. State of Karnataka,* (1991) 3 SCC 358.

92. *New India Sugar Mills Ltd. v. State of Bihar,* AIR 1996 Pat. 94.

93. *Waverly Jute Mills Ltd. v. Raymond & Co.,* AIR 1963 SC 90 : (1963) 3 SCR 209.

While considering List II Entry 32 and List III Entry 25 the Supreme Court has emphasized the importance of the University in the educational scheme. A university is a whole body of teachers and scholars engaged at a particular place in giving and receiving instruction in higher branches of learning; and as such persons associated together as a society or corporate body, with definite organisation and acknowledged powers and privileges and forming an institution for promotion of education in higher or more important branches of learning and includes the colleges, building and other property belonging to such body.[94]

The word 'education' in entry 25 is of wide import so as to include "all matters relating to imparting and controlling education". Entry 25 is specifically made subject to entries 63-66 in List I. Thus, out of the broad entry 25, List III, the area entrusted to the Centre under entries 63 to 66 in List I, has been carved out. A State Legislature could, therefore, make laws with respect to all matters relating to education except the matters excluded. Under entry 66, List I, Parliament has power to legislate with respect to "co-ordination and determination of standards in institutions for higher education or research."

Entry 25, List III, and item 66, List I, overlap to some extent and, therefore, should be construed harmoniously. To the extent of overlapping, the Central power under item 66 must prevail over the State power under item 25.

Once an institution is declared by Central Govt. as a deemed university under UGC Act, which is an enactment under Entry 66, entire matter relating to admission of students in such university would be determined by UGC under the said Act and all India common entrance test conducted, and States would not have legislative competence to make law under Entry 25 of List III in respect of that matter.[95]

The power of the Centre to legislate in respect of the medium of instruction arises under items 63 to 65 in List I to the extent it has a direct bearing and impact upon 'co-ordination and determination of standards,' that is, to ensure maintenance or improvement of standards, in institutions of higher education. Under entry 66, the Centre has power to ensure that a required standard of higher education is maintained. Further, it is also the exclusive responsibility of the Centre to coordinate and determine the standards for higher education. Such coordinate action in the field of higher education along with maintenance of proper standards is regarded as being of paramount importance to national progress. Parliament has an overriding legislative power to ensure that the syllabi, courses of study, and the medium selected by a State do not impair standards of education or render the co-ordinantion of such standards either on an all-India or other basis difficult.

Even if the Centre refrains from legislation to the full extent of its powers, the States do not become authorised to legislate in respect of a matter assigned to the Union. Parliament has exclusive power to legislate with respect to matters included in List I. The State has no power over these matters. A State legislation on any matter falling in List I will be void, inoperative and unenforceable. Accordingly, the validity of a State law on university education under entry 25 List II would, therefore, depend on whether it prejudicially affects 'co-ordination' and

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94. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
95. *Bharati Vidyapeeth v. State of Maharashtra*, (2004) 11 SCC 755 : AIR 2004 SC 1943.

'determination' of standards, even though the Centre may not have enacted any legislation to achieve that purpose. If there be a Central law in respect of that matter, it would have paramountcy over the State law, but even when the Centre does not exercise its power, a State law trenching upon the exclusive Union field would still be invalid.[1]

The power to 'co-ordinate' is not merely a power to 'evaluate' standards, but to 'harmonise', and the power could be used to legislate for preventing the occurrence, or for removal, of disparities in standards. The exercise of the Central power to co-ordinate is not conditional upon the existence of unequal standards; it must of necessity imply the power to prevent what would make co-ordination difficult. The power is absolute and unconditional. The validity of a State law fixing a regional language or Hindi as an exclusive medium of instruction and examination in the universities, superseding English to that extent, depends on the question whether it would necessarily result in the falling of standards. If it does, then the legislation would necessarily fall within item 66 and would be excluded, to that extent, from the State power under item 25, List III.

The power under entry 66, List I, is thus preventive as well as curative. It prevents the States from doing anything which may adversely affect, or create a disparity of, standards in higher education. Or else, the Centre can take steps when such a disparity comes into existence. It can lay down conditions subject to which only States may adopt regional languages as media of instruction. If the Centre remains inactive and makes no legislation with respect to these matters, the Courts may still adjudge the State law pertaining to university education to see whether or not it would affect standards adversely.

The interplay of Entry 66 List I and Entry 25 List III shows that norms for admission do have a connection with the standards of education and that they are not covered only by Entry 25 of List III. Any lowering of the norms of admission does have an adverse effect on the standards of education in the institutions of higher education.[2]

The Courts can thus act as the sentinel, in the absence of Central legislation, to keep a watch on State action having a tendency to lower standards of higher education. To judge whether prescription of a regional language as an exclusive medium of instruction will result in falling of standards or not, the Court has applied such tests as existence of adequate text-books, journals, *etc*.; availability of competent instructors in the medium through which instruction is to be imparted ; capacity and ability of the students to receive or imbibe instructions through the medium proposed, etc. A duty has thus been cast on the State seeking to prescribe a regional language as an *exclusive* medium for higher education to see whether there are adequate text books available, whether there are qualified instructors, whether the students have developed a capacity to comprehend the instruction in that medium. The Court held that the university had no power to prescribe Gujarati or Hindi as the exclusive medium of instruction in higher education.

Thus, in the *Gujarat* case,[3] an expansive interpretation has been given to the Central entry so as to contain the linguistic chauvinism of the States,[4] Medium of

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1. *State of Tamil Nadu v. Adhiyaman Educational & Research Institute*, (1995) 4 SCC 104.
2. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
3. *Gujarat University v. Sri Krishna*, AIR 1963 SC 707 : 1963 Supp (1) SCR 112.

instruction has been held to have an important bearing on the effectiveness of instruction and resultant standards achieved thereby.

It has been held again in *D.A.V. College v. State of Punjab*[5] that no State has the legislative competence to prescribe any particular medium of instruction in respect of higher education or research and scientific or technical instructions if it interferes with Parliament's power under entry 66, List I, to coordinate and determine the standards in such institutions and also to maintain high standards in university education throughout the country.

The impact of the *Gujarat University* seems to have been diluted somewhat by *Chitralekha v. State of Mysore*.[6] The question was whether giving of a weightage to extra-curricular activities as compared to academic record for admission to medical and engineering colleges would affect the Central power in entry 66 in List I. The crux of the *Gujarat* case was explained to be that if the impact of the State law providing for such standards on entry 66, List I, "is so heavy or devastating as to wipe out or appreciably abridge the Central field, it may be struck down."

Despite incorporation of universities being a legislative head in State List, the whole gamut of the university comes within the purview of List I Entry 66 and Parliament alone is competent therefor. It is the exclusive responsibility of Parliament to determine and maintain standards of higher education or research throughout the country and to ensure uniformity therein, and that the same are not lowerd at hands of any State, as it is of great importance to national progress.[7]

The Court refused to hold that if a State Legislature prescribed a higher percentage of marks for extra-curricular activities in the matter of admission to colleges, it would be directly encroaching on the field covered by entry 66 of List I. Justice SUBBA RAO thus sought to restrict the *ratio* of the *Gujarat University* case. In that case, what the Court had said was that any State law would be bad as "prejudicially affecting" the Union power of "co-ordination and maintenance of standards", if it seeks to lower standards in institutions of higher education. Nowhere in the *Gujarat University* case, has the majority said that a State law would be bad only if it *destroyed* the Union power. It was rightly pointed out by the minority Judge (Mudholkar J.) in *Chitralekha* that admission of less qualified students in preference to more qualified ones was bound to impair academic standards.[8]

The opinion of the Supreme Court has varied over time on the question whether laying down of a minimum standard for admission of students to an engineering/medical college relates to entry 66, List I, or entry 25, List III.

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4. Jain, Constitutional Aspects of the Language Problem in India, (1967-68) *Yearbook of the South Asia Institute*, Heidelberg University, 116.

5. AIR 1971 SC 1731 : (1971) 2 SCC 261.

6. AIR 1964 SC 1823 : (1964) 6 SCR 368.
The Judgment in *Chitralekha* was pronounced by SUBBA RAO, J., who had given a dissenting Judgment in the *Gujarat University* case.
Chitralakha ruling has been followed in several cases, *e.g., Rajendran v. State of Madras,* AIR 1968 SC 1012 : (1968) 2 SCR 786; *State of Andhra Pradesh v. L. Narendra Nath,* AIR 1971 SC 2560.
Also see, *Ambesh Kumar,* footnote 10, *infra.*

7. *Prof. Yashpal v. State of Chhattisgarh,* (2005) 5 SCC 420 : AIR 2005 SC 2026.

8. Also see, Nayak, The Central-State Legislative Relationship in Education, 14, *J.I.L.I.,* 562; *P.K. Tripathi, Legislative Relations between the Union and the States & Educational Planning, Spotlight on Constitutional Interpretation,* 153 (1972).

In *State of Madhya Pradesh v. Kumari Nivedita Jain*,[9] the Supreme Court dealt with the question of admission of students to the M.B.B.S. Course in the State medical colleges. The Government of Madhya Pradesh framed rules providing for a minimum of 50% as qualifying marks for the students of general category for admission to medical colleges but for the students of Scheduled Castes/Scheduled Tribes, the minimum was zero. Upholding the validity of the rule, the Supreme Court opined that entry 66, List I, did not apply to the selection of candidates for admission to the medical colleges because standards would come in after admission of students. The Court ruled that entry 25, List III was wide enough to include within its ambit the question of selection of candidates to medical colleges and there was nothing in entries 63, 64, 65 and 66, List I to suggest the contrary.

The Government of India has made regulations under the Indian Medical Council Act, 1956, prescribing certain conditions for admission to post-graduate medical courses. This has been done under entry 66, List I. The U.P. Government by an order prescribed 55% as minimum marks for admission to post-graduate medical courses under entry 25, List III.

The question arose whether the State could impose qualifications in addition to those laid down by the Medical Council and the Regulations made by the Central Government in this connection. The U.P. order was held not bad as it was not in conflict with the regulations made by the Central Government. The order of the State Government merely provided an additional eligibility qualification. It did not encroach upon the power of the Centre to make laws in regard to matters provided in entry 66, List I.[10] The Court ruled that any additional qualifications which the State may lay down would not be contrary to entry 66, List I, since the additional qualifications were not in conflict with the Central Regulations but were designed to further the objectives of these Regulations which was to promote proper standards. The State order merely provided for an additional eligibility qualification.

In *Ajay Kumar Singh v. State of Bihar*,[11] the Supreme Court observed:

> "Entry 66 in List I does not take in the selection of candidates or regulation of admission to institutes of higher education. Because standards come into the picture after admissions are made".

Further, the Court opined that since all the students appear and pass the same examination at the end of the course, standards are maintained. Thus, the rules for admission do not have any bearing on standards. The quality is guaranteed at the exit stage. Therefore, even if students of lower merit are admitted in the course, this will not cause any detriment to the standards. Similar observations were made by the Court in *Post-Graduate Institute of Medical Education and Research Chandigarh v. K.L. Narasimham.*[12]

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9. AIR 1981 SC 2045 : (1981) 4 SCC 296.
10. *Dr. Ambesh Kumar v. Principal, LLRM Medical College, Meerut,* AIR 1987 SC 400 : (1986) Supp SCC 543.
11. (1994) 4 SCC 401.
12. AIR 1997 SC 3681 : (1997) 6 SCC 283.

The matter came again before the Supreme Court in *Preeti*.[13] The impugned rule in the instant case was similar to the one involved in *Nivedita*.[14] In the State of Madhya Pradesh, a common entrance examination was held for admission to post graduate degree courses. The cut-off point for admission for general category candidates was fixed at 45%, but for reserved category candidates it was fixed at 20%.[15] The Court examined the validity of these rules in *Preeti*. The most significant point which the Court has now insisted upon in the instant case is that standard of education is affected by admitting students with low qualifying marks.

Reading entries 66, List I, and entry 25, List III, the Supreme Court has ruled definitively that while controlling education under entry 25, a State cannot impinge on standards in institutions of higher learning as this matter lies solely and exclusively within the purview of theCentre under entry 66, List I. The Court has also ruled that it is not correct to say that the norms for admission have no connection with the standard of education. Norms of admission to an institution of higher education have a direct impact on the standards of education.

The Court has rightly argued in *Preeti* that if the students of low calibre are admitted to a course, the standard of teaching and instruction has to be lowered. But if the calibre of students is high, the level of teaching can also be high. The level of teaching depends on the calibre of the students. Therefore, the rules for admission have relation with the maintenance of standards and, thus, relates to entry 66, List. I. The Centre can, therefore, prescribe the same under entry 66, List I. A State may however impose some additional qualifications for admission, but it can not lower the norms laid down as it can have an adverse effect on the standards of education in the institutes of higher learning. This approach has vindicated the approach of MUDHOLKAR, J., in *Chitralekha*.[16]

Since medical and university education now falls in the Concurrent List (entry 25, List III), the Centre can legislate on admission criteria and, if it does so, the State cannot legislate in this field except to the extent provided in Art. 254.[17]

The Supreme Court has now overruled *Nivedita* insofar as it was held there that the question of standard arises only after admission and not at the time of admission. The Court has also overruled the earlier observation made by it in *Ajay Kumar Singh* that since all students passed the same common examination, standards are not adversely affected even as a result of admission of students of lower merit. The States can prescribe qualifications in addition to those prescribed under entry 66, List I, in order to raise standard of education, but lower-

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13. *Preeti Srivastava (Dr.) v. State of Madhya Pradesh*, AIR 1999 SC 2894 : (1999) 7 SCC 120. The Court overruled some observations to the contrary in such cases as *State of Madhya Pradesh v. Nivedita Jain*, (1981) 4 SCC 296 : AIR 1981 SC 2045 and *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401.
The ruling in *Preeti* has been followed by the Supreme Court in *Venterinary Council of India v. Indian Council of Agricultural Research*, (2000) 1 SCC 750 : AIR 2000 SC 545.

14. *Supra*, footnote 9.

15. To begin with, the cut-off point for these candidates was zero. But the Supreme Court struck it down in *Dr. Sadhana Devi v. State of Uttar Pradesh*, AIR 1997 SC 1120 : (1997) 3 SCC 90, saying that if no minimum qualification was fixed for reserved category candidates, merit would be sacrificed altogether. Thereafter, the cut off point was fixed for such candidates as well though it was much lower than that for general candidates.

16. *Supra*, footnote 6.

17. For discussion on Art. 254, see, Sec. H, *infra.*

ing of norms laid down under entry 66 is not permissible as it has an adverse impact on the standard of education in institutes of higher learning. Any power exercised by a State in the area of education under entry 25, List III, is subject to any existing relevant provisions made in that regard by the Central Government. The States must comply with the minimum standards laid down in a Central Statute while making admissions. However, the States may, in addition, prescribe other additional norms for admission under entry 25, List III.

The Court declared both the provisions made by the States of U.P. and Madhya Pradesh as invalid. The Court ruled that the minimum qualifying marks for passing the entrance examination for admission to post-graduate medical course can be prescribed by the Centre under entry 66, List I. Further, the Court left it to the Medical Council of India, the body created by Parliament, to decide the question whether lower minimum qualifying marks for the reserved category candidates can be prescribed at the post-graduate level of medical education. But even if the minimum qualifying marks can be lowered for the reserved category candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category and for those of the general category. The percentage of 20% for the reserved category and 45% for the general category (as was done in U.P.) has been held to be not permissible. Further, at the level of admission to the super speciality courses, no special provisions are permissible, they being contrary to national interest. Merit alone can be the basis of selection at that level.[18]

The Supreme Court has ruled[19] that the expression 'coordination' used in entry 66, List I, does not merely mean 'evaluation'. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes the action not only for removal of disparities in standards but also for prevention of occurrence of such disparities. Therefore, it would also include power to do all things which are necessary to prevent what would make 'co-ordination' either impossible or difficult.

The Court has held further that this power of the Centre is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention. Therefore, to the extent that the State legislation is in conflict with the Central legislation even when the State legislation is enacted under entry 25, List III, the State Legislation cannot prevail. One thing, however, is quite clear from these cases. If the Centre were to lay down an all-India basic standard for admission, examination, *etc*., for institu-

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18. This Judgment has been delivered by four Judges.

S. R. MAJMUDAR, J., dissented with the majority view and propagated the view that the State can fix 50% minimum qualifying marks for passing the entrance examination for general category candidates and not less than 25% marks for reserved category of candidates. Basically the dissenting Judge propounded the view that it falls within the domain of the States running the institutions to regulate admissions to them as the matter falls under entry 25, List III.

Reference may also be made in this connection to the discussion on Art. 15(4), see, *infra*, Ch. XXII.

19. *State of Tamil Nadu v. Adhiyaman Educational and Research Institute,* 1995 AIR SCW 2179 : (1995) 4 SCC 104.

Also see, *Ramswarup Meena v. University of Rajasthan,* AIR 1997 Raj 35.

tions of higher education, that law would be good under entry 66, List I, and any State law or practice inconsistent therewith would be invalid.

In *Prem Chand Jain v. R.K. Chhabra,*[20] the Supreme Court has held that the University Grants Commission Act enacted by Parliament falls under entry 66, List I. The Act establishes the University Grants Commission.

The State of Andhra Pradesh passed an Act establishing the Commissionerate of Higher Education. The provisions of the State Act very much corresponded with the provisions of the University Grants Commission Act. With minor differences here and there, the State Act was in the same terms as the Central Act. The Supreme Court declared the State Act void and inoperative as it encroached upon entry 66, List I. The State Act established a corporate body with powers supreme in regard to all matters pertaining to higher education. The State sought to justify the Act under entry 25, List III, but the Supreme Court held the Act to fall under entry 66, List I. The State Act was in *pari materia* with the UGC Act as both the Acts dealt with the same subject-matter. Both dealt with the co-ordination and determination of excellence in the standards of teaching and examination in the universities, but this matter belonged exclusively to the Centre under entry 66, List I. Thus, the State had encroached upon entry 66, List I. Any State legislation on a subject falling in List I is void, inoperative and unenforceable.[21]

A State Act taking over a private educational institution falls not under entry 66, List I, but under entry 42, List III.[22]

Parliament has enacted the All India Council for Technical Education Act, 1987, with a view to the proper planning and co-ordinated development of the technical education system in India. The Act has been enacted under entry 66, List I, and entry 25 of List III. It lays down conditions for establishment of private engineering colleges. Accordingly, a State can not make a law on this subject under entry 25, List III inconsistent with the Central Act. Under s. 10(k) of the Central Act, power to grant approval for starting technical institutions vests in the Council. A law requiring approval of a State Government to start such a college will be repugnant to the Central law. The Central Act occupies the field relating to grant of approvals for establishing technical institutions and the provisions of the Central law alone are to be complied with in this respect.[23]

Conditions for establishment of new medical colleges can be laid down, by Parliament/State Legislatures under entry 25, List III. If, however, Parliament enacts a law and evinces an intention to occupy the entire field, then no space is left for the States to enact any law on the subject.[24]

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20. AIR 1984 SC 981 : (1984) 2 SCC 302.

21. *Osmania University Teachers Association v. State of Andhra Pradesh,* AIR 1987 SC 2034 : (1987) 4 SCC 671.

22. *L.N. Mishra Institute of E.D & Social Change v. State of Bihar,* AIR 1988 SC 1136.

