



Amendment to article 248(1) of the constitution of India-Residuary powers of the legislation

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Abstract

The topic of this paper is Legislative Competence. It largely and essentially focuses on the understanding of Article 248(1) of the Constitution of India which provides Residuary powers to the Union when read along with Entry 97 of the State List. The case of Union of India vs Harbhajan Singh Dhillon is analyzed along with its dissenting opinion. The purpose of analyzing the case was to ensure some clarity on the question of residuary powers on entries which were mentioned by virtue of exclusion in the Union list.

Further, after enlisting the intention of the constitution makers and drafters using the Constituent Assembly debates I have made an attempt to show that State autonomy is of equal importance. I have thereby put forward and proposed an amendment which I wish to bring and which should be brought i.e. shifting the entry of residuary powers to the Concurrent List thereby maintaining State autonomy. The last part of this paper focuses on ways and means in which cobwebs in the Constitution can be rectified.

Keywords: constitutional, entry 97, amendment, intention, article 248

Introduction

Tracing through the evolution of Federalism and Residuary powers of Legislation, this essay tries to examine the reasons and purpose of the Constituent Assembly with respect to distribution of powers and the intention behind having such a Strong Centre. While doing so, the framers have drifted from the pure meaning of Federalism and have moved towards what Indian can be called 'a Holding-Together' Federation. I say so because "the Drafting Committee wanted to make it clear that though India was to be a Federation, the Federation was not the result of an agreement by the States to join in a Federation (like that of the US) and that the Federation not being the result of an agreement no State has the right to secede from it." [1] The factors responsible for vesting Residuary powers with the Parliament were few. For instance, Establishing State's autonomy which was weak at that point, maintaining the Unity and Integrity of the nation, enhancing sentiments of Nationalism, communal partition of India being the major one. "Responding to the historical circumstances of the time, however, the 1935 Act adopted a comprehensive and exhaustive enumeration of subjects under three lists. The Constituent Assembly which incorporated this scheme in the present Constitution, further expanded this enumeration with the intention of covering every perceivable subject of government functioning." [2]

Current Position

Article 248 of the Constitution of India, 1950 read along with Entry 97 of list I grants Residuary powers of Legislation and Taxation to the parliament. However, this is subject to the fact that the matter on which the Parliament is legislating must not be enumerated in the State or Concurrent list. The subject of judicial interpretation and review has been an essential part of the Parliament's scope of legislating through Residuary powers. The traditional understanding of the combined reading of Article 248 along with Entry 97, List I was laid down in several cases like that of "Hari Krishna vs Union of India" [3], "Second G.T.O Mangalore vs D.H. Nazareth" [4] and "Jaora Sugar Mills vs State of M.P." [5] where the Supreme Court unequivocally held that where the subject matter of the Legislation did not fall within the State List, Concurrent List and the enumerated entries in the Union List, it was covered by the Residuary jurisdiction of the Parliament."

While these former cases dealt with the availed Residuary powers when the subject matter of legislation were not enlisted in any of the three lists, the case of Union of India vs Harbhajan Singh Dhillon [6] was the first of its kind where the question before the Court was with respect to the scope of Residuary powers of Parliament with respect to an entry by way of exclusion mentioned in the Union List. In this case, The Wealth Tax Act, 1957 was enacted and amended (1969) under Entry 86 of List I. There were two issues in this matter, one being whether wealth tax on agricultural land fell within the ambit of Entry 49 of List II or Entry 86 of List I. The second issue was whether the Parliament had the Legislative competence to make use of residuary powers under Entry 97 of List I, assuming that the Act fell within the ambit of Entry 86 of List I which prohibited the parliament's competence to levy taxes on Agricultural land. The Supreme Court, overruled the High Court Judgement (4:1) by a majority of 4:3 and held that the Parliament had the legislative competence to compute the total value of

assets to impose Wealth tax and include the capital value of agricultural land ^[7] “Holding that the impugned central law is not on entry 49 of the State List, Chief Justice Sikri, a party to the majority holding, observed that if a Central Act does not enter or invade any matter in list II, there is no point in trying to decide as to under which entry or entries of list I or list III a Central Act would rightly fit in ^[8] Justice Mitter was also among the majority who refused to restrict the scope of residuary powers and agreed with C.J Sikri. Following Dhillon, few other cases like “Sat Pal and Company vs Lt Governor of Delhi.” ^[9]

