

Centre State Relations in India

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

Lecture 15: Residuary Power and Interpretation of Statutes

Greetings to all of you. We are discussing module 4 legislative relations and we have already discussed the territorial jurisdictions and the significance of subject matter jurisdictions. Now, today we will be discussing that how the subject matter jurisdictions under Articles 246 and residuary power given in Article 248 has been interpreted and what are the challenges with regard to governing of the issue of legislative relation under the Indian Constitution. Apart from discussing the functioning of the Article 245, 246 and residuary power which lies with the Union under the Indian Constitution. In today's session we will also read about the broader principles which come into play on the matter of interpretation of the Entries given in all three Lists that what are the principles on which the same has to be read. Now, as we have discussed in the last session that Article 245 of the Constitution deals with territorial jurisdiction and where it also symbolizes sovereignty of the Parliament and extra territoriality of the law is allowed and Article 246 talks about subject matter jurisdiction where Parliament and the State Legislatures they are empowered to make law on the subject matters given in Union List, State List and Concurrent List in list in Seventh Schedule.

Now we do understand that while making a comprehensive list on which legislatures have got a competence to make law we have to admit that there is a limitation on comprehending every possible subject matter on which enactment of a law is required in time to come. So, under the Indian Constitution apparently we get a feeling that the exercise undertaken by the framers of the Constitution with regard to making of the List with regard to the identification of subject matters

is very exhaustive. They have made a very exhaustive List under all the three headings Union List, the State List or the Concurrent List. But even with that exhaustiveness as I said because of the limitation of language or because of the constraint of not foreseeing every probable situation which may occur in future which may become a matter of legislative governance is not possible.

Such kind of comprehension is not possible, but at the same time it is desirable that the legislative power of the State or of the Union shall not be restricted or shall not be considered to be absent on the ground of non-incorporation of the subject matters. So, situation may arise in future a contingency may arise where law may be required to enact on a subject matter on which there is a no specific entry in the Seventh Schedule. Article 248 addresses this scenario. Article 248 symbolizes the sweeping power of the legislative body to make a law and in the context of India that sweeping power is available with Parliament because a residuary power is entrusted upon Parliament. Entry 97 of List I read as “*any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists.*” So, by looking at the language of Entry 97 you can very well make out that the intent of the framers of the Constitution was to enable the Parliament to make a law even on a subject which is not specifically provided under the Constitution.

So, that competence should not become a subject matter of assailing the law making power particularly on the ground that no reference of a subject matter is given in the Constitution. That is why Entry 97 read with Article 248 very clearly confers the law making power upon Parliament to make a law on a subject matter which is not there in the Constitution. Now, when you look at the very origin of the conformant of such a residuary power upon the legislature you would find the reference of the British North America Act of 1867 wherein power has been given upon the Dominion Parliament to make a law. Section 91 of the Act says that Parliament of Canada shall have the authority to make law and I read it says “*in relation to all Matters not coming within the Classes of Subjects of this Act assigned exclusively to the Legislatures of the Provinces*”. Now, here let me also apprise you a very important aspect on allocating a residuary power to Parliament or to the State Legislature.

Ordinarily it is suggested that a residuary power shall lie with the State and not with the Union and in fact, it is the arrangement in the United State Constitution or the Australian Constitution.

This very idea comes from this premise that when federation comes into existence it comes into existence based on the very fact of surrendering sovereignty by the States in favor of the Union in favor of the federation. And while surrendering the sovereignty by the States, States purposefully retain the residuary matter so that the strength of the State is maintained. Now, one for India that's not the model we have followed. Possibly because of the model of holding together we adopted which we have discussed in the previous session. Now, when you look at a residuary power under the Government of India Act 1935 and the reference of 1935 Act becomes very important because the governance mechanism has largely been followed under the 1950 Constitution what was given in 1935 Act.

