Centre State Relations in India

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Week 04: Legislative Relations: Territorial Jurisdiction; Distribution of Legislative Subjects and Related Areas

Lecture 14: Distribution of Legislative Power

Greetings to all of you. So, today we are going to start module 4 and it is a lecture 14, where we will be discussing on distribution of legislative powers. We have already discussed administrative relations, where we have understood that how the executive relationship between the Centre and the State they are being governed under the Constitution. Now, in today's session we will start with the legislative relation, which is the feature of Central State relation very important and significant. In today's session we will be covering that how the legislative relation between the Union and the States have evolved, what has been the historical learning, to what extent we have drawn the lessons from the Government of India Act 1935 or Government of India Act 1919, how those features had been debated in the Constituent Assembly and then what has been the final formulation in the current Constitution in the 1950 Constitution. And then we will also discuss that when jurisdictions are being conferred upon the Union and the States, what shall be the way to understand the competence of respective legislatures.

Now, the entire discussion on legislative relation begins with the interpretation of Article 1 of the Constitution, which says that India is a Union of States. Now, when it says Union of States, how shall we understand the very nature and character of the nation. Should it be seen as a country with unitary feature, should be seen as a country with a federal feature or should be seen as a country with a kind of unique set up and in that what kind of autonomy has been given to the provinces to the states. Now, when a matter has gone to the court in the State of West Bengal v.

Committee for Protection of Democratic Rights, West Bengal, the court says that union of states needs to be understood in terms of federation of States.

So, the term federation here symbolizes as we have discussed in earlier sessions that there is independence and interdependency of the Union and the States under the Indian Constitution. So, States are autonomous and they do have independency within the prescribed limit given under the Constitution. That is what we say that that there is federation where we have a kind of clear division of function between the Centre and the Provinces. This division of function is twofold. One is the division based on territorial jurisdiction and other is the division based on subject matter. So, these are two counts on which you find that there has been the constitutional demarcation done between the Union and the Centre.

Now, it has been seen that in order to make the function of the Union and the State very clear, it is decided that a detailed listing should be there of the powers to both the jurisdictions the Centre and the States. That's why what you find is that that elaborative list has been there in the 1950 Constitution which has got its genesis from the Government of India Act 1935 because for the first time the federal system in this country got introduced through the Government of India Act 1935. When you see that there a list has been assigned a list has been prepared wherein subject matters are given for the Centre to make law for the provinces to make law separately. And then what you see 1950s one may say is a improvised version of the model given under 1935 Act. When I say improvised model obviously, I am very clear on this that that improvised model based on the aspirations of independent India, aspiration of new India that is how the makers have really finalised the distribution of legislative power under the 1950 Constitution.

When you look at the scheme given in the 1950 Constitution what you find is that that listing has been done in a very elaborative way. A specific listing has been done when it says threefold there is a Central List, there is a State List and there is a Concurrent List. And when you have a separate state list obviously, that symbolizes greater autonomy for the States. So, that is what was said. However, when Government of India Act 1935 was giving this federal structure to this country when it was being proposed, there was an apprehension raised that with this kind of structuring there is a possibility of higher degree of litigation, higher number of litigations.

And that is very obvious because when you have this kind of demarcation there will be a possibility of the Centre asserting the authority, asserting the power over the subject matter whereas, the State would be objecting it. So, that kind of conflict is very obvious and we will be discussing that how the court has resolved those conflicts, what kind of tools were being used, how the interpretation principles were being used by the court for resolving the conflict in incoming session. Joint Parliamentary Committee of pre-constitutional time has also observed that if you give exclusive direction to the Centre and the Provinces then that way there will be a better assertion of autonomy of the province. So, you may very well look at it that how the idea of having a federal structure with considerable amount of autonomy to the State was envisaged under the 1935 module. Now going back in the history what you find is that, that the federal structuring in India is not that when British started ruling the country they thought about it because that is how you find the Charter Act 1833 which was enacted to regulate the territory which was directly governed by the British.

They made it very clear that there has to be some kind of authority to be given to individual units but in that they denied the that authority to Madras and Bombay provinces and that was given all the legislative power was concentrated into the Governor General in Council which was located in Calcutta. So, that is how you see that 1833 Charter did not lay down any foundation on providing Centre State relation. Though there has been a discussion on granting certain space for self-governance that is how this reform report of Montagu Chelmsford suggests that there has to be a kind of gradual development of self-governing institutions with a view to the progressive realization of responsible government in India. So, you can find that when you look at the historical development pre independence it all started with a unitary structure that and then gradually there was a concession given to the provinces and then autonomy was thought of conferring upon the provinces on the law making that is how you find the Government of India Act 1919. It provides for devolution of authority upon provinces on transfer and subject reserve subject so on limited matters it was suggested that let the provinces enjoy the immunity on the matter of legislation.