23. *Unnikrishan, J.P. v. State of Andhra Pradesh,* AIR 1993 SC 2178 : (1993) 1 SCC 645; *State of Tamil Nadu v. Adhiyaman Educational & Research Institution,* (1995) 4 SCC 104; *Govt. of A.P. v. J.B. Educational Society Hyderabad,* AIR 1998 AP 400; *Jaya Gokul Educational Trust v. Commr. & Secy. to Govt. Higher Education Dept.,* AIR 2000 SC 1614 : (2000) 5 SCC 231; *Union of India v. Shah Goverdhan L. Kabra Teachers College,* (2002) 7 SCALE 435.

Also see, *Thirumuruga Kirupan & Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu,* AIR 1996 SC 2384 : (1996) 3 SCC 15; see, *infra,* Sec. H. "under Repugnancy".

24. For discussion on the Rule of Occupied Field, see, *infra,* under 'Repugnancy', Sec. H(c).

Section 10A of the Indian Medical Council Act, 1956, enacted by Parliament, establishes the Indian Medical Council to prescribe standards of post-graduate medical education. The Act lays down conditions for establishment of new medical colleges. The Supreme Court has ruled that Parliament has made "a complete and exhaustive" provision concerning establishment of new medical colleges. No scope is thus left for any legislation by a State in this field which is fully covered by the law made by Parliament.[25]

Regulation of admission of students to Medical Colleges falls outside entry 66, List I, and inheres in entry 25, List III. While regulation of admission to medical courses may be incidental to the power under entry 66, List I, it is integral to the power conferred by entry 25, List III.[26]

A State law enabling incorporation of such universities which have off campus centres outside the state has been held to be *ultra vires* Art. 245(1).[27]

Referring to List II Entry 32, the Supreme Court has pointed out that incorporation of a company is entirely different from incorporation of a university and they are conceptually different. Sections, 3, 3(1)(i), 12, 13, 26, 33 and 34 of the Companies Act relate to incorporation of a company. It need not have a prior business and a mere statement of a lawful purpose in the memorandum of association is enough. If a company is unable to achieve its objective and is unable to carry on business, the shareholders may suffer some financial loss, but there is absolutely no impact on society at large. However, an university once incorporated gets a right to confer degrees. A university having no infrastructure or teaching facility of any kind would still be in a position to confer degrees and thereby create a complete chaos in the matter of coordination and maintenance of standards in higher studies which would be highly detrimental for the whole nation. A university may, therefore, be established by the State in exercise of its sovereign power which would obviously be through a legislative enactment. In the case of a private university it is necessary that it should be a pre-established institution for higher education with all the infrastructural facilities and qualities which may justify its claim for being conferred with the status of a university and only such an institution can be conferred the legal status and a juristic personality of a university. When the Constitution has conferred power on the State to legislate on incorporation of a university, any Act providing for establishment of a university must make such provisions that only an institution in the sense of university as it is generally understood, with all the infrastructural facilities, where teaching and research on a wide range of subjects and of a particular level are actually done, acquires the status of a university.[28]

(e) LIQUOR

The question of control over manufacture, production *etc*. of rectified spirit has been considered by the Supreme Court in *Bihar Distillery v. Union of India*[29].

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25. *T.K.V.T.S.S. Medical Educational & Charitable Trust v. State of Tamil Nadu,* AIR 1996 SC 2384 : (1986) 3 SCC 15; *Ayurvediya Chikitsa Parishad v. State of Uttar Pradesh,* AIR 1998 All 366.

26. *State of Madhya Pradesh v. Kumari Nivedita Jain,* AIR 1981 SC 2045 : (1981) 4 SCC 296; *Ajay Kumar Singh v. State of Bihar,* (1994) 4 SCC 401; *Nachane Ashwini Shivram v. State of Maharashtra,* AIR 1998 Bom 1; *Dr. Aditya Shrikant Kelkar v. State of Maharashtra,* AIR 1998 Bom. 260.

27. *Prof. Yashpal v. State of Chhattisgarh,* (2005) 5 SCC 420 : AIR 2005 SC 2026.

28. *Prof. Yashpal v. State of Chhattisgarh,* (2005) 5 SCC 420 : AIR 2005 SC 2026.

29. AIR 1997 SC 1208 : (1997) 2 SCC 727.

There has been a lot of confusion on this point. A number of judicial pronouncements have been made earlier[30] and the judicial opinion has been shifting from case to case. Now, in *Bihar Distillery,* the Court has rendered a definitive opinion on the point.

A number of entries become relevant in this connection, *viz.,* entries 7 and 52, List I; entries 8 and 24, List II, and entry 33, List III. There is also the Industries (Development & Regulation) Act, 1951, enacted by Parliament under entry 52, List I, which has taken over fermentation industries under Central control. After a combined reading of all these provisions, the Court has come to the following conclusions.

(a) Rectified spirit is both potable and non-potable. It means that it can be converted into country liquor just by adding water; it is also industrial alcohol as it is used as raw material for many industries. But denatured spirit is non-potable and wholly and exclusively industrial alcohol.

(b) As regards industries manufacturing rectified spirit exclusively for industrial purposes, they fall under the total and exclusive control of the Centre and are governed by the IDR Act. The function of the States is to ensure that rectified spirit is not diverted or misused for potable purposes.[31]

(c) Industries manufacturing rectified spirit exclusively for manufacturing potable liquors are under the total and exclusive control of the States in all respects and at all stages.

(d) The position regarding industries manufacturing rectified spirit for both purposes—potable as well as industrial – is as follows. The power to permit establishment of distillery vests exclusively in the Centre. The States can however take steps to ensure against misuse or diversion of rectified spirit meant for industrial purposes.

The Court has clarified that under entry 8, List II, the power to permit the establishment of any industry engaged in the manufacture of potable liquors (including Indian made foreign liquors), beer, country liquors and other intoxicating drinks is exclusively, vested in the States. The power to prohibit and/or regulate the manufacture, production, sale, transport or consumption of such intoxicating liquors is equally that of the States. It has also been clarified that entry 8, List II, is not overridden by entry 52, List I.[32]

(f) LAW AND ORDER

Parliament has enacted the Armed Forces (Special Powers) Act, 1958, for the suppression of disorder and for restoration and maintenance of public order in the disturbed areas of Assam. The constitutional validity of the Act was challenged before the Supreme Court. To decide the matter, the Supreme Court had to elucidate the relationship between entries 2A of List I and 1 of List II.

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30. *Synthetics & Chemicals v. State of Uttar Pradesh*, AIR 1980 SC 614 : (1980) 2 SCC 441 : AIR 1990 SC 1927 : (1990) 1 SCC 109; *State of Andhra Pradesh. v. McDowell*, AIR 1996 SC 1561 : (1996) 3 SCC 709.

31. *Shri Bileshwarkhana Udyog Khedut Sahakari Mandal Ltd. v. State of Gujarat,* AIR 1992 SC 872 : (1992) 2 SCC 42.

32. *State of Andhra Pradesh v. McDowell,* AIR 1996 SC 1561 : (1996) 3 SCC 709, *Bihar Distillery v. Union of India,* AIR 1997 SC 1208, 1219 : (1997) 3 SCC 727.

The States have power to legislate with respect to "public order" under entry 1, List II. Out of this entry, the field encompassing the use of armed forces in aid of civil power has been carved out and, thus, legislative power with respect to that field has been excluded from the State purview. The States have no power to legislate with respect to the use of the armed forces of the Union in aid of civil power for the purpose of maintaining public order in the State. The legislative competence with respect to that matter vests exclusively in Parliament under entry 2A of List I.

The expression "in the aid of civil power" in entry 2A postulates that the civil authority continues to exist even after the deployment of armed forces. The Centre cannot enact a law enabling the armed forces of the Union "to supplant or act as a substitute for" the civil power of the State.

The Supreme Court has rejected the contention that in the event of deployment of armed forces of the Union in aid of civil power in a State, the supervision and control over the armed forces has to be with the State civil authorities. According to the Court, "The said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the Armed Forces is effectively dealt with and normalcy is restored."[33]

The Court has ruled that the impugned Act is not *ultra vires* the legislative power of Parliament conferred on it by entry 2A, List I.

(iv) RULE OF PITH AND SUBSTANCE

Parliament or a State Legislature should keep within the domain assigned to it, and not trespass into the domain reserved to the other. A law made by one which trespasses or encroaches upon the field assigned to the other is invalid. If a subject falls exclusively in List II, and in no other List, then the power to legislate exclusively vests in the State Legislature. But if it also falls in List I as well, then the power belongs to the Centre. Similarly if it falls within List III also, then it is deemed to be excluded from List II. The dominant position of Parliament in List I and List III is thus established.

But before the legislation with respect to a subject in one List, and touching also on a subject in an other List, is declared to be bad, the Courts apply the rule of pith and substance.[34] To adjudge whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. This rule envisages that the legislation as a whole be examined to ascertain its 'true nature and character' in order to determine to what entry in which List it relates. In determining whether the impugned Act is a law with respect to a given power, the Court has to consider whether the Act, in its pith and substance, is a law on the subject in question. To examine whether a legislation has impinged on the field of other legislatures, in

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33. *Naga People's Movement of Human Rights v. Union of India,* AIR 1998 SC 431 at 447 : (1998) 2 SCC 109.

34. The rule has been borrowed from Canada. Some Canadian cases on the rule are: *Citizens Insurance Company v. Parsons*, 7 A.C. 96; *Russell v. The Queen*, 7 A.C. 829; *Att. Gen for Canada v. Att. Gen. for British Columbia*, 1930 A.C. 111; *Att. Gen. for Saskatchewan v. Att. Gen. for Canada*, AIR 1949 P.C. 190.

fact or in substance, or is incidental, keeping in view the true nature of the enactment, the Courts have evolved the doctrine of "pith and substance" for the purpose of determining whether it is legislation with respect to matters in one list or the other. For applying the principle of "pith and substance" 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. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the Courts look into the substance of the enactment. Thus, if the substance of enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid.[35]

To ascertain the true character of the legislation in question, one must have regard to it as a whole, to its objects and to the scope and effect of its provisions. If according to its 'true nature and character', the legislation substantially relates to a topic assigned to the Legislature which has enacted it, then it is not invalid 'merely because it incidentally' trenches or encroaches on matters assigned to another Legislature. The fact of incidental encroachment does not affect the *vires* of the law even as regards the area of encroachment. To put it differently, incidental encroachment is not altogether forbidden.

The Supreme Court has enunciated the principle in *Premchand Jain v. R.K. Chhabra*[36] as follows:

> "As long as the legislation is within the permissible field in pith and substance, objection would not be entertained merely on the ground that while enacting legislation, provision has been made for a matter which though germane for the purpose for which competent legislation is made, it covers an aspect beyond it. In a series of decisions this Court has opined that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature enacting it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature."[37]

To ascertain the true character of a law, it must be looked into as an organic whole. It would be a wrong approach to view the statute as a mere collection of sections, to disintegrate it into parts and then to examine under which entry each part would fall and then to determine which part of it is valid and which invalid. Instead, the Act should be taken in one piece and then its true character determined. The name given by the legislature to the legislation is immaterial.[38] It is not enough to examine the object of enactment in question.[39]

Wrong reason in the Statement of Objects and Reasons for imposing the tax would not render the Act invalid.

If the State Legislature was competent to pass the Act, the question of motive with which the tax was imposed is immaterial and there can be no plea of a colourable exercise of power to tax if the Government had the power to impose the tax.[40]

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35. *Bharat Hydro Power Corpn. Ltd. v. State of Assam*, (2004) 2 SCC 553 : AIR 2004 SC 3173.
36. AIR 1984 SC 981 : (1984) 2 SCC 302.
37. Also see, *State of Rajasthan v. Vatan Medical & General Store*, AIR 2001 SC 1937 : (2001) 4 SCC 642.
38. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
39. *E. V. Chinnaiah v. State A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
40. *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155 : AIR 2004 SC 3894.

The doctrine of pith and substance saves the incidental encroachment if only the law in pith and substance falls within an entry within the legislative field of the particular legislature which has enacted it. The validity of legislation is not determined by the degree of invasion into the field assigned to the other legislature though it is a relevant factor to determine its 'pith and substance', as the legislation in question may advance so far into the other sphere as to show that its true nature and character is not concerned with a matter falling within the domain of the enacting legislature, in which case it will not be valid.

Once it is found that in pith and substance a law falls within the permitted field, any incidental encroachment by it on a forbidden field does not affect the competence of the concerned legislature to enact the law. "Effect is not the same thing as subject-matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an entry in List II or III".[41]

The practical working of the rule can be appreciated by referring to a few decided cases.

The Bengal Money Lenders Act passed to scale down debts owed by the agriculturists, was challenged on the ground that being a provincial (State) law, it affected promissory notes, a Central subject (Entry 46, List I). The Privy Council found that in its true nature and character, the legislation dealt with money-lenders and money-lending (Entry 30, List II), and not with promissory notes. The money-lenders commonly take a promissory note as security for a loan. A legislature would not, in any real sense, be able to deal with money-lending if it cannot limit the liability of a borrower in respect of a promissory note given by him. The Act was held valid even though as an ancillary effect it affected the negotiable instruments—a Central subject.[42]

The Supreme Court has enunciated the rule of pith and substance in *Balsara*[43] as follows:

> "It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field and, therefore, it is necessary to enquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another legislature".

Applying the rule of pith and substance, it has been held that—

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41. *State of Bombay v. Narottamdas,* AIR 1951 SC 69, 96 : 1951 SCR 51; *Atiabari Tea Co. v. State of Assam,* AIR 1961 SC 232 : 1961 (1) SCR 809; *Kannan D.H.P. Co. v. State of Kerala,* AIR 1972 SC 2301. Also, *Sita Ram v. State of Rajasthan,* AIR 1974 SC 1373; *Kerala State Electricity Board v. Indian Aluminium,* AIR 1976 SC 1031; *State of Karnataka v. Ranganatha Reddy,* AIR 1978 SC 251; *Southern Pharmaceuticals and Chemicals v. State of Kerala,* AIR 1981 SC 1863 : (1981) 4 SCC 391; *Hoechst Pharmaceutical Ltd. v. State of Bihar,* AIR 1983 SC 1019 : (1983) 4 SCC 45; *Krishan Bhimrao Deshpande v. Land Tribunal,* AIR 1993 SC 883; *P.N. Krishna Lal v. Govt. of Kerala,* (1995) Supp (2) SCC 187; *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 : 1994 Cri LJ 3139; *Union of India v. Shah Goverdhan L. Kabra Teachers College,* (2002) 7 SCALE 435.

42. *Prafulla Kumar v. Bank of Commerce, Khulna,* 74 I.A. 23. Also *Subrahmanyan v. Muttuswami,* AIR 1941 FC 47.

43. *State of Bombay v. Balsara,* AIR 1951 SC 318, at 322. Also see, *Atiabari Tea Co. Ltd. v. State of Assam,* AIR 1961 SC 232 : (1961) 1 SCR 809.

(*i*) A State law enforcing prohibition is valid because it prohibits purchase, use, possession, transport and sale of liquor (Entry 8, List II), and it only incidentally encroaches on the Central power on imports (Entry 41, List I).

(*ii*) A State prohibition law is valid even though it also deals with some aspects of evidence and criminal procedure which fall in the Concurrent List, for the law deals, in substance, with intoxicating liquors and only incidentally with evidence and criminal procedure.[44]

(*iii*) The Industrial Disputes Act enacted by Parliament, even though it applies to employees of municipalities, is valid as, in substance, it deals with 'industrial and labour disputes' (Entry 22, List III), and not with 'local government' (Entry 5, List II).[45]

(*iv*) A State law banning use of amplifiers after 10 P.M. is valid as it seeks to control use of amplifiers in the interests of health (Entry 6, List II), and it only incidentally touches upon entry 31, List I.[46]

(*v*) A State law dealing with co-operative societies engaged in the banking business falls under entry 32, List II, and not under Entry 44 or 45, List I.[47]

(*vi*) A State Law dealing with chit funds falls under Entry 7, List III, and not under Entries 26 or 30 of List II. It does not fall under Entry 34, List II, as there is no element of gambling in running chits, nor under Entry 45, List I, as the essence of banking is absent in running chits.[48]

(*vii*) A State law reducing arrears of rent or debts due from agriculturists falls under entries 18 and 30, List II.[49]

(*viii*) The Central Reserve Police Force Act enacted by Parliament falls under Entry 2, List I, and Entries 1 and 2, List III, and not under Entry 2, List II.[50]

(*ix*) The object of the Advocates Act, 1961, is to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Though the Act relates to legal practitioners, in its pith and substance it concerns itself with the qualifications, enrolment and discipline of the persons entitled to practise as advocates before the Supreme Court or the High Courts. The Act thus falls under items 77 and 78 of List I. The power to legislate in regard to such persons is excluded from entry 26 of List III.[51]

(*x*) In *Krishna v. State of Madras*,[52] applying the rule of pith and substance, the Supreme Court upheld the Madras Prohibition Act, even though it laid down procedure and principles of evidence for trial of offences under the law in question very different from those contained in the Criminal Procedure Code and the In-

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44. *Krishna v. State of Madras*, AIR 1957 SC 297 : 1957 SCR 399.
45. *D.N. Banerji v. P.R. Mukherjee*, AIR 1953 SC 58 : 1953 SCR 302.
46. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.
47. *Central Co-op. Bank, Nagpur v. Divisional Jt. Registrar*, AIR 1971 Bom. 365; *Sultan Singh v. Asstt. Registrar*, AIR 1972 All. 159.
48. *C.C. Fund v. Union Territory of Pondicherry*, AIR 1972 Mad. 99.
49. *K.W. Estates v. State of Madras*, AIR 1971 SC 161 : (1970) 3 SCC 894.
50. *State of West Bengal v. Tarun Kumar*, AIR 1975 Cal. 39.
51. *O.N. Mohindroo v. Bar Council*, AIR 1668 SC 888 : (1968) 2 SCR 709; *Bar Council, U.P. v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261.
52. AIR 1957 SC 297 : 1957 SCR 399.

dian Evidence Act, both Central Acts in the Concurrent field. In this case, the Court appears to have gone rather too far in upholding the State law.

In *Ukha*,[53] the Supreme Court had held that provisions in the State law in question concerning criminal procedure and evidence fell under entries 2 and 12 of List III. The only difference in the situations in the two cases appears to be that, while in *Ukha* the State law had received the Presidential assent, the law involved in *Krishna* had not been so reserved, and this perhaps explains the dichotomy in the judicial attitudes, for to take the same view in *Krishna*, as was done in *Ukha*, would have been to hold the law bad on the ground of repugnancy with a Central law.[54]

The danger in taking the *Krishna* doctrine too far is that the uniformity achieved in the procedural areas may be destroyed; the Cr.P.C. would become limited to offences under the I.P.C., and the States would be free to lay down their own brand of procedure and evidence for trial of offences created by their own laws under List II.

The doctrine of pith and substance introduces a degree of flexibility into the otherwise rigid scheme of distribution of powers. It gives an additional dimension to the powers of the Centre as well as the States. The reason behind the rule is that if every legislation were to be declared invalid, howsoever, slight or incidental the encroachment by it of the other field, then the power of each legislature will be drastically circumscribed to deal effectively with the subjects entrusted to it for legislation.

Though the rule applies to both, the Centre and the States, and helps both to some extent, yet since Parliament is the more dominant legislature and its powers are more generally and broadly worded, the State Legislatures benefit much more by the rule than Parliament, for the rule enables them to incidentally trespass into the much larger, and comparatively more important, Central Area.