Dissenting/Minority opinion

In contrast, the conventional thinkers and critics believed that the Supreme court, in order to avoid the vacuum in Legislation, provided an extremely wide and expansive interpretation of residuary powers under Entry 97 of List I. Differing from the original intent of the Constituent Assembly to provide wide understandings of subjects enumerated in the three lists, the Supreme Court was providing wider ambits to residuary powers by way of plenary powers. According to the well-known Jurist Seervai, the Courts decision in “Kesavananda Bharati vs State of Kerala” ^[10] overruled the majority in H.S Dhillon’s case where it was held that the framers would not leave anything for Courts to find in residuary powers, had the subject of legislation been present in their mind. Justice Shelat, who held the minority view in Dhillon’s case was of the opinion that if the subject of legislation was identified and was excluded in the Union List, then it must not be introduced as Residuary power under Entry 97 of List I. The minority view was of the opinion that the conferral of Residuary powers was to be established only after the subjects under the three lists were exhausted. They felt that the States were given several other independent powers to make laws and just looking at List II and coming to conclusions would be unfair. They believed that Wealth tax should have fallen under Entry 49 of List II. Residuary power must be enabled only under areas unforeseeable, as a last resort and not doing so would defeat the purpose of negligible residue to preserve state autonomy and the exhaustive nature of the Lists. The Sarkaria commission stated that post 1987, more than 21 central laws derived their competence from Entry 97 of List I ^[11]

While I understand the arguments proposed by the majority and minority holders, in my opinion Residuary powers provided to in any List would still remain a matter of concern because one would still have to rely on the judicial interpretation and disputes between entries. I say so because the Parliament has been given supremacy in terms of legislative competence, may the matter be in the State List by way of Articles 246, 249, and 250 or Concurrent List by way of Articles 246 and 254(2). However, the ongoing issues can be solved partly by the amendment and wholly by way of a recommendation I wish to propose in the latter part of this essay which will uphold the intent of the Constituent assembly by way of maintaining the exhaustive nature of the Entries in Schedule VII and negligible use of Residuary powers. By placing Residuary powers in the Union list, the constituent assembly provided power to the Parliament directly, however placing them in the Concurrent List or State List would provide the similar kind of powers indirectly.

Amendment Proposed

As a result of the dissenting opinions, and increasing demands for State autonomy, my recommendation would be to bring an amendment to the subject matter of Article 248 which is read along with Entry 97 of List I. The amendment would be to vest the Residuary powers along with Entry 97 to the Concurrent List instead of the Union List. The following are the reasons behind doing so

1. Heading back to 1950, Dr Ambedkar mentioned that the initial proposition with respect to Residuary powers in the draft Constitution was to provide it to the states under the State List. The idea was put down after the Partition of India. The constituent assembly intended to have a strong centre with the states at the periphery. It was observed that the States were not strong enough and it was more than essential to build the unity and integrity of our country. However, it has been 70 years since we got independence and I believe over time States have gotten stronger, unity has emerged and disintegration of States is not a possibility. Thus, if the residuary powers are vested in the Concurrent List, it maintains a balance between States and Unions powers.
2. Providing Residuary powers to the State and Union under the Concurrent List would not only boost the morale of the States, but also motivate them to compete with other States and would also establish provincial autonomy. Doing so would take us a step further towards pure federalism. Thereby making the States feel equal and reducing the supremacy of power to the Parliament in this aspect.
3. By law, where there is repugnancy between the State law and the Union Law in the Concurrent List or any other list, the Parliament would enjoy supremacy of power by way of Article 246 (1) and (2) which are the non-obstante clauses and Article 254(1)(2) with respect to disputes only in the Concurrent List. The courts must lay an understanding that Parliament must in serious consultations with states, Legislate on Residuary matters. Adding to this, matters involving disputes could be dealt with the doctrine of Harmonious Construction whereby the Union after sufficient consultation with the State could make an attempt to harmonize the subject in conflict with the entries mentioned in the Lists ^[12] In this way, the exhaustive nature of the Entries in the Lists prevail, get a wider interpretation and the use of Residuary powers becomes negligible.
4. The Sarkaria Commission was also of the view that Residuary powers should vest in the Concurrent List. The commission recommended “First, that residuary powers be transferred from the Union List to the Concurrent List, except for the residuary power to impose taxes which should be retained in the Union List.