So, 1935 Act has given a federal polity to this country for the first time that is what was experimented with where Centre and the province they were been given jurisdictions and powers directly from the British Parliament through the British legislation where the province was

drawing legitimacy from that legislation and the Centre was also drawing the legitimacy in authority from the same legislation. So, there was no unitary structuring it is not that the provinces were given legitimacy by the Centre. Chapter 99 to Chapter 106 read with Schedule VII of the Government of India Act 1935 dealt with legislative power in a very elaborative way and what you find is that that the power of the Federal Legislature which extended to entire British India where for the List I and List III it was suggested that that it is the Central government we shall have the power it is the Federal Parliament we shall have the power to make law which was given between Sections 99 and 100. On a similar note, for the powers to make law on a List II for the State subject is the provinces which were given the necessary authority. Obviously, that was authority was given to subject to the laws made by the Parliament. That's all what it started with.

Now when you move ahead and trace the development of concretization of legislative relation in India under the 1950 Constitution, you find that B.N. Rao, the constitutional advisor to the Constitutional Assembly he made an attempt to analyze that what shall be kind of structuring given for the Union's legislative power and that is how he started preparing a note which is popularly known as Constitutional Precedents. He started doing it in 1946 and he said that there should be certain subject matters which should be there with the federation or Union, for example he analyzed treaty making power foreign affairs ambit of defense power and raising finance, these are the things which he thought that let it be a part of the union subject when he was drawing the content of the Union subject. When the Constitutional Assembly came into existence different committees were constituted and one such significant Committee was the Union Powers Committee which was set up to prepare a report on the scope of Union subjects. The responsibility was given to the committee to draw a list that what all subject matter should be there with the Union. When they started working on it, there was a framework before them in the form of Cabinet Mission Plan because Cabinet Mission Plan was a document through which a road map was laid down for independence of the country and under that road map it was suggested that the Union shall have a restricted jurisdiction it should not have a very expansive jurisdiction to make law on several subjects. Therefore, Cabinet Mission Plan suggested that let the Central Legislature or let the Union be given a power to make law on foreign affairs, defense power to raise finance and communication that is how it was suggested. But then when it went to

the Union Powers Committee, they suggested that the relationship between the Union and the units must be taken into consideration when we are talking about finalizing the Union List and therefore, they said that there must be a definite provision to the effect that the Union laws shall be given effect in every province in every unit. Additionally, they said that there has to be an implied power in favor of the Union which would make the governance of the country smooth. When Union Powers Committee started deliberating upon it in accordance with the road map given by under the Cabinet Mission Plan the questions which were before them was how they shall identify that what subject matter should be there, what should be the criteria which should be kept in mind. These are the questions which they looked into it. They looked into this very aspect that should India go for a strong Centre, the power to the Centre must be on a higher side in comparison to the power which has been granted to the Provinces or the State. It was also discussed that on the lines of Australian Constitution should two Provinces two States be allowed to request the Union to formulate a law for those States and should there be a kind of compulsory list on which Union shall be given power to make law. In that regard they have identified that at least fourteen items should be there where the Union should have an inherent power in that currency, coinage, power to deal with grave economic emergencies, these are the areas thought that it must be part of inherent power of the Parliament.

Now partition played a very important role in concretizing the model what we experience today. It played a heavy influence in shaping up the thought process on the power of the Parliament and the State while drafting of the Constitution because as it was suggested in the Cabinet Mission Plan that only limited subject matter should be there with the Union. Later on, when partition took place then they there was a need felt to empower the Union with such an extent so that any kind of divisive tendencies should not be allowed to grow. Integrity of the country became very important and considering that unity and integrity they decided to revisit the scheme which initially they were considering for dividing the law-making power between the Centre and the State. So, what was that reconsideration and what was that revisiting? They were of the opinion that we need to make federation very strong and they also said that that let there be a clear enumeration, enunciation of the Union List, State List and the Concurrent List. But they made a very important recommendation that the residue power shall lie with the Centre. So, here they

have suggested something contrary to the classical model of federal system where residue power goes with the State.