The doctrine gives quite a good deal of maneuverability to the Courts. It furnishes them with a tool to uphold legislation, for it is for them to decide its true nature and character and, thus, they have a number of choices open to them and most often the Courts by putting a favorable interpretation on the legislation in question use their power to support the same.[55]

Legislation made under the power of regulation and control of one legislature, in respect of a particular subject of legislation, does not *ipso facto* deprive another legislature of the power of taxation in respect of the same subject of legislation. Power to tax or impose a levy for augmenting revenue shall continue to be exercisable by the legislature in whom it vests, in spite of regulation or control having been assumed by another legislature, unless the tax legislation concerned levies a tax in such a manner or of such magnitude as can be demonstrated to be tampering or intermeddling with the other legislature's power of regulation and control. Further it has been held that the primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the

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53. *Ukha Kolhe v. State of Maharashtra*, AIR 1963 SC 1531 : (1964) 1 SCR 926.
54. See, Sec. H, *infra*, on this aspect.
55. Also see, *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218; *supra*, footnote 41.

nature of a tax and within the power of taxation of the legislature concerned cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity by reason of the incidence of the levy being permitted to be passed on to the buyer.[56]

(v) DOCTRINE OF COLOURABLE LEGISLATION

The doctrine of colourable legislation is based on the maxim that what cannot be done directly cannot also be done indirectly. The doctrine becomes applicable when a legislature seeks to do something in an indirect manner what it cannot do directly. The doctrine thus refers to the question of competency of the legislature to enact a particular law. If the impugned legislation falls within the competence of the legislature, the question of doing something indirectly which cannot be done directly does not arise.

The doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. If the legislature is competent to pass a particular law, the motives which impelled it to act are irrelevant. On the other hand, if the legislature lacks the competency, the question of motive does not arise at all; the legislation will be invalid even if enacted with the best of motives. Whether a statute is constitutional or not is thus a question of power. "Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of *mala fides*."[57]

The Constitution distributes legislative powers between the State Legislatures and Parliament, and each has to act within its sphere. In respect of a particular legislation, the question may arise whether the legislature has transgressed the limits imposed on it by the Constitution. Such transgression may be patent, manifest or direct, or may be disguised, covert or indirect. It is to the latter class of cases that the expression 'colourable legislation' is applied. The underlying idea is that although, apparently, a legislature in passing a statute purports to act within the limits of its powers, yet, in substance and reality, it has transgressed these limits on its powers by taking resort to a mere pretence or disguise. If that is so, the legislation in question is invalid.

The legislation enacted may be regarded on colourable legislation. It is only when a legislature having no power to legislate frames a legislation so camouflaging the same as to make it appear to fall within its competence, the legislation enacted may be regarded as colourable legislation. The extent of encroachment in the field reserved for the other legislature is an element for determining whether the impugned Act is a colourable piece of legislation.

The essence of the matter is that a legislature having restrictive power cannot seek to do something indirectly which it cannot accomplish directly within the scope of its power. A legislature cannot overstep the field of competency indirectly. It is also characterised as a fraud on the Constitution because no legislature can violate the Constitution by employing an indirect method. The Supreme

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56. *State of W. B. v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.

57. *R.S. Joshi v. Ajit Mills, Ahmedabad,* AIR 1977 SC 2279 : (1977) 4 SCC 98. Also see, Ch. II, Sec. M, *supra.*

Court has explained the doctrine of colourable legislation as follows in *Gajapati*:[58]

> "If the constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries... 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 or indirect, and it is to this latter class of cases that the expression colourable legislation has been applied... 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 mere pretence or disguise."

To the same effect is the following observation of the Supreme Court in *R.S. Joshi*:[59]

> "In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant…. if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motives were most commendable."

To decide whether or not the legislature has transgressed the sphere assigned to it, what is material is the pith and substance; the true nature and character, of the legislation in question and not its outward or formal appearance. If the subject-matter of the legislation, in substance, is beyond the powers of the legislature, the form in which the legislation is clothed would not save it from condemnation.[60] As the Supreme Court has observed in *Gajapati:* "The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these the inquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority."[61]

The doctrine of colourable legislation has no application if the legislature concerned has constitutional authority to pass a law in regard to a particular subject, whatever the reasons behind it may be. The whole doctrine resolves itself into the question of competency of the enacting legislature to enact the law in question.

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58. *K.C. Gajapati Narayana Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1. Also see, *Gullapalli Negeswara Rao v. A.P. State R.T.C.*, AIR 1959 SC 308, 316 : 1959 Supp (1) SCR 319; *K. Kunhikoman v. State of Kerala*, AIR 1962 SC 723 : 1962 Supp (1) SCR 829; *Jayvantsinghji v. State of Gujarat*, AIR 1962 SC 821 : 1962 Supp (2) SCR 411; *Jalan Trading Co v. Mill Mazdoor Sabha*, AIR 1967 SC 691 : (1967) 1 SCR 15; *Jabalpur Bus Operators' Ass. v. Union of India*, AIR 1994 MP 62.

59. *Supra*, footnote 57.

60. *Ashok Kumar v. Union of India,* AIR 1991 SC 1792 : (1991) 3 SCC 498. For the Rule of Pith and Substance, see, *supra.*

61. *Supra*, footnote 58.

If the legislature is competent to pass the particular law, the motives which impel it to make the law are irrelevant.[62] As the Supreme Court has stated[63]: "The doctrine of colourable legislation is relevant only in connection with the question of legislative competency". Also, if the legislature is competent to do a thing directly then the mere fact that it is attempting to do it indirectly cannot make the Act invalid.

In a recent case,[64] the Supreme Court rejecting the argument that the Armed Forces (Special Powers) Act, 1958, enacted by Parliament is colourable legislation and a fraud on the Constitution, has observed in this connection:

> "The use of the expression 'colourable legislation' seeks to convey that by enacting the legislation in question the legislature is seeking to do indirectly what it cannot do directly. But ultimately the issue boils down to the question whether the legislature had the competence to enact the legislation because if the impugned legislation falls within the competence of the legislature the question of doing something indirectly which cannot be done directly does not arise".

The real purpose of a legislation may be different from what appears on its face, but it would be colourable legislation only if the real object is not attainable by the Legislature because it lies beyond its ambit. The impugned Act has been held to relate to entry 2 of List I as well as the residuary power of Parliament under Art. 248 read with entry 97 of List I.[65]

The doctrine of colourable legislation has reference to the competence and not to the motives, *bona fides* or *mala fides* of the legislature. The motives of a legislature in making a law are irrelevant.

It is not for the Courts to divine and scrutinise the policy which led to the enactment of a law falling within the ambit of the legislature concerned. As the Supreme Court has observed:[66] "The motive of the legislature in passing a statute is beyond the scrutiny of the Courts....The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts."[67]

It is rare that a law is declared bad on the ground of colourable legislation. A State law dealing with the abolition of the landlord system, provided for payment of compensation on the basis of income accruing to the landlord by way of rent. Arrears of the rent due to the landlord prior to the date of acquisition were to vest in the State, and half of these arrears were to be given to the landlord as compensation. The provision was held to be a piece of colourable legislation and hence void[68] under entry 42,

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62. *Shankaranarayana, infra,* footnote 66.
63. *Bhairebendra Narayan v. State of Assam,* AIR 1956 SC 503 : 1956 SCR 303.
64. *Naga People's Movement for Human Rights v. Union of India,* AIR 1998 SC 431, 451 : (1998) 2 SCC 109. For this Act, see, *supra,* Sec. E.
65. For Residuary Power of Parliament, see, Sec. I.
66. *B.R. Shankaranarayana v. State of Mysore,* AIR 1966 SC 1571 : (1967) 2 LLJ 751; *T.G. Venkataraman v. State of Madras,* AIR 1970 SC 508 : (1969) 2 SCC 299; *Laxmi Narayan v. State of Orissa,* AIR 1983 Ori. 210; *R.S. Joshi v. Ajit Mills,* 1977 SC 2279 : (1977) 4 SCC 98.
67. *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724, 733 : 1985 (3) SCC 198.
68. *State of Bihar v. Kameshwar,* AIR 1952 SC 252, 289 : 1952 SCR 889.

List III,[69] as "the taking of the whole and returning a half means nothing more or less than taking half without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised. The impugned provision, therefore, in reality does not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent".

If a statute is found to be invalid on the ground of legislative competence, it does not permanently inhibit the legislature from re-enacting the same if the power to do so is properly traced and established. In such a situation, it cannot be said that the subsequent legislation is merely a colourable legislation or a camouflage to re-enact the invalidated previous legislation.[70]

Recently the Supreme Court has further elucidated the doctrine of colourable exercise of power in *S.S. Bola v. B.D. Sardana.*[71] The question whether it is colourable legislation, and as such void, does not depend on the motive or *bona fides* of the legislature to pass that particular law. What the Court has to determine in such a case is whether the legislature has purported to act within the limits of the power. There is in reality and substance a transgression of the powers, but the same is veiled by what appears on proper examination to be a mere pretence or disguise. If the legislature enacts a law on the pretext of the exercise of its legislative power, though actually it does not possess such power, the legislation to that extent is void as the legislature makes its Act only in pretence of, and in purported colourable exercise of, its power. It has been held that an university cannot be established only to provide consultancy work to industry and public organizations. Chhattisgarh Adhniyam of 2002 permitting creation of such universities was a colourable piece of legislation.[72]

H. REPUGNANCY BETWEEN A CENTRAL AND STATE LAW

(a) ARTICLE 254(1)

The constitutional provision relevant for solving questions of repugnancy between a Central law and a State law is to be found in Art 254.

According to Art. 254(1), if any provision of a State law is repugnant to a provision in a law made by Parliament which it is competent to enact, or to any existing law with respect to one of the matters in the Concurrent List, then the Parliamentary or the existing law prevails over the State law, and it does not matter whether the Parliamentary law has been enacted before or after the State law. To the extent of repugnancy, the State law is void.

The most common application of this provision arises when both the Central law and the State law happen to be with respect to the same matter in the Concurrent List and there is repugnancy between them. Repugnancy between two statutes—Central and State—arises if there is direct conflict, *i.e.* these laws are fully inconsistent and have absolutely irreconcilable provisions and if the laws made

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69. At this time, entry 42, List III, spoke of "principles on which compensation for property acquired or requisitioned for the purpose of the Union or of a State or any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

The entry has since been substantially modified, *supra*, Sec. F.

70. *S. Sat Pal & Co. v. Lt. Gov. of Delhi*, AIR 1979 SC 1550, 1555 : (1979) 4 SCC 232.

71. AIR 1997 SC at 3183, 3190 : (1997) 8 SCC 522.

72. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.

by Parliament and the State Legislature occupy the same field.[73] The Supreme Court has said that every effort should be made to reconcile the two enactments and construe both so as to avoid they being repugnant to each other. Repugnancy has to be there in fact and not based on a mere possibility. If the two enactments operate in different fields without encroaching upon each other then there would be no repugnancy.[74]

The repugnancy has to exist in fact and it must be shown clearly and sufficiently that the State law is repugnant to the Union law. There is no such repugnancy between Ss. 13 to 16 of State Act i.e. Maharashtra Control of Organised Crime Act, 1999 and provisions of Central Act i.e., Telegraph Act, 1885, S. 5(2) read with Telegraph Rules, 1951.[75]

Because of Art. 254(1), the power of Parliament to legislate in regard to matters in List III is supreme. Art. 254(1) gives overriding effect to the provisions of a law made by Parliament which Parliament is competent to enact. A law made by the State is void if it is repugnant to the Central law.

The phraseology of the provision on a plain reading suggests that it would apply to all cases of repugnancy between a Central law and a State law. It does not say that the State law and the Central law should belong to the Concurrent List only. The words 'in the Concurrent List' appear to qualify only the 'existing' law which means that an existing law in relation to a matter in the Concurrent List prevails over a State law in that area in case of repugnancy. So far as the post-Constitution laws are concerned, the words used are "which Parliament is competent to enact" which are quite broad and would comprise laws made by the Centre both in the Central as well as the Concurrent Lists. This will mean that if there is repugnancy between a State law falling in the State List and a Central law falling in the Central List, the latter should prevail over the former. But the judicial interpretation of Art. 254(1) has so far been otherwise. The judicial decisions have consistently ruled that repugnancy arises, and Art. 254(1) applies, only when both the laws—Central and the State—pertain to a matter in the Concurrent List, and not otherwise.[76] The Supreme Court has explained the purport of Art. 254(1) as follows in *Hoechst*:[77]

> "Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union Law relating to that subject, whether the Union law is prior or later in time, the Union Law will prevail and the State law shall, to the extent of such repugnancy, be void."

If a State makes a law with respect to a matter in the State List, then there is no question of repugnancy between it and a Central law pertaining to a matter in the Central or Concurrent List. This view is based on the rule of pith and substance. If a State law is enacted with respect to a matter in List I, it is void, but if it falls

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73. *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8; *Vijay Kumar Sharma v. State of Karnataka*, AIR 1990 SC 2072, 2080 : (1990) 2 SCC 562. Also see, *infra.*

74. *Bharat Hydro Power Corpn. Ltd. v. State of Assam*, (2004) 2 SCC 553 : AIR 2004 SC 3173. See also *Central Bank of India v. State of Kerala*, (2009) 4 SCC 94 : (2009) 3 JT 216.

75. *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 : (2008) 10 JT 77.

76. *State of Jammu & Kashmir v. M.S. Farooqi*, AIR 1972 SC 1738 : 1972 (1) SCC 872; *Bar Council of Uttar Pradesh v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261; *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031.

77. *Hoechst Pharm. Ltd. v. State of Bihar*, AIR 1983 SC 1019, 1041 : (1983) 4 SCC 45.

within the State List then its incidental encroachment into the Concurrent List will not render it invalid.[78]

A word of comment on this judicial approach to Art. 254(1) is called for at this stage. When an impugned statute appears to touch two different entries in two lists, then the rule of pith and substance helps in characterising the law as belonging to this or that entry. But, under Art. 254(1), questions of a different nature arise. Here the question is not whether a statute falls under this entry or that, but whether a State law comes into conflict with a Central law or not. It has been elucidated by the Supreme Court that for application of this article, firstly, there must be repugnancy between the State law and the law made by the Parliament. Secondly, if there is repugnancy, the State legislation would be void only to the extent of repugnancy. If there is no repugnancy between the two laws, there is no question of application of Article 254(1) and both the Acts would operate. Repugnancy between two statutes may be ascertained by considering whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature. Where the paramount legislation does not purport to be exhaustive or unqualified there is no inconsistency and it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law. Before coming to the conclusion that there is a repeal by implication, the Court must be satisfied that the two enactments are so inconsistent that it becomes impossible for them to stand together.[79]

It does not appear to be a sound proposition to confine Art. 254(1) only to the situation where the Central-State laws fall in the Concurrent List rather than when they fall in different Lists and yet are inconsistent to some extent. It is true that situations of repugnancy arise most commonly when the two laws fall in the same List, but it is not inconceivable that similar difficulty may arise when the two statutes fall in two different Lists.

The inconvenience which may arise by discarding the broader meaning of Art. 254(1) may be appreciated by the following example under Art. 253. Parliament can legislate even on a State matter to effectuate a treaty. It is quite possible that when Parliament passes such a law, it may come in conflict with an already existing State law on that subject. There appears to be no doubt that in such a situation the Central law would prevail over the State law but this result can be achieved only by invoking the wider meaning of Art. 254(1). In the *Kannan* case,[80] the Supreme Court envisaged the possibility of repugnancy between a Central Act (List I) and a State law falling under Lists II and III, though, in the instant case, no conflict between the two Acts was found.

Earlier in *Hingir Rampur Coal Co. v. State of Orissa*,[81] the Court went into the question of repugnancy between the State law (Entry 23, List II) and a Central law (Entry 52, List I) in two different Lists. Without referring to Art. 254, the Court held that there was no repugnancy between the two different Acts as they

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78. *Krishna v. State of Madras*, AIR 1957 SC 297 : 1957 SCR 399; *State of Madras v. Dunkerley*, AIR 1958 SC 560.

79. *Kanaka Gruha Nirmana Sahakara Sangha v. Narayanamma*, (2003) 1 SCC 228 : AIR 2002 SC 3659.

80. *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218.

81. AIR 1961 SC 459 : (1961) 2 SCR 537.
Also, *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431.

covered different fields. These cases do show that there is a possibility of repugnancy between a Central law and a State law enacted under the entries in Lists I and II.

Reference may also be made in this connection to *Srinivasa Raghavachar v. State of Karnataka*[82]. The Advocates Act, 1961, has been enacted by Parliament under entries 77 and 78 of List I. A State law prohibited legal practitioners from appearing before the land tribunal. The State law was held invalid as it was repugnant to the Central law. Here there was repugnancy between a Central Law enacted under an entry in List I and a State Law enacted under an entry in List II.

The interpretation put on Art. 254(1) by and large helps the States, and adds an additional dimension to their legislative power in the State List, as they can legislate with respect to a matter in List II without being unduly trammelled by the existence of a Central law in the Concurrent List or even in the Central List. The Indian Medical Council Act, 1956, has been enacted by Parliament under entry 26, List III. S. 27 of the Act provides that every person who is enrolled as a medical practitioner on the Indian Medical Register shall be entitled, according to his qualifications, to practise in any part of the country. A West Bengal Act prohibited members of the State Health Service from carrying on any private practice. The Supreme Court has ruled that the State Act is not repugnant to the Central Act because those who join the service voluntarily give up their right to practise. The State Act does not regulate the rights and privileges of the members of the medical profession in general. The State Act has been enacted under entry 41, List II. There is no conflict between the provisions of the two Acts and hence there is no repugnancy between the two under Art. 254.

The Court distinguished *Srinivasa* because there the restriction on practice was imposed by law, not undertaken voluntarily. The legal practitioners seeking to appear before the land tribunal were not members of any service and they had not given up their right to practice voluntarily in lieu of accepting the benefits of service. In the instant case, the doctors in question have voluntarily joined the State service and have subjected themselves to its terms and conditions, one of the terms being that they will have no right of private practice.[83]

The question of repugnancy between a Central law and a State law has been elaborately discussed by a three Judge Bench of the Supreme Court in *Vijay Kumar Sharma v. State of Karnataka*[84]. The State of Karnataka enacted the Karnataka Contract Carriages (Acquisition) Act, 1976, under entry 42, List III, providing for acquisition of contract carriages. Thereafter, Parliament enacted the Motor Vehicles Act, 1988, falling under entry 35 of List III, providing for grant of contract carriage permits. The question was, whether S. 20 of the Karnataka Act was repugnant to Ss. 73, 74 and 80 of the Central Act.

A majority and minority opinions were delivered by the Court in the instant case. The majority opined that, under Art. 254, the question of repugnancy can arise only in the Concurrent field. In Art. 254(1), it is clearly indicated that the competing legislations must be in respect of "one of the matters" enumerated in the Concurrent List. In the instant case, the two legislations did not relate to one common head of legislation in the Concurrent List; the two laws dealt with dif-

82. AIR 1987 SC 1518 : (1987) 2 SCC 692.
83. *Sukumar Mukherjee v. State of West Bengal*, AIR 1993 SC 2335 : (1993) 3 SCC 723.
84. AIR 1990 SC 2072 : (1990) 2 SCC 562.

ferent matters of legislation and, therefore, Art. 254(1) would not apply in such a situation. In the instant case, "the subject-matters of both the statutes and the object of the two sets of provisions" being different, "both statutes can stand together."