Second, that the Centre should limit the field it occupies with respect to Concurrent List entries to only as much as is necessary for ensuring uniformity in basic issues of national policy, with the details being left for State action.”^[13] Thus, while the Parliament legislations must be given preference in matters of National Interest, National Policy, Defence, Taxation and Emergencies, the State could be given autonomy under other laws.

5. In addition to these, where the State law is repugnant to law provided by the Residuary Legislation under the Concurrent List by the Union, the States could rely on the Presidents assent under Article 254(2). However, the Parliament still has supremacy of repealing, amending or varying that law if need be.
6. The Indian Constitution has heavily borrowed from other constitutions like Canadian, American and Australian. On comparison, it can be observed that the American Constitution is one of the most federal constitution. While the ultimate objective of the framers was to make India, a federal nation, a small step should be taken in that direction by transferring residuary powers in the Concurrent List.

Based on the amendment of Article 248(1) – Residuary Powers of Legislation must be read as

(1) Subject to Article 246 (A) and 248(2), Parliament and the Legislature of the State have concurrent power to make any law with respect to any matter not enumerated in any of the lists.

Entry 97 of List I must be transferred to the concurrent list.

Entry 48 of List III – any other matter not enumerated in List I, II or III excluding any tax not mentioned in any list.

Conclusion and Recommendation

Along with a shift in the Residuary powers I would like to make a suggestion which would help us overcome the frequent use of Residuary powers. Apart from the fact that Residuary powers were provided to the Parliament under Article 248 read along with Entry 97, another major issue was the wide interpretation and frequent usage of Residuary powers. The intention of the framers was to make the Entries in the Lists so exhaustive, that no vacuum was left for Residuary powers to be used. In order to maintain exhaustiveness as a fundamental aspect of the Lists, the use of Residuary powers must be negligible. The needs of governance are bound to change over time, and thus the entries cannot remain static. With increasing contemporary issues, rising disputes, evolving jurisprudence, and uncertainty in decisions, a subject that might have been vital for allocation under the 1935 Act or the 1950 Act, may not be vital anymore. Disaster Management, Climate Change, Pollution, Population control and such other concerns were not of prime issue back then, however currently they're of prime concern. Such Constitutional cobwebs create vacuum in the Legislation which makes us dependant on Residuary powers. While several States and commissions have been established in the past, the likes of Rajamannar Committee(1969), Venkatachaliah Commission(2002), Punchhi Commission, (2010), and the Sarkaria Commission, they have all established consistency in their demands of greater state autonomy, and a shift of Residuary powers respectively. As a recommendation I would suggest periodic review of the subject matters of the Entries enumerated in the Lists. Along with the Finance Commission, a periodic review of the seventh schedule is the need of the hour. The Commission may make recommendations every 7 to 10 years. The recommendations could include, Removal of entries that have ceased to remain relevant in the present day context. Second would be Addition of new entries so as to minimize the 'unforeseeable legislative domain'^[14] for which the Residuary powers are relied upon. Third would be Appropriate Placement of New and Old Entries under the respective Lists.

In a nutshell, the shift of Residuary powers along with Entry 97 from the Union List to the Concurrent List and periodic review of the entries ensures State autonomy, Harmony in Centre-State relations and takes the country a step further towards pure Federalism. However, in the process the intent of the Constituent Assembly of having a strong centre, exhaustive entries in the Lists and considering Residuary powers as a last resort has not been compromised because the centre still has the plenary powers as enlisted in Articles 246, 254, 249,250 and the periodic review as proposed by way of a recommendation.

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