We have discussed earlier that how the Indian system is based on the system of holding together where unity and integrity plays a significant role in determining the law-making authority. So, that is what was taken up in the Constituent Assembly and then they started debating on it. The recommendations of the Union Powers Committee were accepted we have got a Schedule in the Draft Constitution where all three legislative lists were added. On legislative relations you find that in detail in depth discussion took place amongst the members. They were the view point that we need to make the Centre strong and when Centre is been made strong at the same time provinces must be given necessary autonomy on those areas which are exclusively reserved for the States. So, this is what you find that Draft Article 216 which was debated in the Constituent Assembly which is now Article 245. Article 245 basically deals with territorial application of laws and Article 246 deals with subject matter of legislative competence that's how they started discussing on it. They were of the view that as far as exclusivity of making law is concerned Parliament shall have exclusive jurisdiction to make law on the Union List whereas, the State shall have exclusive power to make a law on the State List. Now this is what it has come up with Article 245 provides for extent of the laws which Parliament and the State Legislature makes.

So, what it suggests is that that the Parliament shall make a law for the entire country or any part of the country and State shall make a law for the State or for the part of the State. However, it is been suggested that the law-making power which has been given under Article 245 where we were talking about territorial competence is *"subject to the provisions of the Constitution"*. Now when you say *"subject to the provisions of the Constitution"* for a law student it becomes significant to understand that is this expression confer necessary judicial authority upon the court to review the law-making power of the Centre and the States. Because it is the responsibility of the Centre and the State to see that how the law made by the Centre or the State is within the defined boundary or not. If not, they can very well be declared as unconstitutional and ultra vires. So, power to review comes from Article 245 apart from the language of Article 13.

So, one may say it is the source of reviewing power available to the court in addition to Article 13 and Articles 245,246, even Article 372 confers that power to review to the court. Now

because India is a sovereign country and sovereignty is one of the important features of in the Constitution which is which is clearly spelled out in the Preamble to the Constitution that is what is further concretized in under Article 245(2) where you see that to Article 245(2) protects law made by Parliament having extra territorial operation. That is what you see that that even if the law is been made having extra territorial operation that law should not be unconstitutional. The reason being that India is a sovereign country and situation may arise where if the cause of action is in India and there is some legal action to be taken when the offender is in other jurisdiction, he or she can be brought back to this country for facing the law of the land. So, that is what is the extra territorial operation of the the law and is presumed under Article 245(2) that such law shall be constitutional because it is made well within the authority of the Parliament. That's what the provision and in fact, you find that the penal law in India refers to extra territoriality provision.

So, this is the scope of Article 245. We need to understand very categorically that when it comes to locating the source of making law one should always look at Articles 245 and 246. Entries given under 7thSchedule they are not the source of legislation they are only the subject matter of legislation. This understanding becomes very important because whenever the question of interpretation comes one has to read this Articles with the relevant Entries of the List. One need not look at the List alone and try to identify the scope and ambit of the power of the Legislature. Another important point which says is that that there has to be presumption of constitutionality of the law made by the Legislature whether it is made by the Centre or made by the State there has to be a presumption. This presumption of constitutionality is primarily based on this premise that the laws are made by the elected representative and they do know what is what is to be done for the welfare of the people. So, that understanding that whatever they do they do for the welfare of the people and they are being authorized to undertake those kinds of responsibilities this presumption is there. Now, as I said that the validity of the law made by the Legislature be it the Centre or the State that can be challenged on two grounds one is as I said lack of legislative competence which is basically Articles 245 and 246. For example, the Centre makes a law on a State subject or a State makes a law on the Union subject then even if the law is very laudable even if the law is very good and it is it serves the interest of people that law cannot be a valid law in the eyes of law that law would be a non est law. The ground other ground is Article 13 as I

said that if any law violates fundamental rights that law is considered to be unconstitutional right from inception.