One of the majority Judges (SAWANT, J.) asserted that whenever, the question of repugnancy between the State and Central legislation is raised, the first thing to examine is whether the two Acts in question cover or relate to the same subject-matter and to determine this the rule of pith and substance ought to be applied[85] so as to find out the dominant intention of the two Acts. Both the Acts must be substantially on the same subject to attract Art. 254(1).

On the other hand, the minority Judge (K. RAMASWAMY, J.) found a direct conflict between the two statutes in the same occupied field. According to him, "the two sets of provisions run on collision course... Thereby, there exists the operational incompatibility and irreconcilability of the two sets of provisions". According to him, Art. 254(1) "posits as a rule that in case of repugnancy or inconsistency between the State law and the Union law relating *to the same matter* in the Concurrent List occupying the same field, the Union law shall prevail...."

He also denied that the rule of pith and substance would have any application when the matter in question is covered by an entry or entries in the Concurrent List and occupied the same field both in the Union and the State laws. It would not matter as to in which entry or entries in the Concurrent List the subject matter falls, or in exercise whereof the provisions therein were made. According to him, the doctrine of pith and substance would apply to questions of legislative competence of the respective legislatures in the federal system under Arts. 246(1) and 246(3) and to resolve the conflict of jurisdiction. The doctrine solves the problem of overlapping of "any two entries of two different lists *vis-a-vis* the Act".

Accordingly, the majority held the State Act valid, while the minority Judge held this Act to be void. It would appear from the above that the majority approach favoured the States while the minority approach supported the Centre.

But the overwhelming majority of the decided cases insist that the inconsistency must be in relation to the concurrent list and that is also the court's upto-date pronouncement declaring firmly and clearly that when one of the two Acts of Parliament is enacted in a field in List I Entry 66 and the other under List III Entry 25, the question of repugnancy does not arise. Repugnancy needs consideration when one Act is enacted by the Parliament and the other the State and the fields of both must be in relation to List III.[86]

(b) ARTICLE 254(2)

Article 254(1) lays down the general rule while Art. 254(2) is an exception to the general rule laid down in Art. 254(1).[87]

Article 254(2) provides an expedient to save a State law repugnant to a Central law on a matter in the Concurrent List, and, thus, relaxes the rigidity of the rule of repugnancy contained in Art. 254(1) as mentioned above. Ordinarily, under

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85. See, *supra*, Sec. G.(iv), for the Rule of Pith and Substance.

86. Annamalai University represented by *Registrar v. Secretary to Government, Information and Tourism Department*, (2009) 4 SCC 590 : (2009) 4 JT 43.

87. *T. Barai v. Henry & Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

Art. 254(1), in such a situation, the supremacy is in favour of the Centre, and a State law is void to the extent of repugnancy. There may, however, be some peculiar local circumstances prevailing in a State making some special provision, and not the uniform Central law, desirable on the matter. To introduce an element of flexibility, and to make it possible to have a State law suitable to the local circumstances kept alive in the face of a Central law to the contrary on a matter in the Concurrent List, Art. 254(2) has been incorporated in the Constitution.

Article 254(2) provides that where a State law with respect to a matter in the Concurrent List contains any provision repugnant to the provisions of a previous Central law *with respect to that matter*, the State law prevails in the State concerned if, having been reserved for the consideration of the President, it has received his assent. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in its application to that State only. Both laws deal with a Concurrent subject. The Supreme Court has explained the effect of Art. 254(2) thus:[88]

> "In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only".

The final say rests with the Centre which decides ultimately whether or not the Central law should give way to the State law. The State law so assented to by the Centre would however prevail in the State to the extent of inconsistency with the Central law; the State law would not override the whole of the Central law.[89]

In Art. 254(2), the words "with respect to that matter" are very relevant. As the Supreme Court has observed in *Zaverbhai.*:[90]

> "The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Art. 254(2) will have no application".

The Tamil Nadu Legislature passed the Public Men (Criminal Misconduct) Act, 1974, which received the presidential assent under Art. 254(2). Action was initiated under the Act against the ex-Chief Minister of Tamil Nadu, M. Karunanidhi. The Act was then repealed. The question arose whether action could be taken against him under the relevant Central legislation.[91] Argument against this course of action was that, as there was repugnancy between the Central law and the State law, and the State law was kept alive because of the presidential assent under Art. 254(2), the Central law was repealed *pro tanto* and so when the State law was repealed, the Central laws could not be revived in the State unless re-enacted.

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88. *Hoechst Pharm. Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45.

89. *Deep Chand v. State of U.P.*, AIR 1959 SC 648; *Ukha Kolhe v. State of Maharashtra*, AIR 1963 SC 1531 : (1964) 1 SCR 926; *V.D.M. Coop. Society v. State of Andhra Pradesh*, AIR 1977 A.P. 241; *T. Barai v. Henry & Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

90. *Zaverbhai Amaidas v. State of Bombay*, AIR 1954 SC 752, at 757 : (1955) 1 SCR 799.

91. Ss. 161, 471 of the Indian Penal Code, 1865, and S. 5(2) read with S. 5(5)(*d*) of the Prevention of Corruption Act.

Accepting this contention, the Supreme Court said that when a State law inconsistent with a Central law on a matter in the Concurrent List is kept alive under Art. 254(2), the State law would then prevail in the State and the Central law will be overruled in its applicability to that State. The doctrine of eclipse will not apply to the constitutionality of the Central law in such a situation.[1] In the instant case, however, the Court found no inconsistency between the Central and the State laws, as the State law merely created a new and distinct offence with different ingredients which was in its nature and purport essentially different from the offences contemplated under the Central law. The State Act was in effect complimentary to the Central law. Therefore, the Central law was not repealed by the State law in the State and the ex-Chief Minister could be tried under the Central law after the repeal of the State law.[2]

Article 254(2) does not operate when the two Acts operate in different fields, *e.g.* the Central Act pertains to Insolvency (entry 9, List III) and the State Act relates to Stamp duties (entry 44, List III). Therefore, no stamp fees are payable on the sale deed executed by the Official Assignee.[3]

Article 254(2) has been conceived with a view to save State laws falling in the Concurrent List from being superseded by Central Laws because of the operation of the rule of repugnancy. Art. 254(2) operates when the following two conditions are satisfied:

(a) There is a valid Central law on the same subject-matter occupying the same field in the Concurrent List to which the State law relates;

(b) The State legislation is repugnant to the Central law.

It means that if there is no Central law with respect to the subject-matter in the Concurrent List to which the State law relates, Art. 254(2) does not operate. The State law in such a situation prevails *proprio vigore.*

A State law made under entry 22, List III, received the assent of the President under Art. 254(2). There already existed a Central law—The Industrial Disputes Act, also passed under the same entry. The question was whether the later State Act would prevail over the earlier Central law. The Court ruled that the State law could prevail over the earlier Central law if there was repugnancy, express or implied, between the two laws. But, in the absence of any such repugnancy between the two laws, both could co-exist.[4]

Article 254(2), it has been held by the Supreme Court, becomes applicable only when the State law is repugnant to an earlier law enacted by Parliament. When a State Act becomes repugnant to a Parliamentary law enacted thereafter, Art. 254(2) does not apply. When repugnancy arises later in point of time than the State Act, Art. 254(2) does not apply, and, in such a situation, Parliamentary

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1. For discussion on the Doctrine of Eclipse, see, *infra*, Ch. XX, Sec. C.
2. *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431.
See, Ch. XIII, Sec. C, *infra.*
3. *Official Assignee, Madras v. Inspector General of Registration*, AIR 1981 Mad. 54.
Also see, *Chandramohan v. Florence Indravathi*, AIR 1982 Kant. 242.
4. *Krishna Dist. Co-op. Marketing Soc. Ltd. v. N.V.P. Rao*, AIR 1987 SC 1960 : (1987) 4 SCC 99.

law would prevail over the State law.[5] The Supreme Court has stated the position in this respect as follows:[6]

> "The fact that the State Act has received the assent of the President would be of no avail because repugnancy is with the Central Act which was enacted by the Parliament *after* the enactment of the State Act."[7]

When Parliament has already enacted a law earlier than the enactment of the State law, and the State law has received Presidential assent, and thereafter the Parliamentary law is brought into effect, the State law will prevail because the law made by Parliament was the earlier law.[8]

A State law was repugnant to a Central law. Both laws had been enacted under entry 41, List III. The State law had received the President's assent under Arts. 31 and 31A.[9] The Supreme Court refused to treat this Presidential assent as having been given under Art. 254(2) insofar as its repugnancy with the Central Act was concerned.[10] The Court emphasized that the assent of the President under Art. 254(2) is not a matter of idle formality. The President is to be apprised of the reason as to why his assent is sought. When the assent of the President is given for a specific purpose, as in the present case, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it. In the instant case, President's assent was not sought because of the repugnancy between the State and the Central Acts, but for a different specific purpose. Therefore, such assent cannot avail the State under Art. 254(2).

PROVISO TO ART. 254(2)

Similarly, when the State seeks President's assent under Art. 254(2) to a State law specifically because of its repugnancy with a specific central law, the State law is not protected if it is repugnant to any other law. In the instant case, the state reserved the State Rent Act under Art. 254(2) for President's assent, and received it, qua its repugnancy with the Transfer of Property Act, a central law. The Supreme Court ruled that such a President's assent could not save the State Act when it was found to be repugnant to another Central Act, viz., the Public Premises Act, 1977. This aspect was neither brought to the notice of the President nor did the President give any consideration to it. The Court has emphasized that President's assent is not an empty formality. The efficacy of the President's assent would be limited to that purpose only for which it was sought and given.[11]

Again in *Grand Kakatiya*,[12] it was held that both the Central and the impugned State Act operated in the same field in as much as the phrase "for this compensation" in the State Act was nothing but "gratuity", though called by a different name and was repugnant to the Central Act (The Payment of Gratuity Act) and would be void unless it was shown that while obtaining the Presidential assent

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5. *M.P. Shikshak Congress v. R.P.F. Commissioner, Jabalpur*, AIR 1999 SC 443 : (1999) 1 SCC 396.
6. *Thirumuruga K.V.T.S., S. Medical & Educational Trust v. State of Tamil Nadu*, AIR 1996 SC 2384.
7. Also see, *S.M.C. Students, Parents Ass. v. Union of India*, AIR 2001 Kant, 457, 465.
8. *Pt. Rishikesh v. Salma Begum*, (1995) 4 SCC 718.
9. See, *infra*, Chs. XXXI, Sec. C, and XXXII, Secs. A and B, for Arts. 31 and 31A.
10. *Jamalpur Gram Panchayat v. Malwinder Singh*, AIR 1985 SC 1394 : (1985) 3 SCC 661.
11. *Kaisari Hind v. National Textile Corporation*, (2002) 7 SCALE 95.
12. (2009) 5 SCC 342 : AIR 2009 SC 2337.

for the State Act the conflict between the two Acts were *specifically brought to the notice of the President* before obtaining such assent.[13]

The President's assent to the State law under Art. 254(2), as mentioned above, does not confer irrevocable immunity on the State legislation from the operation of the rule of repugnancy. The proviso to Art. 254(2) somewhat curtails the ambit of Art. 254(2).

Under the proviso to Art. 254(2), Parliament is not prevented 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 State Legislature which relates to a matter in the Concurrent List.

The proviso qualifies the exception contained in Art. 254(2) to Art. 254(1). The proviso thus enlarges the power of Parliament, as acting under the proviso, the Parliament can enact a provision repugnant to the earlier State law. Thus, the Presidential assent to the State law gives protection to it against a Central law only so long as Parliament does not thereafter legislate again with respect to that matter making a provision conflicting with the State law. If it does, the State law would be void to the extent of repugnancy with the later Parliamentary law. The later Parliamentary law should however be on the same matter as the earlier State law. If the two legislations deal with separate and distinct matters, though of a cognate and allied character, then the State law is not abrogated.

A salient feature of this provision is that it not only enables Parliament to make subsequently a provision repugnant to the earlier State law and thus impliedly repeal that State law,[14] but even to declare expressly the earlier State law repealed. Thus, even though the subsequent law made by Parliament does not expressly repeal the earlier State law, yet the State law becomes void as soon as the subsequent law of Parliament creating repugnancy is made on the same matter.[15]

The working of the principle can be illustrated with reference to *Zaverbhai v. State of Bombay*.[16] The Central Legislature enacted the Essential Supplies Act in 1946 conferring power on the Central Government to issue orders to regulate production, supply and distribution of essential commodities. Under S. 7(1), a contravention of any of the orders was to be punishable with imprisonment up to three years or fine or with both. Considering these punishments inadequate, the Bombay Legislature enacted an Act in 1947 to enhance the punishments provided under the Central law. Both laws were referable to the Concurrent List. As there was avowed repugnancy between the Central and the Bombay laws, the Bombay law received the assent of the Centre and became operative in Bombay. In 1950, Parliament modified its Act of 1946 and enhanced the punishments. The Supreme Court held that the Bombay Act of 1947 and the Central Act of 1950

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13. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd*., (2009) 5 SCC 342 : AIR 2009 SC 2337.

14. *T. Barai v. Henry Ah Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

15. *Thirumurga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu*, (1996) 3 SCC 15.

16. AIR 1954 SC 752 : (1955) 1 SCR 799. Also see, *Deepchand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8; *T. Barai v. Henry Ah Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177; *Lalbhai Talsibhai Patel, Ahmedabad v. Addl. Special Land Acquisition Officer, Ahmedabad*, AIR 1986 Guj. 24; *Shakuntalabai v. State of Maharashtra*, AIR 1986 Bom. 308.

dealt with the same subject of 'enhanced punishment', and that under the proviso to Art. 254(2), the State law became void because it was repugnant to the later Central law.

The Supreme Court stated that under the proviso to Art. 254(2), Parliament can repeal a State law. But where Parliament does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later law "with respect to the same matter" that may be enacted by Parliament.

The Supreme Court has enunciated the principle of implied repeal thus : "If the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment". This principle is equally applicable to a question under Art. 254(2) whether further legislation by Parliament is in respect of the same matter as that of the State law.[17]

The U.P. Legislature enacted an Act to regulate supply and purchase of sugarcane. Parliament later enacted the Essential Commodities Act, S. 16(1)(b) of which laid down that any law in force in a State would be repealed "in so far as such law controls or authorises the control of the production, supply and distribution of, and trade and commerce in, any essential commodity".

The Supreme Court held in *Tika Ramji v. State of Uttar Pradesh*[18] that this provision did not repeal the earlier State law, as there was no repugnancy between the two laws, and both could co-exist, although they both related to entry 33(b) in List III.

The proviso to Art. 254(2) confers on Parliament the power to repeal a State law only when—

(1) there was already a Central law on a matter in the Concurrent List;

(2) a State then made a law on the same matter inconsistent with the Central law; and

(3) this State law received the Presidential assent under Art. 254(2).

Such a State law could then be repealed, amended or altered by Parliament by later making a law with respect to the same matter as the State law. If there was no Parliamentary law already in existence prior to the enactment of the State law on the matter, then the later Parliamentary law cannot expressly repeal the earlier State law; though, in case of repugnancy between the two, the Parliamentary law shall prevail to the extent of repugnancy. In the *Tika Ramji* case, there was no Central law in the field when the State law was enacted, and so S. 16(1)(b) could not operate to repeal the U.P. Act.

The Supreme Court also pointed out that under the proviso to Art. 254(2), power to repeal an earlier law is conferred on Parliament and the same cannot be delegated by it to any executive authority. *Tikaramji* is a significant pronouncement in the area of Indian Federalism, as it removes the idea that Parliament can specifically repeal any State law in the Concurrent area even if not repugnant to the Central law on the matter. The Supreme Court by literally interpreting the

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17. Also see, *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45.
18. AIR 1956 SC 676 : 1956 SCR 393; *supra*, Sec. H.

proviso to Art. 254(2), ruled that Parliament can repeal a State law only when the conditions above-mentioned are fulfilled.[19]

(c) REPUGNANCY

Repugnancy between two pieces of legislation, generally speaking, means that conflicting results are produced when both the laws are applied to the same facts. Repugnancy arises when the provisions of the two laws are fully inconsistent and are absolutely irreconcilable, and that it is impossible to obey one without disobeying the other, *e.g.* when one statute says 'do' while the other says 'don't' in the same set of facts.[20] In this case, there is a contradiction in the actual terms of the statutes and this can easily be detected.

Such a situation arose in *ITC*[21] where the Supreme Court found direct collision between an Act enacted by Parliament and a State Act. The Court ruled that the "question of allowing both of them to operate would not arise." In such a situation, the Central legislation would prevail over the State Law.

The Central Act in question was the Tobacco Board Act enacted under entry 52, List I. The State Act was the Agricultural Produce Markets Act enacted under entry 27, List II. The Court observed:

> "... we hold that the Tobacco Board Act and the Agricultural Produce Markets Act, collide with each other and cannot be operated simultaneously. Necessarily, therefore, the Tobacco Board Act would prevail and the Agricultural Produce Markets Act, so far as it relates to levy of fee for sale and purchase of tobacco within the market area must be held to go out of the purview of the said Act."

But not all cases are so obvious. Contradiction may appear not so much in the phraseology as when they are applied to a given set of facts. When both statutes cover the same field and they produce conflicting legal results in a given set of facts, repugnancy arises between them. For example, when the penalty prescribed for an offence by one Act is altered in degree by the other Act, repugnancy arises. Also, when a statute describes again an offence created by another statute, and imposes a different punishment, or varies the procedure, repugnancy arises between the two.[22]

The U.P. Legislature enacted an Act in 1955 authorizing the government to frame a scheme of nationalization of motor transport. Thereafter, Parliament, with a view to introduce a uniform law, amended the Motor Vehicles Act in 1956. The Supreme Court found in *Deep Chand v. State of U.P.*,[23] that both the Acts operate in respect of the subject-matter in the same field, and that they differed from each other in many important details, *e.g.*, authority to initiate the scheme, manner of doing it, authority to hear objections, principles regarding payment of compensation *etc*., and so the U.P. Act would have to give way to the Central Act.

There would be no repugnancy if the provisions made by one law do not exist in the other law; the provisions made by Parliament and the State are mutually

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19. M.P. JAIN, Justice Bhagwati and Indian Constitutional Law, 2 *JILI*, 31, 44 (1959-60).
20. *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8.
21. *I.T.C. Ltd. v. Agricultural Produce Market Committee*, AIR 2002 SC 852, 894; *supra*, Sec. G(iii)(a).
22. *Zaverbhai v. State of Bombay*, *supra*,
23. AIR 1959 SC 648 : 1959 Supp (2) SCR 8, *supra*,

exclusive, do not impinge upon each other and there is no overlapping between them.[24] When the Central Act and the State Act can co-exist and their spheres of operation are different, there is no inconsistency between them. Thus, the Criminal Procedure Code and the Haryana Children Act are not inconsistent. A child accused of murder is to be tried under the Children Act and not the Cr.P. Code.[25] Similarly, in *M. Karunanidhi*[26] the State law and the Central law although occupying the same field were found to be complimentary and not inconsistent. Both could co-exist without coming into collision with each other.

When repugnancy arises, an effort is made to reconcile the two statutes and to avoid their being repugnant to each other.[27] At times, by interpreting the language of a State law narrowly, it may be possible to remove the incompatibility between the Central and State laws and thus to keep alive the State law.[28]

The repugnancy between two statutes should exist in fact and not depend merely on a possibility.[29] Under Art. 254(1), the State law is void only 'to the extent' of its repugnancy with the Central law. Therefore the whole of the State law need not be declared bad if the repugnant portion may be severed from it. If, however, the invalid portion cannot be severed then the whole Act falls through. The doctrine of severability has been discussed later.[30] Further, the portion of the State law repugnant to the Central law is not dead; it does not become *ultra vires* in whole or in part; it is eclipsed and if the Central law were to be repealed at any time, it would again become operative.[31]

A more subtle case of repugnancy arises when two statutes pertain to the same subject-matter, but when Parliament intends to make its enactment a complete code and evinces an intention to cover the entire field. This is the rule of occupied field. In such a case, the State law whether passed before or after would be overborne on the ground of repugnancy.[32] As the Supreme Court has observed in a recent case:[33]

> "It cannot, therefore, be said that the test of two legislations containing contradictory provisions is the only criterion of repugnance. Repugnancy may arise between two enactments even though obedience to each of them is possible

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24. *The Tika Ramji* case, AIR 1956 SC 676 : 1956 SCR 393; *supra*,

25. *Raghbir v. State of Haryana*, AIR 1981 SC 2037. Also, *Fatehchand Himmatlal v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670.

26. *Supra*, footnote 2.

27. *Shyamakant v. Rambhajan*, AIR 1939 FC 74; *Tika Ramji v. State of U.P.*, *supra*; *A.K. Sabhapathy v. State of Kerala*, AIR 1983 Ker 24.

28. *Tansukh Rai v. Nilratan*, AIR 1966 SC 1780 : (1966) 2 SCR 6.

29. *Shyamakant v. Rambhajan*, *supra*, footnote 27.

30. *Infra*, Ch. XX. Sec. C; *R.M.D.C. v. Union of India*, AIR 1957 SC 628, 633; *B&G Exchange v. State of Punjab*, AIR 1961 SC 268 : (1961) 1 SCR 668.

31. *Bhikaji v. State of M.P.*, AIR 1955 SC 781; *Deep Chand v. State of U.P.*, *supra; Dularey v. Dist. Judge*, AIR 1984 SC 1260 : (1984) 3 SCC 99.

Also see further on the point of eclipse under Fundamental Rights, Ch. XX. Sec. C.

32. *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461; *Ratan Lal Adukia v. Union of India*, AIR 1990 SC 104 : (1989) 3 SCC 537, *Govt. of A.P. v. J.B. Educational Society, Hyderabad*, AIR 1998 AP 400, 412; *Kulwant Kaur v. Gurdial Singh Mann*, AIR 2001 SC 1273, at 1280 : (2001) 4 SCC 262.

33. *Thirumurga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu*, AIR 1996 SC 2384 at 2391 : (1996) 3 SCC 15.

Also see, *Jaya Gokul Educational Trust v. Commissioner & Secretary to Govt. Higher Education Dept., Thiruvananthapuram*, AIR 2000 SC 1614 : (2000) 5 SCC 231; *supra*, Sec. G(c), footnote 23 at p. 772.

> without disobeying the other if a competent legislature with a superior efficacy expressly or implied evinces by its legislation an intention to cover the whole field."

In the instant case, s. 10A of the Indian Medical Council Act was held to prevail over the Tamil Nadu law dealing with affiliation of medical colleges in the State. Both the Acts were enacted under entry 25 of List III. The Court refused to accept the contention that there was no repugnance between the two Acts as both can be complied with. The Court ruled that Parliament has evinced an intention to occupy the whole field relating to establishment of medical colleges in the country. Parliament has made a "complete and exhaustive provision" covering the entire field for establishing of new medical colleges in the country. No further scope is left for the operation of the State legislation in the said field which is fully covered by the law made by Parliament.

The Orissa Legislature enacted an Act levying a cess on all extracted minerals for the better development of mining areas. Later, Parliament enacted the Mines and Minerals Act, 1957, requiring the Central Government to ensure conservation and development of country's mineral resources. The Supreme Court held that the State Act was superseded as a whole because Parliament had clearly evinced an intention to cover the entire field of minerals.[34]

A Kashmir law concerning infliction of disciplinary punishments on civil servants was held not applicable to the members of the All India Service as Parliament has occupied the field and that the Central enactments give clear indication that this was the only manner in which any disciplinary action can be taken against these persons.[35] In such a case, the inconsistency between the two laws is of such a nature that they come into direct collision with each other and it is impossible to obey the one without disobeying the other.

I. RESIDUARY POWER

The three Lists are drawn very elaborately and presumably all subject-matters identifiable at the time of the constitution-making, and regarding which a government could conceivably be called upon to make laws in modern times, have been assigned to one of the Lists. But it is humanly not possible to foresee every possible activity and assign it to one List or the other.

The framers of the Constitution were conscious of the fact that human knowledge is limited and human perception imperfect and no one could foresee what contingency may arise in future needing legislation. Therefore, the residuary power is intended to take care of such matters as could not be identified at the time of the constitution-making. Further, the framers of the Constitution were

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34. *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461 ; *Baijnath Kadia v. State of Bihar*, AIR 1970 SC 1436 : (1969) 3 SCC 838.

But see, *State of Haryana v. Chaman Lal*, AIR 1977 SC 1654. Parliament made certain changes in 1972 in the Mines Act of 1957. The Court now ruled that the State could enact a law for vesting of lands containing mineral deposits in the State. Parliament did not want to encroach on State power under entries 18 in List II and 42 in III. After 1972, the Central Act does not cover ownership of minerals which are part of land. The States have now a sphere of their own powers under the amended Central Act. Also see, *Fatehchand v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670.

35. *State of Jammu & Kashmir v. Farooqi*, AIR 1972 SC 1738 : (1972) 1 SCC 872.

designedly devising for a strong Centre. Moreover, the present is an era of fast technological advancement, and no one can visualize future developments and exigencies of government. Something unforeseen may happen and some new matter may arise calling for governmental action. A question may then arise as to which government, Central or State, is entitled to legislate with respect to that matter. To meet this difficulty, the Constitution provides that the residue will belong exclusively to the Centre. This is provided for in Art. 248 read with entry 97, List I. These provisions take care of any unforeseen eventuality.

Entry 97, List I, runs as : "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

Article 248(1) says : "Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List."

Residuary powers have been vested in the Centre so as to make the Centre strong. As was stated in the Constituent Assembly by Jawahar Lal Nehru, Chairman of the Union Powers Committee:

> "We think that residuary powers should remain with the Centre. In view however of the exhaustive nature of the three Lists drawn up by us, the residuary subjects could only relate to matters which, while they may claim recognition in the future, are not at present identifiable and cannot therefore be included now in the Lists."[36]

If the law does not fall in the State List, the Parliament has legislative competence to enact the law by virtue of its residuary power and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List.[37] The basic question thus required to be examined is whether the subject-matter of the Central Act falls in any of the entries in the State List. The question of residuary power is discussed further in detail in the next Chapter under the heading "Residuary Taxes".[38]

S. 3 of the Commissions of Inquiry Act has been held to be fully covered by the Centre's residuary power. The Central Government can appoint an inquiry commission to inquire into charges against State Ministers under its residuary power as this subject is not mentioned in any List.[39] Support for such a power can also be found in entry 94, List I, and entry 45, List III. It is an accepted principle that Parliament can supplement any of its powers under any entry in Lists I and III with its residuary power.[40]

A law taking over of management of Auroville by the Centre is covered by the Centre's residuary power. Shree Aurobindo Society established a cultural township where people from different countries could live in harmony as one community and engage in cultural, educational, scientific and other activities seeking to promote human unity. In course of time, serious irregularities in the management of the society and mis-utilisation of funds were detected. Accordingly, Parliament passed an Act taking over the management of Auroville in public interest. It

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36. Rao, B. Shiva, *The Framing of India's Constitution,* II, 777.
37. See, *Union of India v. H.S. Dhillon,* AIR 1972 SC 1061, 1074-75 : (1971) 2 SCC 729; *S.P. Mittal v. Union of India,* AIR 1983 SC 1 : (1983) 1 SCC 51, 18-19; *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569, 629-630.
38. *Infra,* Ch. XI, Sec. G.
39. *State of Karnataka v. Union of India,* AIR 1978 SC 68 : (1977) 4 SCC 608.
40. See *Dhillon, supra,* note 2; *infra,* Ch. XI, Sec. B.

was held that Parliament had competence to enact such a law under its residuary power.[41]

As regards legislation for the Union Territories, Parliament can rely on Art. 246(4) read with any topic in any of the three Lists or on its residuary power.[42]

The scope of the residuary power is very wide. For example, under entry 3 in List III, Parliament can legislate with respect to preventive detention on grounds mentioned therein.[43] Further, Parliament can legislate with respect to preventive detention under entry 9, List I, on grounds mentioned therein.[44] But these two entries do not exhaust the entire field of preventive detention. Parliament can legislate under its residuary power with respect to preventive detention on any ground not mentioned in these two entries. Preventive detention on certain grounds is covered by these entries, but, on other grounds, Parliament can act under its residuary power. Thus, Parliament has enacted the Conservation of Foreign Exchange and Prevention of Smuggling Act [COFEPOSA] providing for preventive detention in connection with smuggling and foreign exchange racketeering. This Act can find support from entry 36, List I (foreign exchange) and Parliament's residuary power.[45]

In the famous *Golak Nath* case,[46] a judicial view was expressed by a majority of the Supreme Court that Art. 368 (as it then stood) merely provided for procedure to amend the Constitution and did not by itself confer a substantive power to amend and that such power was to be found in the residuary power of Parliament. In *Kesavnanda*,[47] the Supreme Court repudiated this view, and read the power to amend the Constitution in Art. 368 itself and not in the residuary power of Parliament. As explained by HEDGE and MUKHERJEA, JJ:[48]

> "Entry 97 in List I was included to meet some unexpected and unforeseen contingencies. It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution..... would have left the important power hidden in entry 97 of List I leaving to the off chance of the Courts locating that power in that entry."

From the above, a principle was sought to be implied with a view to limit the breadth of the residuary power that if a subject was prominently present to the minds of the constitution-makers, then that matter ought not to be read in the residuary but should be located in one of the entries.[49] But the Supreme Court has refused to accept any such limitation on the residuary power saying that it is not proper to unduly circumscribe, erode or whittle down the residuary by a process of interpretation as new developments may demand new laws not covered by any

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41. *S.P. Mittal v. Union of India*, AIR 1983 SC 1 : (1983) 1 SCC 51.
42. *Sat Pal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550 : (1979) 4 SCC 232. Also see, *supra*, Ch. IX.
43. *Supra*, Sec. F.
44. *Supra*, Sec. D.
45. See, *infra*, Ch. XXVII, Sec. B, for discussion on Preventive Detention.
46. AIR 1967 SC 1643 : (1967) 2 SCR 762.
For a detailed discussion on this case, See Ch. XLI, *infra.*
47. AIR 1973 SC 1461 : (1973) 4 SCC 225.
48. *Ibid*, at 1614.
49. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 1264 (2nd Ed.)

of the three Lists and these Lists cannot be regarded as exhaustive of governmental action and activity.[50]

Parliament can enact an Act to prevent the improper use of certain emblems and names for professional and commercial purposes either under entry 49, List I, or its residuary power, as the matter does not fall under entry 26, List II.[51] However, recourse could be had to the residuary only if the matter is found to be outside the State purview. As the Supreme Court has emphasized:[52]

> "Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established....."

Parliament's residuary power is not to be interpreted so expansively as to whittle down the power of the State Legislatures. "Residuary should not be so interpreted as to destroy or belittle State autonomy." It has been emphasized that in a Constitution like ours "where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislatures". To do so would be to affect the federal principle adversely. If there is competition between an entry in List II and the residuary power of the Centre, the former may be given a broad and plentiful interpretation.[53]

An important question of interpretation of the residuary power has given rise to difference of opinion among the Judges of the Supreme Court. The question is : should the residuary power be invoked when the subject-matter of legislation in question is not found in any of the *three* Lists, or when it is not found in List II and List III only; List I being irrelevant for the purpose as the residuary power belongs to the Centre?

Prior to *Dhillon,*[54] the judicial view was that recourse to entry 97, List I, ought to be had only when the impugned legislation did not fall in any of the three Lists. The argument was that if the impugned legislation fell under any entry in List II, residuary power could not be invoked. Further, if the impugned legislation fell under an entry in List I or List III, then recourse to the residuary would be unnecessary.

It was said that entry 97, List I, was not the first step in the discussion of such problems, but the last resort.[55] But *Dhillon* seems to have changed this position. The Supreme Court has ruled in this case by majority that once it is found that the subject-matter of the impugned legislation does not fall under any entry in List II or III then Parliament can take recourse to the residuary power, or it can be combined with any other entry in List I. This question is fully discussed in the next Chapter under the heading "Residuary Taxes".[56]

In *Amratlal Prajivandas,*[57] following *Dhillon,* the Supreme Court has observed that the test to determine the legislative competence of Parliament is this : when-

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50. *Satpal & Co., supra,* note, 42, at 1554.
51. *Sable Waghire & Co. v. Union of India,* AIR 1975 SC 1172 : (1975) 1 SCC 763; *supra*.
52. *International Tourist Corp. v. State of Haryana,* AIR 1981 SC 774 , 778 : (1981) 2 SCC 318.
53. *Jaora Sugar Mills v. State of Madhya Pradesh,* AIR 1966 SC 416, 421 : (1966) 1 SCR 523.
54. *Union of India v. H.S. Dhillon,* AIR 1972 SC 1061 : (1971) 2 SCC 779; *supra,* footnote 37.
55. *Hari Krishna Bhargava v. Union of India,* AIR 1966 SC 619 : (1966) 2 SCR 22.
56. See, *infra,* Ch. XI, Sec. G.
57. *Att. Gen. for India v. Amratlal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54.

ever the competence of Parliament to enact a specific statute is questioned one must look to the entries in List II. If the said statute is not relatable to any of the entries in List II, no further inquiry is necessary as Parliament will be competent to enact the said statute either by virtue of the entries in List I and List III, or by virtue of the residuary power contained in Art. 248 read with entry 97, List I.

The Consumer Protection Act, 1986, creates *quasi*-judicial bodies to render inexpensive and speedy remedies to consumers. The Act provides an additional forum providing inexpensive and speedy resolution of disputes arising between consumers and suppliers of goods and services. These bodies are not supposed to supplant but supplement the existing judicial system. The agencies created by the Act are in no way parallel hierarchy to the judicial Courts. The Act would fall under the Parliament's residuary power and not under entry 11A, List III.[58]

The Constitutional status of and the competence of Parliament to impose service tax on practising chartered accountants and architects was raised before the Supreme Court by the practioners.[59] The Supreme Court repelled the challenge fundamentally on the view that service tax was tax on service and not a tax on service providers having taken into consideration that services constitute a heterogeneous spectrum of economic activities covering a wide range such as management, banking, insurance, communication, entertainment etc. and that the service sector is now occupying the centre stage of the Indian economy and an "Industry by itself". Since consumption of goods and consumption of services both satisfy the human needs, there is hardly any distinction between the two.[60]

VALIDATION OF INVALID STATE LAWS

When States lack legislative competence with respect to a subject-matter, Parliament will have such competence. At times, when a State law is declared invalid because of the State's legislative incompetence, Parliament may come to the rescue of the State by way of validating the law in question.

Here the principle is that Parliament cannot merely pass an Act saying that such and such State Act is hereby declared as valid. This amounts to delegation of legislative power on the State Legislature on a topic which the Constitution has kept outside the State jurisdiction and this Parliament is not competent to do. As the Supreme Court has explained:

> "Where a topic is not included within the relevant list dealing with the legislative competence of the State Legislatures, Parliament by making a law cannot attempt to confer such legislative competence on the State Legislatures."

It is for the Constitution and not Parliament to confer competence on State Legislatures. Parliament cannot arrogate to itself any omnipotence to redraw legislative Lists so as to confer competence on the State to legislate on a topic which is outside its purview. Instead, since Parliament can legislate on a topic within its power, it can re-enact the invalid State law. As a convenient legislative device, Parliament can, instead of repeating the whole of the State Act, legislate referentially. For example, when a State Act is held invalid, Parliament may enact a law putting the State Act in a schedule and saying that the Act "shall be

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58. *Vishwabharathi House Building Co-op. Soc. Ltd. v. Union of India,* AIR 1999 Kant. 210.
59. *All India Federation of Tax Practioners v. Union of India,* (2007) 7 SCC 527 : (2007) 9 JT 1.
60. *Ibid.*

deemed always to have been as valid as if the provisions contained therein had been enacted by Parliament."

The Supreme Court has treated this strategy as valid because Parliament has legislated and not merely declared valid an invalid statute. As an abbreviation of drafting, Parliament has borrowed into its statute by reference the words of a State Act not *qua* State Act but as a "convenient shorthand", "as against a long-hand writing of all the sections into the Central Act." When Parliament has power to legislate on a topic, it can make an Act on the topic by any drafting means including referential legislation.

In *Baijnath Kedia v. State of Bihar*[61], the Supreme Court held a statutory provision made by a State Legislature unconstitutional on the ground that the State Legislature had no power to enact it and that only Parliament was competent to legislate in that behalf. Thereafter, Parliament enacted a Validation Act. The act was upheld as valid by the Supreme Court.[62] The Court ruled that Parliament could validate retrospectively what a State Legislature had no power to enact.

But the validating act cannot be considered as remedying the defects pointed out by the judicial verdict by making a "cosmetic change" in the original Act.[63]

Most of these validating Acts have been enacted by Parliament under its residuary power. A number of validating Acts have been passed by Parliament to validate judicially invalidated State taxing measures.[64]

In *Shree Vinod Kumar v. State of Himachal Pradesh,*[65] the Supreme Court invalidated an Act passed by the Himachal Pradesh Assembly on the ground that the Assembly was not validly constituted and, as such, it was incompetent to pass the law in question. Parliament then passed a validating Act validating the constitution and proceedings of the Legislative Assembly of Himachal Pradesh. The Courts were prohibited from questioning the validity of any Act or proceeding of the Assembly on the ground of defect in its constitution. The Supreme Court upheld the competence of Parliament to enact the validating Act under its residuary power.[66]

J. PARLIAMENTARY LEGISLATION IN THE STATE FIELD

Proverbially, federalism has been characterised as a rigid form of government. Constituted as it is of a dual polity, there is a rigid distribution of the functions between the Centre and the States supported by no less a sanction than that of the Constitution. The balance thus drawn between the Centre and the States cannot be disturbed by one of them unilaterally. Neither the Centre nor the States can trench upon the jurisdiction assigned to the other.

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61. (1969) 3 SCC 838 : AIR 1970 SC 1436.

62. *Krishna Chandra Gangopadhyaya v. Union of India,* AIR 1975 SC 1389 : (1975) 2 SCC 302. Also see, *Shetkari Sahakari Sakhar Karkhana v. Collector of Sangli,* AIR 1979 SC 1972 : (1980) 1 SCC 381.

63. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd*., (2009) 5 SCC 342, 365 : AIR 2009 SC 2337.

64. See, *infra,* next Chapter.

65. AIR 1959 SC 223 : (1959) Supp 1 SCR 160.

66. *Jadab Singh v. Himachal Pradesh Administration,* (1960) 3 SCR 75 : AIR 1960 SC 1008.

A change in the scheme of distribution of powers can be effected only by an amendment of the Constitution which is not always easy to effectuate, as the process of constitutional amendment in a federation is always more rigid than the ordinary legislative process.[67]

There are disadvantages in having a rigid scheme of distribution of functions. A scheme which may be appropriate in the context of the times when the Constitution was adopted, may need re-adjustment when circumstances may have changed. There may arise an emergency in the country when a Central law on a matter in the State List may be a desideratum; and if this cannot be done without amending the Constitution, difficulties may be felt in taking effective steps to meet the situation.