Further if you go by this it says that in order to see that legislative competence what we need to look at is that we need to see that how relevant Entries are being looked at how that relevant Entry is talking about the scope the content which Parliament or the State Legislature required to consider for making the laws. In this process one has to really keep in mind which will be certainly discussing in incoming sessions that whether the law is been made with an intent to address the List given with a jurisdiction to the Centre of the State or under the garb of that something else is been attempted what we call it as colourable legislation that what you are not allowed to do directly you are doing it indirectly. That's how you understand colorable legislation. We have a separate session on interpretation of the provisions related to Articles 245 and 246 or 254. There we will be discussing this interpretation rules separately therefore I am not discussing these rules in detail here. So, but then at the same time in order to give complete effect to the Entry it is suggested that anything which is connected with the ancillary matter or the subsidiary matter that should be counted in that should not be seen to be a case of transgression, that is not a transgression that is something which is to be seen as impliedly covered under that Entry. That's how the entire interpretation should be there. You can very well make out that that is something with the limitation of the language because everything cannot be explained that is what is important and that's how when you look at it how Article 246 deals on the law-making power of the Union and the State. Article 246(1) says that Union has got exclusive power to make a law on the subject matters given in List I, under Article 246(2) the Union has got a power to make law on the matter of Concurrent List and then Article 246(2) says State has got a power to make law on List III, but subject to List I. So, State has got a power to make law on the Concurrent List, but then that is subject to the Union List which is given in List I and then Article 246(3) says that State again has got a power to make law exclusively for List II, but subject to List I and List III. So, if you look at this scheme you find that this scheme somewhere talks about supremacy of the Parliament, supremacy of the Union Legislature on the on the law making and that is what you make very well relate with the change in stance of the Union Powers Committee after partition took place.

There has been attempt made to give exhaustive list of subject matter under the Schedule 7. Now, we need to understand that the subject matters are somewhere designed on this idea of responsibility resource scheme. Responsibilities which are more closely connected with welfare of the people, it seems that those responsibilities in the form of subjects are been given to the State List, they are not been given to the Union List. The subject matters which are of national interest, which are of larger public importance where kind of pan India legal system is required that is given to the Union government. Additionally it was thought that there may be a requirement of information of law that is something which has been given in the Concurrent List where states can also make law and the Centre can also make law.

So, situation may arise for example, subject matters like Motor Vehicles Act, labour law where States can have necessary tweaking with the laws which are made by the Centre. So, you will find that these kinds of subject matters are there in the Concurrent List. Another important point to be noted here and to be looked at is this that over a period of time the number of subjects given in the State List has been shrinking. It started with 66 items now we have 59 items in the State List. So, it certainly raises a question on the issue of autonomy to the State that to what extent the autonomy the sanctity of that autonomy is being maintained post-independence.

So, this is what is the scope of Article 246 what you look at it that Article 246 talks about subject matter competence of the Parliament and State Legislature. Further it says that it is the legislative power is derived from Article 246 while other Articles and other entries they merely represent the fields of legislation as I said that that is they are not the source and the source comes from Article 246. Now when you look at the language of Articles 245 and 246 you find that there is a kind of scheme given for resolving the conflict if it arises on the making of the law particularly in the language of Article 246. Now what is the scheme given if you read Article 246(1) and Article 246(2), it starts with “notwithstanding clause” meaning thereby supremacy is given to the Central Legislature to the Union Legislature on the making of the law with regard to List I and List III. And when it comes to the law-making power to the provinces to the State it says subjective clause.

Now it says subjective clause you find that in what is the scheme given what is the formula suggested by the framers of the Constitution that in case of conflict, it is the parliamentary

legislation which shall have precedence and not the State legislation. So one may say that a kind of principle of federal supremacy is considered to be the governing rule in the matter of resolving the conflict between the Central law and the State law. Now "with respect to" which is given in Article 246 that becomes very important again expression to interpret the power of the legislature. The expression "with respect to" which appears to be taken from the Australian Constitution very well provides for giving the ambit of law making that one need not go in a very mathematical way of understanding that what is the permissible limit of making the law. One has to be practical and pragmatic that's what "with respect to" suggests that when you are identifying the ambit let the ambit be identified in this way so that whatever relevant whatever connected with this must be considered to be part of that Entry that is specific in enunciation which has been given there and that is why when you look at some of the important cases in fact some of the cases which you find is pre-independence cases but still good law has been let down in this course cases.