Gradual adjustments may be effected in the balance of power by the process of judicial interpretation, but there may be times when this technique fails to rise to the occasion and make the needed adjustments to meet situations at hand. To some extent, rigidity of federalism has been mitigated by the newly arising concept of co-operative federalism,[68] but even this concept has its own limitations in practice, and it is a product of non-availability of better and more effective methods of effecting the needed adjustments in the Central-State relationship. There have been occasions in other federations when lack of necessary powers in the Centre has been keenly felt as pressing problems have demanded urgent solutions.[69]

The Constitution of India, however, breaks new ground in this respect. It contains several provisions to create a mechanism for effecting temporary adjustments in the frame of the distribution of powers and thus introduce an element of flexibility in an otherwise inherently rigid federal structure, and some of these methods are original insofar as these expedients are not to be found elsewhere. Learning by the difficulties faced in other federations by a too rigid distribution of powers, which often denied power to the Centre to take effective measures to meet a given situation, the framers of the Indian Constitution took adequate care to create a federal structure which could be easily moulded to respond to the needs of the situation, without resorting to the tedious and elaborate procedure of amending the Constitution.

First, the sizeable Concurrent List represents an attempt to break down, to some extent, the unpassable barriers between the Centre and the States which arise when there are two exclusive areas allotted to them. The Concurrent List makes it possible for either the Centre or the States or both to operate on a matter according to the demands of the situation at a given time. A further flexibility has been introduced in this area by providing for an expedient to keep a State law alive in the face of a Central law.[70]

Secondly, a number of constitutional provisions enable Parliament to legislate in the State sphere from time to time. These constitutional provisions are discussed below.

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67. For the process of Amendment of the Constitution in India, see, *infra*, Ch. XLI.
68. On Co-operative Federalism in India, see, *infra*, Ch. XIV.
69. *Infra*, Sec. L, this Chapter.
70. *Supra*, Sec. H, this Chapter.

(a) ARTICLE 249

According to Article 249, if the Rajya Sabha declares, by a resolution supported by two thirds of the members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws with respect to a matter in the State List specified in the resolution, it becomes lawful for Parliament to make laws for the whole or any part of India with respect to that matter so long as the resolution stands.

Such a resolution may remain in force for such period as is mentioned therein but not exceeding one year; it can be renewed as many times as may be necessary but not exceeding a year at a time. The law made by Parliament in the State List under this provision would cease to have effect six months after the resolution passed by Rajya Sabha comes to an end.

The procedure is of strictly temporary efficacy as the life of the resolution is limited to one year at a time. If Central power is required to be continued beyond one year, a fresh resolution will have to be passed by the Rajya Sabha for another year and so on.

The function entrusted to the Rajya Sabha under this Article emanates from the theory that this House contains representatives of the States who are elected by the State Legislative Assemblies.[71]

The strategy contained in Art. 249 can be used when national interest so demands and to tide over a temporary situation. For this unique feature of the Indian Constitution, no parallelism is to be found in any other federal constitution.

Article 249 has been used so far very sparingly. For example, in 1950, due to the Korean War, prices of imported goods began to soar. There was great need to effectively control black marketing. No action could be taken to control imported goods under entry 33, List III, as it stood before its amendment in 1955 because it did not then cover imported goods. Therefore, under Art. 249, Rajya Sabha passed a resolution to enable Parliament to make laws for a period of one year with respect to entries 26 and 27 of List II. Parliament then enacted the Essential Supplies (Temporary Powers) Amendment Act, 1950, and the Supply and Prices of Goods Act, 1950, for controlling supply, distribution and price of certain goods.

Again, in 1951, pursuant to another resolution of the Rajya Sabha under Art. 249, Parliament passed the Evacuee Interest (Separation) Act, 1951, applicable to all evacuee property including agricultural land.

Because of the menace of terrorism in Punjab, on August 13, 1986, the Rajya Sabha passed a resolution authorising Parliament to make laws for one year with respect to six entries in the State List, *viz.* : 1, 2, 4, 64, 65 and 66. However, no law in pursuance of this resolution was ever passed by Parliament.

It may be underlined that there are four in-built safeguards against misuse of power conferred by Art. 249, *viz.*:

(1) Parliament can assume jurisdiction to legislate only if two-thirds of the members of the *Rajya Sabha* present and voting pass the necessary resolution;

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71. *Supra*, Ch. II, Sec. B.

(2) the resolution must specify the matter enumerated in the State List with respect to which Parliament is being authorised to legislate in the national interest;

(3) the resolution passed by the *Rajya Sabha* remains in force for one year; and

(4) the law enacted by Parliament in pursuance of this resolution remains in force only for six months after the resolution ceases to remain in force.

The State Legislature continues to enjoy power to make laws which it is empowered to make under the Constitution, even after the Rajya Sabha passes a resolution under Art. 249. This is however subject to the rule of repugnancy. This rule has been specifically laid down in Art. 251, which is mentioned below.

Article 249 provides a simple and quick method to cope with extraordinary situations which temporarily assume national importance. The Article may also be availed of when speed is of the essence of the matter, and it is not considered necessary or expedient to invoke the emergency provisions contained in Arts. 352 and 356.[72]

(b) ARTICLE 250

While a proclamation of emergency is in operation in the country under Art. 352, Parliament is empowered under Art. 250 to legislate with respect to any matter in the State List.[73]

Article 250 does not restrict the power of a State Legislature to make a law which it is entitled to make under the Constitution. However, because of Art. 251, in case of repugnancy between a State law and a Parliamentary law enacted under Art. 250, the latter is to prevail and the State law, to the extent of repugnancy, and so long as the Parliamentary law continues, is to be inoperative.

(c) ARTICLE 252

Article 252(1) provides for delegation of powers by two or more States to Parliament so as to enable it to legislate with respect to a matter in the State List in relation to such States.

If it appears to two or more State Legislatures to be desirable that any matter in the State List should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by the Houses of those State Legislatures, Parliament can then pass an Act for regulating that matter so far as those States are concerned.

Any law so enacted by Parliament can apply to any other State by which it is adopted afterwards by a resolution passed to that effect in its Legislature. While enacting a law under Art. 252(1), Parliament can so structure the law as to be capable of being effectively adopted by any other State later on by passing a resolution to that effect. A State can adopt the Central law, after it has been enacted, under Art. 252(2), even if it had not passed the resolution originally under Art. 252(1).

In the context of Art. 252(1), the term 'State Legislature' means only the House or Houses of the Legislature without including the Governor. Therefore,

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72. See below under Art. 250.
73. *Infra*, Chap. XIII, under Emergency Provisions.

Governor's assent is not necessary to the resolution passed by the House or Houses.[74]

When the State Legislature passes a resolution under Art. 252(1), Parliament becomes entitled to legislate, and the State Legislature ceases to share the power to make law, with respect to that matter. The resolution operates as "abdication or surrender" of the State power with respect to that matter which is the subject-matter of the resolution, and it is placed solely in the hands of Parliament which alone can then legislate with respect to it. "It is as if such matter is lifted out of List II and placed in List I of the Seventh Schedule to the Constitution."[75] Only so much power is conferred on Parliament as is resolved by the State Legislature to be entrusted to Parliament. By passing a resolution under Art. 252(1), the State Legislature surrendered to Parliament the right to pass legislation imposing a ceiling on the holding of urban immovable property. The Supreme Court ruled that the State had not surrendered the subject of Town planning and development to Parliament.[76]

Under Art. 252, power to legislate is vested in Parliament only when two or more States pass a resolution authorising Parliament to make a law on a matter in List II which is not within the legislative domain of Parliament. The passing of the resolutions by the States is a condition precedent for vesting the Parliament with such power by the State Legislatures.

The effect of Art. 252(1) is that Parliament becomes competent to legislate with respect to a matter for which it has no power to make a law. There are many subjects in the State List such as, public health, agriculture, forests, fisheries *etc*., which may, at times, demand common legislation for two or more States. Article 252(1) prescribes a method by which Parliament may be enabled to do so. This Article becomes applicable when at least two States join and pass the necessary resolutions invoking the aid of Parliament.

Notionally speaking, the specific subject is out of the legislative domain of the States passing the resolution under Art. 252(1). The Supreme Court has held in *RMDC*[77] that any Act of the State Legislature will be subject to the rule of repugnancy, though Art. 254, in terms, may not supply.[78] If any State Act relating to the same matter, occupying the same field as the law made by Parliament under cl. (1), is repugnant to the latter, it will be rendered inoperative to the extent of repugnancy.[79]

The Karnataka Legislature resolved to entrust to Parliament the subject-matter of imposing a ceiling on urban immovable property and acquisition of such property in excess of the ceiling. So much subject-matter was thus carved out of entry 18, List II, *viz.*, 'land', but the rest of the legislative area comprised in the entry continued to fall within the State legislative domain.[80]

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74. *Union of India v. Basavaiah Choudhary,* AIR 1979 SC 1415 : (1979) 3 SCC 324.
75. *Thumati Venkaiah v. State of Andhra Pradesh,* AIR 1980 SC 1568 : (1980) 4 SCC 295.
76. *H.H.M. Shanti Devi P. Gaikwad v. Sarjibhai H. Patel,* AIR 2001 SC 1462 : (2001) 5 SCC 101.
77. *R.M.D.C. v. State of Mysore,* AIR 1962 SC 594 : (1962) 3 SCR 230.
78. For discussion on Art. 254, see, *supra,* Sec. H.
79. Also see, on this point : *Jamati Rangayya v. State of Andhra Pradesh,* AIR 1978 AP 106; T. *Khande Rao v. State of Karnataka,* AIR 1979 Kant. 71; *Birajananda Das v. Competent Authority,* AIR 1986 Cal. 8.
80. *Krishna Bhimrao Deshpande v. Land Tribunal, Dharwad,* AIR 1993 SC 883 : (1993) 1 SCC 287.

Article 252 has been used a few times. For example, in order to have a uniform law for the control and regulation of prize competitions, several States passed resolutions authorising Parliament to enact the requisite legislation. The need for a Central law was felt because these competitions were run by out-of-State journals which a State law could not effectively control. Parliament then enacted the Prize Competitions Act, 1955.[81]

The States of Bengal and Bihar have authorised Parliament to legislate for the setting up of the Damodar Valley Corporation to control the Damodar River which constantly ravaged the two States.

Parliament enacted the Urban Land (Ceiling and Regulation) Act, 1976, after resolutions under Art. 252(1) were adopted by eleven State Legislatures.[82]

Article 252(2) provides:

> "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."

Because of Art. 252(2), the State Legislatures have no power to repeal or amend an Act passed by Parliament under Art. 252(1). Only Parliament can amend or repeal it in the manner laid down in Art. 252(2). The effect of Art. 252, therefore, is that the State Legislature loses its power to make laws on the subject to the extent its field is covered by the resolution under Art. 252(1) although the matter continues to be remain in List II. For applicability of the repealing Act a State must adopt the repeal by resolution passed by legislature in that behalf. Since the legislature of the State of West Bengal did not do so, the Urban Land (Ceiling and Regulation) Act would not applicable in that State.[83]

The parliamentary law passed under Art. 252(1) may be amended or repealed by an Act of Parliament passed or adopted in like manner and not by the State Legislature.[84] The Speaker of the Lok Sabha has held that the previous permission of the States would be necessary to amend the Central Act because, according to Art. 252(2), amending legislation was to be passed in 'like manner' as the original legislation which meant that authorisation from the States for the amendment was also necessary. The Speaker overruled the Government's view that once the State Legislatures authorised Parliament to legislate on a subject, and a law was passed by Parliament, it was authorised to amend the law without seeking States' authority again. The Speaker held that the jurisdiction vested in Parliament expired when once the Act was passed in pursuance of the State authorisation, and fresh consent of the States would be necessary for amending the original Act. This means that if the State Legislatures do not give the necessary consent to amend or repeal the earlier Act in the same manner laid down in clause (1), neither Parliament nor the State Legislatures have the power to amend or repeal the Act under cl. (2).

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81. *R.M.D.C. v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *R.M.D.C. v. State of Mysore*, AIR 1962 SC 594 : (1962) 3 SCR 230.

82. Other Acts passed by Parliament under Art. 252(1) are : The Estate Duty Act, 1953, in its application to agricultural land; The Seeds Act, 1966; The Water Preservation and Control of Pollution Act, 1974; The National Capital Region Planning Board Act, 1985.

83. *State of W.B. v. Pronab Kumar Sur*, (2003) 9 SCC 490 : AIR 2003 SC 2313.

84. See, Art. 252(2) given above.

When Parliament passes an Act under Art. 252, it would not be categorized as the State Act. By passing resolutions, the States surrender their legislative power to Parliament. Parliament does not act as a delegate of the States because the initial enacting of the Act as well as its subsequent amending or repealing rests with Parliament alone and not with the States.[85]

Article 252 denotes flexibility woven into the fabric of the Indian federalism. The scheme of distribution of powers under the Indian Constitution becomes somewhat less rigid because of Art. 252. There is, however, one flaw in the phrasesology of Art. 252(2). As it stands now, it menas that after Parliament has passed the law under Art. 252(1), it can amend the law in *like manner*. This means that the States must again pass resolutions authorising Parliament to amend the law. If the State Legislatures fail to pass such resolutions, Parliament cannot amend the law.

The procedure laid down in Art. 252 has been the subject of a controversy. In *Union of India v. Valluri B. Chaudhary,*[86] a question was raised about the validity of the Urban Land (Ceiling and Regulation) Act, 1976. The Legislatures of 11 States considered it desirable to have a uniform legislation enacted by Parliament for imposing a ceiling on urban immovable property. Accordingly, these Legislatures passed resolutions under Art. 252(1) authorising Parliament to legislate on this topic. In pursuance of these resolutions, Parliament enacted the Urban Land (Ceiling and Regulation) Act, 1976.

Initially, the Act applied to the eleven States which had originally passed the requisite resolutions, but later it was adopted by resolutions passed by the Legislatures of six more States. The primary object of the Act was to impose a ceiling on vacant land in urban areas. The pith and substance of the Act was with regard to urban vacant lands – a matter falling under entry 18, List II.

The validity of the Act was challenged *inter alia* on the ground that while the resolutions of the States had authorised Parliament to enact a law to impose a ceiling on urban immovable property, actually the Act as enacted imposed a ceiling on urban vacant land which was a different subject and, thus, contrary to the resolutions. The Supreme Court rejected the contention arguing that since 'urban immovable property' was a wider expression which also included 'land', there was no contradiction between the resolution passed by the States and the legislation enacted by Parliament.

No such provision authorising the States to delegate power to the Centre exists in the U.S.A. The Australian Constitution, however, in sec. 51(*xxxviii*) authorises the Central Parliament to enact laws with respect to matters referred to it by the Parliament or Parliaments of any State or States, 'so that the law shall extend only to States by whose Parliaments the matter is referred, or which otherwise adopt the law." The Indian provision is a close replica of the Australian model, but the interesting fact is that while it has not been used at all in Australia so far, in India, the provision has been used quite a few times as stated above.

The Canadian Constitution has no such provision. A straight delegation of legislative powers by a Province to the Centre (or *vice versa*) has been held to be *ultra vires* on the ground that such a delegation would constitute a breach of the

85. *Rajendra Kumar v. State of Madhya Pradesh*, AIR 1979 MP 108.
86. AIR 1979 SC 1415 : (1979) 3 SCC 324.

"watertight compartments", between the Centre and the Provinces as envisaged in the Canadian Constitution and would permit the Dominion and Provinces to enlarge and contract each other's jurisdiction at will.[87] But, on the other hand, a delegation of power by the Centre to a board functioning under a Provincial law has been upheld.[88] The present position in Canada thus is that a delegation of legislative power by a Province to the Dominion or *vice versa* is invalid, but delegation of power by one on a body created by the other is valid.[89]

(d) IMPLEMENTATION OF A TREATY

Article 253 confers on Parliament the capacity to legislate, irrespective of the scheme of distribution of powers, to implement a treaty or a decision made at an international conference.[90]

(e) EMERGENCY

Parliament becomes empowered to make laws with respect to any matter in the State List in relation to the State whose administration is taken over by the Centre under Art. 356.[91]

(f) EXPANSIVE NATURE OF SOME UNION ENTRIES

Lastly, it may also be noted that certain entries, *viz.*, 7, 23, 27, 52, 53, 54, 56, 62, 63, 67 in the Union List are so worded as to make their ambit expansive. For example, under entry 52, Parliament can take any industry under Central control by declaring that its control by the Union is 'expedient in the public interest.'[92] This is a flexible provision because an industry can stay in the State sphere until need is felt to bring it under Central control.

K. CENTRAL CONTROL OVER STATE LEGISLATION

There are a few provisions in the Constitution as stated below which prescribe assent of the President, *i.e.*, the Central Executive before a Bill passed by a State Legislature can become legally effective. This mechanism is part of the scheme of checks and balances insofar as the Centre is able to keep under its control certain types of State legislation.

(a) Article 31A(1) provides that a law regarding acquisition of estates will not be invalid even if it is inconsistent with Art. 14 or 19.[93] However, under the first proviso to Art. 31 A(1), the exemptions granted to some categories of acquisitorial law from Arts. 14 and 19 cannot be available unless the relevant State law has been reserved for the consideration of the President and has received his assent. In this way, the Centre can ensure that the States make only justifiable use of their power to deviate from the Fundamental Rights.

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87. *Att. Gen. of Nova Scotia v. Att. Gen. of Canada*, (1951) SCR 31.
88. *P.E.I. Potato Marketing Board v. Willis*, (1952) 4 DLR 146; *Coughlin v. Ontario Highway Transport Board*, (1968) S.C.R. 569.
89. *Scott*, Delegation by Parliament to Provincial Legislatures and vice versa, 1948 *Can. BR* 984.
90. *Supra*, Sec. D.
91. For a detailed discussion on the Emergency Provisions, see, *infra*, Ch. XIII.
92. *Supra*, Sec. D.
93. *Infra*, Ch XXXII, Sec. B.

The proviso enables the Central Executive to keep some check on State laws falling under Art. 31A(1), so that there is some uniformity among the State laws and that there is no undue curtailment of the Fundamental Rights guaranteed by Arts. 14 and 19.[1] The Centre can also ensure that the State does not use its legislative power for a purpose extraneous or collateral to the purposes mentioned in Art. 31A(1). This is a safeguard against undue, excessive and indiscriminate abridgement of Fundamental Rights by State legislation.

(b) Article 31C gives overriding effect to the Directive Principles over Fundamental Rights granted by Art. 14 or Art. 19, but a State law can claim this effect only if the President gives his assent to it.[2] This is also a safeguard against undue abridgment of Fundamental Rights in the name of implementation of Directive Principles. It may be appreciated that Art. 31C confers very drastic power on State Legislatures and so some safeguard is necessary against unwise or inappropriate laws being enacted and claiming exemption from Fundamental Rights guaranteed by Art. 14 or Art. 19.

(c) Under the Second Proviso to Art. 200, a State Governor has been ordained not to assent to, but to reserve for the consideration of the President, any Bill passed by a State Legislature which, in his opinion, would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Constitution designed to fill.[3]

For the proper functioning of a democratic system, governed by Rule of Law, an independent judiciary is an integral and indispensable part of the constitutional system.[4] This provision is intended to preserve the integrity of the High Courts which are designed to be strong instruments of justice. It is a safeguard against a State passing any law which may adversely affect the powers, jurisdiction or status of the High Court. The Centre can intervene in a fit case and preserve the High Court's constitutional status.

(d) Under Art. 288(2), a State law imposing, or authorising imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by law made by Parliament for regulating or developing any inter-State river or river-valley, has no effect unless it has received the assent of the President.[5]

(e) Article 301 declares that trade, commerce and intercourse shall be free throughout India. However, under Art. 304(b), a State Legislature may impose reasonable restriction in public interest on the freedom of trade, commerce or intercourse with or within the State, but no such Bill is to be moved in the State Legislature without the previous sanction of the President.[6] This proviso is also a safeguard to ensure that State laws do not unduly disrupt the economic unity of the country. The Centre can ensure that States do not make laws to unnecessarily curtail freedom of trade and commerce.

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1. For discussion on Arts. 14 and 19, see, *infra*, Chs. XXI and XXIV.
2. See, *infra*, Ch. XXXII, Sec. D. Also see, Chs. XXXIV, Secs. A and B; XLI, Sec. D, *infra.*
3. *Supra*, Chs. VI and VIII.
4. See, on this theme, Ch. IV, Sec. K; Ch. VIII, Sec. F.
5. *Infra*, Ch. XI, Sec. J(ii).
6. *Infra*, Ch. XV, entitled "Freedom of Trade and Commerce".

It may however be mentioned that in the absence of prior sanction of the President, the defect can be cured under Art. 255 by subsequent assent of the President to the State law in question.[7]

(f) Then, there is Art. 254(2) under which repugnancy between a State law and a Central law with respect to a matter in the Concurrent List may be cured by the assent of the President to the State legislation.[8]

(g) When a proclamation of financial emergency is in operation under Art. 360(1), the President, *i.e.*, the Central Executive can direct the States to reserve all Money Bills or Financial Bills for the President's consideration after they are passed by the State Legislature. [Art. 360(4)(a)(ii)].[9]

(h) Besides the above specific situations where State legislation compulsorily needs Central assent for its validity, there is Art. 200 which makes a general provision enabling the State Governor to reserve a Bill passed by the State Legislature for Presidential consideration and assent.[10]

The implications of this provision appear to be that the Governor may also reserve a Bill, in situations other than those mentioned above, but it is not clear in what situations and circumstances the Governor may do so. No norms have been laid down in the Constitution as to when the Governor can exercise this power, or when the President can refuse to give his assent to a State Bill. On its face, it appears to give a blank cheque to the Governor and, as already discussed, he would exercise this power in his discretion.[11]

It needs to be said that the Governor should exercise his discretionary power to reserve a Bill for President's assent not liberally but exceptionally, *i.e.*, only in rare and exceptional cases. The reason for taking this view is that if the Governor interprets his power too liberally, it will result in too many State Bills being reserved for the Centre's assent and this will jeopardise the system of parliamentary democrary in the State.

Some of the situations when the Governor may be justified in reserving a State Bill are :

(i) when the State Bill suffers from patent unconstitutionality;
(ii) when the State Bill derogates from the scheme and framework of the Constitution so as to endanger the soveregnty, unity and integrity of the country;
(iii) when the State Bill *ex facie* comes in conflict with a Central law;
(iv) when the legitimate interests of another State or its people are being adversely affected.

Mere policy differences between the Governor and the State Government do not justify reservation of the State Bills by the Governor for President's assent. It may also be stated that unconstitutionality can arise in several situations, *e.g.*, the State Legislature may exceed its legislative competence which may happen when the Bill in question relates to a matter in List I and not to List II or List III; when

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7. For Art. 255, See, footnote 18, *infra*.
8. *Supra*, Sec. H.
9. *Infra*, Ch. XIII, Sec. F.
10. *Supra*, Chs. VI, Sec. F(i); Ch. VII, Sec. C.
11. *Ibid.*

the Bill infringes a Fundamental Right or it infringes some other constitutional provision or limitation.[12]

It may also be noted that Arts. 200 and 201[13] provide the necessary mechanism for making operational the various constitutional provisions, noted above, which require certain types of State Bills to be reserved for the President's consideration and assent.[14]

There is the corresponding question that once the State Bill is referred to the President under Art. 200, what are the considerations which the Central Government applies to examine the Bill. The formal powers of the President are laid down in this connection in Art. 201, but what tests should the Central Government apply to assess the State law is not laid down in Art. 201. *Prima facie,* Art. 201 confers an unrestricted power on the Central Government to examine the reserved State laws. The Central Executive is entitled to examine the State law from all angles, such as, whether or not it is in conformity with the Constitution, or the Central policies; whether it is inconsistent with any Central law *etc*.

A few illustrations to show the practical working of these provisions may be noted here. Punjab passed the Temporary Tax Bill levying a surcharge of 1 per cent on sales tax and an increased passenger and freight tax. The Centre refused its assent to the Bill as its effect was to levy 8 per cent tax on luxury goods as against the ceiling of 7 per cent fixed by the Chief Ministers' Conference. Another objection was that the Bill levied a tax of 3 per cent on goods declared essential on which only a 2 per cent sales tax was permissible under the Central Sales Tax Act, 1956. The Centre also sought an assurance from Punjab that it would share the enhanced revenue from the passenger tax with the Union Territory of Himachal Pradesh. The Centre signified its assent to the Bill when all these lacunae were removed.

In 1961, the Centre refused to assent to the Madhya Pradesh Panchayat Raj Bill, 1960, because it provided for nominated village panchayats to be set up for a year, and the Centre took the view that the system of nominations was a negation of the concept of panchayats.

The most typical case in this area is *In re Kerala Education Bill.*[15] The Kerala Legislature passed a Bill in 1957 to provide for the better organisation and development of educational institutions in the State. Its provisions raised a bitter public controversy in the State. The Governor reserved the Bill under Art. 200 for consideration of the President who sought the advisory opinion of the Supreme Court under Art. 143.[16] The Supreme Court held that some of the provisions of the Bill offended Art. 30(1), pertaining to the right of minorities to establish and administer educational institutions.[17] The President returned the Bill to the State for necessary amendments therein in the light of the Supreme Court's opinion. It is clear that the Centre sought the advice of the Supreme Court so as to keep it-

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12. On Fundamental Rights, see, Chs. XX—XXXIII, *infra.*

13. According to Art. 201, when a Bill is reserved for the President's consideration, the President may assent or withhold his assent therefrom.
See, Ch. VI, Sec. F(i) and Ch. VII, Sec. C, *supra.*

14. See, STUDY TEAM, ADMINISTRATIVE REFORMS COMM., REPORT ON CENTRE-STATE RELATIONSHIP, I, 277; *Report of the Sarkaria Comm.,* Ch. V, 143-159.

15. AIR 1958 SC 956 : 1959 SCR 995; *supra,* Ch. IV, Sec. F(c).

16. *Supra,* Ch. IV, Sec. C.

17. *Infra,* Ch. XXX, Sec. B.

self above the accusation of partisan politics as the Central and State Governments belonged to different political parties.

According to Art. 255, no Act of Parliament or of a State Legislature is to be invalid by reason only that the recommendation or previous sanction of the President required by the Constitution was not given, if assent is given to it by the President subsequently.[18] An interesting case in the area is *Jawaharmal v. State of Rajasthan*.[19] Rajasthan enacted a law levying a tax. The law needed Presidential assent but it was not secured. Later Rajasthan enacted another law declaring that the earlier law would not be deemed to be invalid by reason of the fact that Presidential assent had not been secured. This later law secured Presidential assent. The Supreme Court held that it could not cure the infirmity of the earlier law. That infirmity could be cured only by Presidential assent and not by any legislative fiat. Even the Presidential assent to the later law cannot cure the defect of the earlier law.

From the above discussion, it is clear that even in the sphere allotted to the States, the Centre exercises appreciable control over their legislation. Every year a large number of State Bills come to the Centre for assent under various provisions of the Constitution mentioned above. According to the Report of the Sarkaria Commission, during the period from 1977 to 1985, 1130 State Bills were reserved for the consideration of the President. Most of these originate under Art. 254(2) so as to validate an inconsistency between a State law and a Central law in the Concurrent List. The President assented to most of these bills; the assent was withheld only in 31 cases.[20] The norms on which the Centre acts in exercising its powers are not clear. However, on the whole, it appears that the Centre is circumspect in exercising its controlling powers over the State legislation. It is only in a very few cases that Presidential assent is refused to State laws. Some of the grounds on which such assent has been refused are: there was already a Central law in existence (in the Concurrent List); the matter lies within the exclusive jurisdiction of the Centre; the Centre is contemplating action itself; exclusion of Union property from State taxation; non-conformity with the policies of the Central Government; unconstitutionality; lack of procedural sagefuards etc.[21]

Commenting on the constitutional scheme of reserving State laws for the President's assent, the Sarkaria Commission has stated that it is "intended to subserve the broad purpose of co-operative federalism in the realm of Union-State legislative relations"; it is "designed to make our system strong, viable, effective and responsive to the challenges of a changing social order;" it is a necessary means and tool for evolving cohesive, integrated policies on basic issues of national significance. But, for the system to be effective, it is necessary that it is used sparingly and only in proper cases.

It may also be appreciated that the constitutional provisions regarding Central control over State legislation existing in India do undoubtedly detract to some extent from State autonomy. There is also inherent in these provisions a seed of

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18. If the previous sanction needed is that of the Governor, the Act will not be invalid if it has been subsequently assented to by the Governor or the President.

19. AIR 1966 SC 764 : (1966) 1 SCR 890.
For a comment on the case, see, 8 *JILI*, 637.

20. REPORT, 152.

21. S.N. JAIN, Freedom of Trade & Commerce *X J.I.L.I.*, 558-61 (1968); Alice Jacob, Presidential Assent to State Bills—A Case Study, XII, *J.I.L.I.* 151 (1970).

Centre-State conflict, for with various political parties in office, there may be a difference of policies amongst the various governments. A party controlling a State may pass a Bill within its competence to effectuate its political and economic ideologies and the political party in control at the Centre may not approve of the approach of the State Government. Thus, a deadlock may ensue between the Centre and the State concerned which can be broken only by a process of discussion and compromise between the two, as the Constitution prescribes no method to override a Central veto over State legislation where Central assent is necessary for effectuation of the State law.

However, the Central control over State legislation is justified in some situations. There are considerations of uniformity of law and uniformity of approach in certain basic matters. If, for instance, a State Government were to embark on a large scale indiscriminate nationalisation, its impact may be felt not merely within the State, but the national economic interests as a whole may be affected; it may drive away foreign investors from the country and so the Cente may not remain a passive spectator for long. Then there are cases of State laws prevailing against Central laws in the Concurrent sphere. This is a matter which the Centre can decide keeping in view the considerations of uniformity as against local exigencies. Centre's assent in certain cases confers an immunity on the State laws from being challenged under the Fundamental Rights.[22] This matter raises questions of individual rights as against social control. On the whole, however, if past practice is any guide, the Centre is wary of controlling State legislation unless it is demonstrably against national interests, or is unconstitutional, or is against well established national policies, and, perhaps, mere difference of approach is not the determining factor.

In the U.S.A. and Australia, the Centre exercises no control over the State legislation. In Canada, however, the Lt. Governor of a Province may reserve a Provincial Bill for the consideration of the Governor-General, a provision analogous to Art. 200 in India. Also, the Centre in Canada has power to disallow a Provincial law (after it has been assented to by the Lt.Governor and has thus come into operation) within a year of its enactment. Intervention through disallowance or reservation is exceptional. The whole trend in Canada has been towards lessening use of this power and that from the very beginning it has been recognised that the power should be used with circumspection and according to some principles. Legally, however, there are no limitations on the use of the device of reservation or disallowance in Canada. There is no power in the Central Government in India to disallow a State Act after it has come into operation as there is in Canada.

L. DISTRIBUTION OF POWERS IN OTHER FEDERATIONS

(i) CANADA

The scheme of distribution of powers in Canada between the Centre and the Provinces makes a threefold enumeration of powers.[23]

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22. See, *Supra.*

23. BORA LASKIN, CANADIAN CONSTITUTIONAL LAW, 202-900 (1975). Also see, D.J. Smiley, *The Canadian Political Nationality,* (1967) : G. Hawkins (ed.), *Concepts of Federalism,* (1965); Reports of the Rowell-Sirois Commission.

The Centre is empowered by S. 91 of the British North America Act, 1867, to make laws for the 'peace, order, and good government of Canada with respect to subjects not exclusively assigned to the Provinces'; but 'for greater certainty', and not 'so as to restrict the generality' of the foregoing provision, 30 specific heads of powers have been mentioned in the section itself; it is further laid down that whatever falls within this enumeration cannot be regarded as coming within the subjects falling in the Provincial List. Some of these heads are: defence, postal service, currency and coinage, taxation, criminal law, regulation of trade and commerce, unemployment insurance. S. 92 empowers the Provinces to legislate exclusively with respect to sixteen subjects. One of the heads in the Provincial list is 'property and civil rights'. 'Education' is an exclusive Provincial matter. Under s. 95, 'Agriculture' and 'immigration' are concurrent subjects with supremacy in favour of the Centre in case of conflict between a Central and a Provincial law. S. 94A makes 'Old age pension' a concurrent subject, but, curiously enough, in this area the supremacy lies with the Provinces and the Central law is subject to the Provincial law.

The British North America Act was intended to establish a strong Centre, but the constitutional developments in the country belied the hopes of the makers of the BNA Act. The growth of the Canadian Federation has been too much influenced by the existence of bi-racialism and bi-linguism in the country. The English-speaking people, in a majority in the country, want a strong Centre. On the other hand, the French-speaking minority, concentrated in the Province of Quebec, have always desired a weak Centre and strong Provinces so that their language and culture may be preserved. The framers devised the scheme in such a way as to leave matters of a local nature to the Provinces and to transfer matters of 'general' or 'national' concern to the Centre and thus given primacy to it. Literally, Section 91 is so designed as to make the general power—power to legislate for the peace, order and good government of Canada—as the main grant and to make the enumerations therein as the 'illustrations' of the general grant.

This view was substantially upheld by the Privy Council in *Russell v. The Queen*,[24] where it was held that all federal laws would be valid if they dealt with national or general aspects of any subject-matter even though that subject-matter in its local aspect might appear to come within S. 92. Had this view been applied consistently, the Centre in Canada would have become extremely powerful. But, in course of time, the Privy Council which acted for long as the highest and ultimate interpretative judicial organ from Canada, being influenced with the aspirations of the French minority so interpreted the scheme of distribution of powers as to shift the balance of power in favour of the Provinces at the cost of the Centre. The Central power became confined to the subject matters enumerated in S. 91. The efficacy of the 'general' power was very much diluted as a peace-time power and came to be used by the Centre only in cases of emergency like war and not in normal times.[25] This happened because the exercise of general power

24. 7 A.C. 829.

25. See on this point, Bora Laskin, Peace, Order and Good Government Re-examined, 25 *Can. B.R.* 1054 (1947); also his note in 35 *Can. B.R.*, 101; Scott, Centralisation And Decentralisation, 29 *Can B.R.*, 1095 (1951): SCOTT, French Canada and Canadian Federalism in EVOLVING CANADIAN FEDERALISM, 54-61; Smiley, The Two Themes of Canadian Federalism, 31 *Can. JI. of Eco. & Pol. Sc.* 80. *Cf.* L.P. Pigeon, The Meaning of Provincial Autonomy, 29 *Can. B.R.* 1126 (1951).

invariably came in conflict with the Provincial power on 'property and civil rights,' and the Privy Council instead of interpreting the latter narrowly, interpreted the Dominion's power narrowly.

Not only this, the Provincial power over "property and civil rights" was interpreted by the Privy Council so broadly as to affect adversely some of the Centre's enumerated powers in s. 91, *e.g*., the scope of trade and commerce power has been very much curtailed. While the general rule is that in case of conflict between the Dominion's enumerated power in Sec. 91 and the Provincial head in S. 92, the Dominion's power prevails, yet the conflict between 'trade and commerce' and 'property and civil rights' has been an exception to this rule as in such a case the judicial view has invariably leaned in favour of the latter.

The Privy Council took the view that, if taken literally the phrase "trade and commerce" would extend over the whole range of economic life but that such a construction would ignore and render meaningless the Provincial power over property and civil rights.[26] Thus, by excluding "property and civil rights" from "trade and commerce", and interpreting 'property and civil rights' broadly, much of the Dominion Government's power has been neutralized.

This judicial approach can be illustrated by reference to a few decided cases. In 1937 in the *Weekly Rest case*,[27] the Privy Council held that legislation regarding labour fell under the Provincial power over 'property and civil rights' and that the general power could be used only under 'abnormal' or 'exceptional circumstances'. In peace time, therefore, the 'residue' came to belong to the Provinces instead of the Dominion. 'Property and civil rights' being a term of very general nature comprised so much that little was left as a 'residue' in the peace time.[28]

The Centre has been denied power to regulate the supply and price of necessities of life.[29] *In Att. Gen. for British Columbia v. Att. Gen. for Canada*,[30] while invalidating the Central agricultural marketing legislation, the Privy Council declared that 'regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province'. In the words of Bora Laskin, "The story of the trade and commerce power ..... is ..... the saddest legacy of Privy Council adjudication."[31] This is the position in normal times. The position however changes in favour of the Dominion in an emergency when 'property and civil rights' is restrictively interpreted; and, consequently, the 'general power' is broadly interpreted.[32] In war-time the general power becomes very potent and the Dominion Parliament can enact many socio-economic laws which it cannot do during peace-time.[33]

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26. *Bank of Toronto v. Lamb*, (1887) 12 A.C. 575.
27. *Att. Gen. for Canada v. Att. Gen. for Ontario*, 1937 A.C. 326.
28. *Snider's case*, 1925 A.C. 396; MacDonald, Constitution in the Changing World, 1948 *Can, B.R. 2*; *Canadian Federation of Agriculture v. Att. Gen. of Quebec*, 1951 A.C. 179.
29. *In Re Board of Commerce Act*, 1919, 1922 AC 191.
30. 1937 A.C. 377.
31. Also see, *Citizens Insurance v. Parsons*, 7 A.C. 96; *Att. Gen. for Ontario v. Att. Gen. for Canada*, [1896] A.C. 348; *In Re Dairy Industry Act (1950)*, [1951] A.C. 179.
32. An application of the emergency doctrine is to be found in the *Anti-Inflation Reference* (1976) 52. SCR 373. The Anti-Inflation Act was justified on the basis of economic crisis in Canada.
33. *Fort Frances Pulp & Paper Co. v. Manitoba Free Press*, [1923] A.C. 695.