For example it has been said that as far as giving effect to notwithstanding clause is concerned it is suggested that that should be the last resort. As a last resort one should give primacy to the federal legislation otherwise an attempt should be done for reconciliation of the Central law and the State law and that's what the Privy Council says in Prafulla v. Bank of Commerce which is a Privy Council judgment given in 1947 it says that List I has a priority over List III and List II and List III has a priority over List II. But the priority of the Federal Legislature does not mean that Provincial Legislature the power or scope of Provincial Legislature is to be compromised. So, wherever an incidental encroachment is there, that is not to be taken into account for determining the legality or constitutionality of the law. Then you have another important judgment of In re CP & Berar Taxation Act, where again it says that if two List appear to conflict with each other an attempt should be made to reconcile them by reading them together under the pith and substance rule we will be studying and discussing this rule in the coming sessions where we will take up few cases to explain that how these rules have played role how they have been applied by the court of law. So first attempt should be made to reconcile to see that both the laws are being given effect and the second one is that if reconciliation fails or if there is something which cannot be given effect then one has to go for "notwithstanding clause" and one has to determine decide on based on the precedence or ordering.

So the question is that what do you need to look at it? You need to look at it as - what is the character of legislation, how do look at the scope effect of legislation that that inquiry is important to understand that what is the area which is covered and whether the area which is aimed to be covered under a given law is aligning with the jurisdiction conferred by the Constitution or not. So that is what is important that we need to look into the character of the law, the content of the law, the effect of the law in order to understand and that is how when you look at this Constitution Bench judgment in Naga People's Movement v. Union of India you find that the court explains that how the legislative power is to be read in relation to Parliament or the State Legislature. The court in relation to Armed Forces Special Powers Act says that it is constitutional because one may read the necessary power with the Parliament by bringing in or by employing residuary power of the Parliament. This was the scenario in 1958, now with the 42nd amendment Act now we have an Entry 2A which gives necessary power to the Parliament to make laws on certain aspects related to public order. Now the court has said in this Naga People's Movement v. Union of India case that *"while examining the legislative competence of Parliament to make a law what is required to be seen is whether the subject-matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List 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."* So in view of this, the court said that Entry 1 of the State List and Article 248 read with Entry 97 and Entries 2 and 2A of the Union List, one can very well read that Parliament has got a necessary jurisdiction to make a law to deal with on a subject matter of Armed Forces Special Power Act where additional power has been given to armed forces to deal with law and order situation in certain areas where certain kind of immunity has been given to the armed forces under that law.

Then again another important case which is again to do with conflict between the Central and the State law where the question was that that how we read the Entry. In SP Mittal v. Union of India, which is a case pertaining to the taking over of Auroville organization under Auroville (Emergency Provision) Act 1980 where in management of Auroville society was taken over. The Centre has taken over the management on by reading Entry 44 List I which talks about incorporation whereas the State said that it has to do with Entry 32 List II which talks about

societies and therefore, State argued that it was argued that it was a law falls within the State competence and not within the Union competence and therefore, the law is invalid. The court has read it in this way that that when you give a effective Entry 44 List I it appears that that the law where management of Auroville society has taken over it is more to do with Entry 44 incorporation and not to do with the society which Entry 32 refers to.

Now, we have been discussing the input from different Commissions also in order to understand that how the entire growth of the constitutional provision has been debated time to time and in the matter of legislative relation Sarkaria Commission has given a very strong recommendation on certain points.

For example, on the matter of law making power of the Union on the Concurrent List it says that the Union should occupy that field what is given as a concurrent field only when the informality of law is required in the larger interest of the nation. Otherwise let the matter be dealt by individual States and this recommendation of the Sarkaria Commission becomes very important because if at the first instance Parliament would take up law making exercise on the Concurrent List then certainly it will have a very detrimental effect on the federal structure. Then putting that subject in the Concurrent List and authorizing the State to make a law would become a futile. It will have no value or no significance because once Centre makes a law the State cannot make a law on the subject because Central law shall have a precedent.

Another important suggestion which was given is that that when the Centre proposes to make a law or aims to make a law on the subject matter given in the Concurrent List it is desirable that let there be a consultative process taken place with the State government and with the Inter-State Council which is given in Article 263. This is something which is been suggested so that there is a kind of consensus and agreement that yes this is a law this is subject matter on which law is required at the national level and everyone has agreed with it so that better implementation of law effectiveness of that law is guaranteed and assured. Another important Commission which has talked about legislative relation is the Punchhi Commission. This Punchhi Commission again has said that let there be a consultation between the Union and the States on the matter of Concurrent List if the Union decides to make a law. Then the Commission has also said that let there be a better working relation between the Centre and the State so that when the law is made

by the Centre on the subject matter given List III there has to be a better effect implementation effect is ensured and therefore, it was suggested that let there be an agreement and consensus arrived at between the Centre and the States on this matter.

These are the references for this lecture. Thank you very much.