A limited interpretation has been given to the Centre's spending power. It has been held that spending accompanied by a regulatory scheme would be classified by reference to the latter. In the instant case, the Act was held invalid.[34]

With the disappearance of the Privy Council's jurisdiction over Canada, and the emergence of the Canadian Supreme Court as the final Court of appeal, some judicial efforts have been made to restore the balance in favour of the Centre by reclaiming to some extent the 'general power' as well as the 'trade and commerce' power and to restrict the scope of the Provincial power on 'property and civil rights'.[35]

The Central Government in Canada faces a great difficulty in the area of foreign relations. Under S. 132 of the B.N.A. Act, the Canadian Parliament has 'necessary and proper' power to perform the obligations of Canada, 'as a part of the British Empire', towards foreign countries arising under treaties between the Empire and such foreign countries. In 1876, when the B.N.A. Act was passed, Canada was a British colony with no international status of its own and so S. 132 was sufficient to meet its needs. If Canada enters into a treaty as a part of the British Empire, it can implement it irrespective of the scheme of distribution of powers. But, today, Canada enters into treaties as a sovereign country, and not as a part of the British Empire, and to these treaties S. 132 does not apply. Such treaties can be implemented by Parliament to the extent it is possible to do so within the limits of the subjects assigned to it under S. 91. It cannot encroach upon the Provincial field.[36] If a treaty concerns a matter falling in the provincial sphere, then comparable legislation by the various Provinces may be needed to implement the treaty, and this, at times, may prove to be very difficult. The power of the Central Government is thus very much circumscribed in the international field.[37]

The development of Canadian Federalism has been in striking contrast with that of the American Federalism. In the U.S.A., the Centre designed to have limited powers has grown into a colossus. On the other hand, in Canada, the Centre designed to be strong has turned out to be restricted in dealing with the socio-economic problems of a fast developing economy.

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34. *Re Employment and Social Insurance Act (1937),* [1937] A.C. 355.

35. See, for example, *Johannesson v. West St. Paul* (1952) 1 S.C.R. 292; *Munro v. National Capital Commission,* (1966) S.C.R. 663; *A.G. for Manitoba v. Manitoba Egg & Poultry Association* (1971) SCR 689; Bora Laskin, *Canadian Constitutional Cases,* 122-130 (1975).

36. *Att. Gen. for Canada. v. Att. Gen. for Ontario,* 1937 AC 326.
According to this judgment, a distinction has to be drawn between the "legislative powers given to the Dominion to perfom obligations imposed upon Canada as part of the empire by an Imperial executive responsible to and controlled by the.. Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament." These latter obligations are not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries." Consequently, they are not covered by S. 132 as given above.

37. Szablowski, Creation and Implementation of Treaties in Canada, 1956 *Can. B.R.* 28; Hendry, *Treaties and Federal Constitutions;* Scott, Centralisation and Decentralisation in Canadian Federalism, 1951 *Can B.R.* 1095; Nettl, 'The Treaty Enforcement Power in Federal Constitutions, 1950 *Can B.R.* 1051; Matas, Treaty making power in Canada, 1947 *Can B.R.* 458; McWhinney, *Comparative Federalism,* 43(1962); Laskin, Some International Legal Aspects of Federalism; The Experience of Canada in Currie (ed.), *Federalism and the New Nations of Africa,* 389 (1964).

Comparing the Indian and Canadian schemes of distribution of powers, a number of resemblances and contrasts are found to exist. The Centre in Canada has an exclusive field enumerated in S. 91 of the B.N.A. Act. So has the Centre in India although the Union List is more elaborate and detailed than its Canadian counterpart. The Canadian Provinces have an exclusive field. So have the States in India though here again the State List is more detailed. In Canada, there is a small concurrent field consisting of three subjects only; the Concurrent area in India is, however, much larger. In both countries, the residuary belongs to the Centre, but there is not much left by way of residuary in Canada because of the judicial interpretation of the Provincial 'property and civil rights' clause in peace-time.

The emergency view of the Centre's 'general power' in Canada can be compared with the 'emergency' provisions of the Indian Constitution. In Canada, during an emergency, the Centre's general power becomes much more meaningful due to a restrictive interpretation put on the Provincial power over 'property and civil rights'.[38] How much scope the general power would have during an emergency is, however, a matter for the Courts to determine as and when controversies are presented to them for adjudication. In India, on the other hand, when an emergency is declared, the Cenrre becomes entitled to legislate with respect to any matter in the State List. Another very important point of contrast between the two countries is that while the Centre in India has a comprehensive power to give effect to a treaty, and it may legislate even though the subject-matter falls within the State List,[39] in Canada the Centre is restricted to some extent in this area.

(ii) U.S.A.

In the U.S.A., the federation came into existence as a result of the voluntary compact between 13 sovereign States. These States surrendered a part of their sovereign powers to a federal entity and retained with themselves the unsurrendered residue.

The Constitution of the United States of America was brought into being in 1787. It is, therefore, the oldest and the most respected member of the family of modern federal constitutions and is regarded as a precursor of the modern federalism. Experiences derived from its working have profoundly influenced the growth of federalism elsewhere.

The U.S. Constitution adopts a very simple method for Centre-State distribution of powers. It has only one List specifically enumerating the powers of the Centre. A few enumerated and specified powers have thus been allocated to the Centre, and the unenumerated residue of powers have been left to the States.

The powers entrusted to the Federal Government are thus specific and fall under eighteen heads but Central powers have expanded a great deal over time through judicial creativity and activism so much so that, in the words of U.S. Supreme Court as early as 1920, "it is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in

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38. *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, 1923 A.C. 695. Also, Murphy, The War Power of the Dominion, 30 *Can. B.R.*, 791 (1952).

39. *Supra*, Sec. D(c).

every civilized government is not to be found".[40] Moreover, "even constitutional power may be established by usage".[41] The Congress is given power to make all laws which may be 'necessary and proper' to give effect to its enumerated powers.

The Centre may enter into treaties with foreign countries, which on being confirmed by 2/3rds of the senators present, are placed in the same category as an Act of Congress and override State legislation. A self-executing treaty becomes operative automatically when approved by the Senate, but a non-self-executing treaty can be effectuated only by passing a law. A treaty is self-executing if its framers intended to prescribe a rule which, standing alone, would be enforceable in the Courts.[42] Under its treaty making power, the Centre has full control over foreign affairs and is authorised to give effect to a treaty entered into by it with a foreign country irrespective of the Centre-State division of functions. In an early case[43], the Supreme Court declared : "It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide'. 'If this were not so', said the Court, 'The will of a small part of the United States may control or defeat the will of the whole." The Supreme Court has even asserted that the Central Government's power over external affairs does not depend upon the affirmative grant of power in the Constitution but is a necessary concomitant of nationality. Without an extensive foregin affairs power, the U.S.A. would not have gained primacy in international sphere.[44]

Most of the powers granted to the Centre are couched in very general language. A liberal interpretation of these powers has made the Centre very powerful, and has helped in the transformation of an agricultural country into the modern industrial giant of today. The commerce power has become the source of the Centre's extensive power to regulate the economic life of the country, to deal with national economic problems, to prevent or restrict disfavoured local activities like gambling, prostitution, *etc*., and to restrict the States from interfering with the flow of trade and traffic over State boundaries.[45] The commerce power has been interpreted so as to cover almost every aspect of national economy including production as well as distributive activities. Had this not been so, big

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40. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

41. *Inland Waterways Corp. v. Young*, 309 US 517 (1940).
See, for a discussion on the Congress's powers, CORWIN, THE CONSTITUION : WHAT IT MEANS TO-DAY, 32-93.

42. Looper, Limitations on the Treaty Power in the Federal States, 34 *N.Y.U.L.R.*, 1045, 1055: McLaughlin, The Scope of the Treaty Power, 43 *Minnesota L.R.*, 651 (1959): Sutherland, Restricting the Treaty Power, 65 *Harv. L.R.* 1305 (1952); *Heuenstein v. Lynham*, 100 U.S. 483.

43. *Ware v. Hylton*, 3 Dall. 199.

44. *Missouri v. Holland*, 262 U.S. 416; *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *Perez v. Brownell*, 356 U.S. 44 (1958): *Zschering v. Miller*, 389 C.S. 429 (1968).

45. *N.L.R.B. v. Jones*, 301 U.S. 1: *U.S. v. Darby*, 312 U.S. 100; *Wickard v. Filburn*, 317 U.S. 111: *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675. Stern, The Scope of the Phrase Inter-State Commerce, *Selected Essays in Constutional Law*, 298 (1963).
Marphy J. said in *American Power & Light Co. v. Securities & Exchange Comm*., 329 U.S. 60, 104: "The federal commerce power is as broad as the economic needs of the nation."

corporations having operations throughout the country could not have grown and the country could not have industrialized itself in such a phenomenal manner.[46]

Responsibility for defence lies solely on the Centre and its war power is interpreted very broadly during the war crisis. The war power "staggers the imagination by its scope and variety", and "in short, what is necessary to win the war Congress may do."[47] The War power includes not only power to wage war but also power to prevent it as well as to remedy the evils which have arisen from its rise and progress.[48]

The Supreme Court has developed the doctrine of "incidental and ancillary powers." The 'necessary and proper' clause has also been liberally interpreted so as to confer a greater dimension to its enumerated powers. Under this power, the Courts have sustained means chosen by Congress which, although not themselves within the granted power', are 'nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.'[49] Thus, the Congress enjoys a good deal of discretion to decide what means need be adopted to achieve the purposes implicit in its powers. Justice STONE, speaking for the Supreme Court, asserted that Congress's powers under the necessary and proper clause are no more limited by the reserved powers of the States than are its necessary powers.[50] The "necessary and proper" clause which is known as the "co-efficient clause" furnishes each of the "enumerated" powers of Congress with its second dimension, so to speak.[51]

Under its taxing power, the Centre has been enabled to raise vast sums of revenue in peace as well as in war.[52] And, the taxing power has been used not only to raise money but also for regulatory purpose.[53] Its power to spend for general welfare has been interpreted broadly so as to enable the Centre to spend money not only for an activity falling within its constitutional ambit, but even for a purpose which falls under the States' jurisdiction. Congress can spend money on any activity which it identifies as a matter of 'general' welfare.[54]

Congress has come to exercise enormous power with the acquiescence of the Supreme Court. Over time, the Centre has grown into a colossus and has dwarfed the States. Though the States still remain important administrative units performing many useful functions—education, public health, highways, law and order, are some of the activities in the large miscellany of the State functions in the modern times—yet the fact remains that their relative constitutional position

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46. "The Commerce clause forms the keystone of the arch on which the commercial prosperity of the nation is made to rest." M. RAMASWAMY, THE COMMERCE CLAUSE IN THE CONSTITUTION OF THE UNITED STATES, 7.

47. CUSHMAN, CASES IN CONST. LAW, 463 (1968).

48. *Yakus v. U.S.*, 321 U.S. 414: *Bowles v. Willingham*, 321 *U.S.* 503: *Woods v. Miller*, 333 U.S. 138; *Corwin, Total War and the Constitution* (1947).

49. *U.S. v. Darby*, 312 U.S. 100; *McCulloch v. Maryland*, 4 Wheat. 316; *U.S. v. Oregon*, 366 U.S. 643.

50. *U.S. v. Darby*, *supra.*

51. CORWIN, *supra*, 33 (1973).

52. *Infra*, next Chapter.

53. Robert Cushman, The National Police Power under the taxing clause of the Constitution, *4 Minn. L Rev.*, 247, and Social and Economic Control through Federal Taxation, 18 *Minn, L.R., 759*; *Carter v. Carter Coal Co.*, 298 U.S. 238; *U.S. v. Kahriger*, 345 U.S. 22.

54. *U.S. v. Butler*, 291 U.S.I; *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619; *Cleveland v. U.S.*, 323 US 329; see, M.P. Jain, Federal Grants-in-Aid in the U.S.A., 1946 *Vyavahara Nirnaya*, 245: *infra*, next Chapter.

is inferior to the Central Government whose primacy is an established fact. New areas of national concern have been emerging. National policies have been extending into new fields which were once the preserve of the States. The fact remains that in the U.S.A. which was once regarded as the home of classical federalism, strong centripetal tendencies have emerged in course of time and today the functional reality does not accord with the classical federal theory. In the U.S.A., there has been a continuous expansion of the functions of the Central Government and this has completely altered the federal balance of powers in favour of the Central Government. Correspondingly the residual powers of the State Governments have been attenuated. This transformation has been achieved without any amendment of the Constitution. In this process, the Supreme Court has played a crucial role. Much of the constitutional transformation has taken place through judicial activism. By the process of liberal interpretation of the Constitution, the Court has expanded the scope of many heads of power to cover a variety of legislative fields.

Comparing the scheme of distribution of powers in the U.S.A. with that in India, we find that in America there is only one List while there are three Lists in India. In America only the exclusive powers of the Centre are defined; there is no concurrent field and the residue vests with the States. In India, the exclusive powers of the Centre as well as of the States are defined: there is a large concurrent area and the residue vests in the Centre and not the States. Functions assigned to the Centre in India are much more numerous and broader in ambit than those assigned to the Centre in the U.S.A.

Defence and external affairs are Central subjects in both the countries but the Centre's external affairs power appears to be broader in India than in the U.S.A., for whereas in India it extends to treaty obligations as well as to non-obligatory international conferences,[55] in the U.S.A. it extends only to treaty obligations. All treaties in India need legislation for implementation as, unlike the U.S.A., there is no concept of self-executing treaties. In both places, the Centre is not hindered by the distribution of powers in the implementation of its treaty obligations. The Supreme Court in the U.S.A. has helped in the growth of the Centre as a powerful entity; in India, the Centre has been conceded a powerful status by the Constitution itself which is more pervasive than that of the Centre in the U.S.A.[56] The Supreme Court has further expanded the Centre's powers by its creative interpretation.[57]

(iii) AUSTRALIA

The Commonwealth of Australia joined the family of federations in 1900 when the British Parliament enacted the Commonwealth of Australia Constitution Act. It follows the American model to the extent of giving only specific powers to the Centre but, in effect, there are some interesting differences between Australia and America in the scheme of distribution of powers between the Centre and the States.

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55. *Supra*, sec. D.

56. See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TO-DAY, 38-124(1978); GUNTHER, CONSTITUTIONAL LAW: CASES & MATERIALS 81-372 (1975).

57. On Constitutional Interpretation, see, Ch. XL, *infra.*

Section 51 of the Commonwealth Act enumerates 40 heads with respect to which the Central Parliament has power to legislate. S. 51 does not make the power of the Centre exclusive and the States are also authorised to legislate in this area concurrently. But some heads either by their nature, or by virtue of other constitutional provisions, are such that only the Central Parliament can make laws with respect to them, as for example, borrowing money on the public credit of the Commonwealth, defence, external affairs, *etc*. Besides, a few *exclusive* powers have also been assigned to the Centre.[58] All the rest of the functions, lying beyond the concurrent and the Centre's exclusive fields, fall within the exclusive State jurisdiction. The States thus have to look after such functions as education, health, roads, railways and other various developmental activities.[59] In case of an inconsistency between a Central law and a State law, the Central law prevails and the State law is invalid to the extent of inconsistency.

Though the powers of the Centre are defined and specific, yet they have been couched in such terms as have, on the whole, proved to be capable of expansion by judicial interpretation. The High Court has persistently read Commonwealth powers liberally and generously. The defence power has been interpreted in such a way as to enable the Centre to regulate practically all aspects of people's life during war-time with a view to military preparedness of the nation. This power has been used to support regulation of substantial areas of the national economy to enable a smooth transition from war to peace or in preparation for war.[60] It has been stated by an authority that the defence power in Australia is "so simply and largely conferred that in time of war the Parliament could itself make any laws whatever, unless they could be plainly shown to have no possible bearing on the military preparedness of the nation".[61]

The Centre has full control over external affairs: it can make a law to give effect to a treaty even if its subject-matter falls under the States' jurisdiction.[62] This is potentially important because of the rapid expansion in the scope of international agreements. By signing such an agreement, the Centre can acquire many powers which it may lack otherwise.

The Centre has found in its powers on 'inter-state commerce' and 'arbitration of industrial disputes' a great potential capacity to regulate economic affairs in the country because progressively trade and commerce is becoming more national in character and less confined within the limits of any one State.[63]

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58. These powers are: (*a*) the seat of the Central Government (S. 92): (*b*) places acquired by the Centre for public purposes (S. 52); (*c*) territory surrendered to the Commonwealth by any State (Ss. 122 and 111); (*d*) the public services of the Centre (S. 52); (*e*) duties of customs and excise (S. 90 with S. 52(iii);) (*f*) naval and military forces (S. 52 and S. 114); (*g*) bounties in the production or export of goods (Ss. 90 and 91); (*h*) coinage of money or legal tender (Ss. 51 and 115).

59. SAWER, AUSTRALIAN CONSTITUTIONAL Cases (1982).

60. *Farey v. Burvett*, 21 CLR 433; *Marcus Clark & Co. v. Commonwealth*, 87 CLR 177; *King v. Foster*, 79 CLR 43; Bailey, *Fifty Years of Australian Constitution*, 25 ALJ 319; *Australian Communist Party v. Commonwealth*, 83 CLR 1; Cower, 33 *JI. Comp. Leg.*, 83; Else-Mitchell, *Essays on the Australian Constitution*, 157-191 (1961); COLIN HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW, 422-441 (1972).

61. K.H. BAILEY, STUDIES IN THE AUSTRALIAN CONSTITUTION, 32 (ed. Portus).

62. *R. v. Burgess, ex parte Henry*, 55 CLR 608; *Airlines of N.S.W. v. State of N.S.W.*, 113 CLR 54 (1965); *New South Wales v. Commonwealth*, 135 C.L.R. 337; ELSE-MITCHELL, *op. cit.*, 374; COLIN HOWARD, *op. cit.*, 441-457.

63. *Australian National Airways v. The Commonwealth*, 71 CLR 29.

The extent of the spending power of the Centre is broad. It is not definitely established yet the Centre can spend for any purpose it likes. In the *Pharmaceutical Act* case,[64] Commonwealth appropriations for granting pharmaceutical benefits were held invalid suggesting that, unlike the U.S., the Australian Central Government does not have general power to spend its funds on such social services as it pleases. The decision also suggested that a spending scheme connected with public health and having extensive coercive regulation as incidental to the spending is to be treated as a law about public health, and so beyond the Central power. This decision led to amending the Constitution so as to enable the Centre to provide a number of welfare services. However, in *Victoria v. Commonwealth & Hayden*[65] by a majority, the High Court has sustained the liberal view of the spending power and has ruled that Parliament can appropriate money for such purposes as it may determine.

In spite of the expansion over time in the powers of the Centre, there is a feeling that it lacks adequate power to deal with peace-time socio-economic problems facing the country and efforts made to amend the Constitution to rectify the lacunae therein have not succeded because of an extremely rigid process to amend the Constitution.[66]

There are several interesting points of comparison and contrast between the Australian and Indian schemes of distribution of powers. Both in Australia and India, certain powers have been assigned exclusively to the Centre, though, in India, the enumeration of powers in the Union List is much more exhaustive and much larger than in Australia. Both countries have Concurrent Lists with primacy being vested in the Centre, though in India, unlike Australia, it is possible to keep alive a State law inconsistent with the Central law while there is no such provision in Australia. In Australia, the powers of the States are unenumerated and undefined. In India, it is not so; the powers of the States are enumerated and defined as contained in the State and the Concurrent Lists. In India, the residue vests in the Centre; in Australia, the residue vests in the States. In both countries, the Centre has been clothed with a comprehensive defence power. The Centre's power over external affairs also is comprehensive and broad in both countries.

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64. *Att. Gen. (Vic.) v. Commonwealth*, 71 CLR 237 (1945).
Also see, FAJGENBAUM & HANKS, AUSTRALIAN CONSTITUTIONAL LAW, 629 (1980).

65. (1975) 134 CLR 338.

66. EVATT, POST-WAR RECONSTRUCTION AND THE CONSTITUTION; CAMPBELL, POST-WAR RECONSTRUCTION IN AUSTRALIA, 238-262.
In 1959, a Jt. Parliamentary Committee suggested some constitutional amendments but nothing came out of it.
For Constitutional Amendment, see, *infra*, Ch. XLI.