Now, under 1935 Act a residuary power was conferred upon the Governor General. It was neither with the Federation nor with the Provinces and we have studied that Government of India Act 1935 is a first attempt to adopt first attempt and to provide a federal system in India. So, under the Government of India Act 1935 you would find that the discretionary power is given to the Governor General which Governor General can exercise under Section 104 through a public notification empowering either the Federal Legislature or the Provincial Legislature to make a law on such subjects which are not given in the Schedule. So, you can very well visualize that under 1935 Act the essence of parliamentary system was not followed and adopted in its entirety and that is why you observe that discretionary power has been conferred upon the Governor General to take a call that what shall happen when necessity of enacting a law arises on a matter which is not explicitly provided under any of the List.

So, we have followed the Canadian model and the idea of following the Canadian model was not in the mind of the framers of the Constitution right from the time when they sat together for formulating a Constitution for new India. In fact, the Constituent Assembly Debates conveys that when they started drafting the Constitution they were willing to follow the American model which we have also discussed in the previous session there that they decided to allocate only subjects of national importance to the Federation and larger number of subjects were thought to be left with the States including the residuary power. But then partition played an important role. When it became a kind of reality that Britishers will divide the country into two parts, then the framers of the Constitution, when they reassembled as a sovereign body (because we know very well that the making of the Constitution started before a formal declaration of independence of

this country), they continued with the exercise they were carrying out that exercise with a newer legitimacy and sanctity and aspiration of the people. While deliberating upon the governance structure, one aspect struck very prominently to the framers on the unity and integrity of the country. That's why that the Centre State relation in India has taken a trajectory which you may say in the alignment of in conformity with strengthening the Centre as and when required for unity of the country.

So partition played an important role in conferring more powers to the Centre and one such instance you find where power to make a law on a subject matter which is not given known as a residuary power allocated to the Centre. And true to the spirit of parliamentary democracy unlike the arrangement given under Government of India Act 1935, for 1950 Constitution it has not said that let the President not be the repository of this power let this power be there with Parliament. And that is how you find that when this was debated it was made very clear that the Parliament shall have the power to make laws on subjects that were not mentioned in List II or List III of the Constitution. The members agreed with this arrangement without getting into detailed discussion. Article 248 has also witnessed an amendment in recent time when India has adopted a true model of cooperative federalism by constitutionalizing, uniform indirect tax structuring in the form of goods and services tax (GST).

In that context you find that the amendment has been done under Article 248 that 101st constitutional amendment where a residuary power of Parliament has been made subject to Article 246A and Article 246A is about providing a constitutional framework for making laws with regard to goods and services tax. So, on the matter of GST, Parliament does not have a residuary power that is why this amendment has been brought in. Now Article 248 when you look at it, it says that Parliament has got exclusive power to make the law in respect of any matter which is not there in the Concurrent or the State List subject to Article 246A. And under Article 248 it has also been suggested that such a residuary power can also be exercised in the matter of tax laws. Though the framers of the Constitution when they sat together and decided to allocate revenue generation authority to Parliament and the State Legislatures they were very mathematical and adopted a very nuanced approach and came up with the tax related Entries either with the Union List or the State List.

But then again the need of Article 246 too arises because of the limitation of the comprehension, limitation of visualization of every situation and that's why it categorically says that residuary power can also be used for making a law on the tax matter. So, what is the scope of Article 248 when you read you find the scope is that, that even though the subject matters are included after a lot of deliberation with great articulation, but still there is a possibility of a matter not getting addressed nor being included and in such matter the power to make law including on tax matters lies with the Parliament. But then as we have adopted a federal system where State autonomy is also to be respected and regarded on those matters in relation to those spheres which is constitutionally approved and constitutionally sanctioned and therefore, it is suggested that a residuary power should be a matter of last refuge, only when an exercise has been taken that subject matter is not there in any of the list. Now, this is something which has become a matter of judicial interpretation because the very fact that how and in what way the court should validate the invocation of power by Parliament.

Should it be done only by looking at the very aspect that law has been made after going through the subject matters given in List II after examining the competence of the State Legislature or it is also desirable to look at List III where State Legislature does have a competence because that is shared responsibility of the Centre and the States. Now, this judgment of *Manikkasundaram v. Nayudu* (1947), it gives a guidance on the applicability of a residuary power and I read "*when there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the Lists and the other in a finding of no existing power. Such a construction should be preferred where it can be deduced from some entry or entries in the Lists or some provision elsewhere in the Act.*"

So, this observation of the court is in the direction of giving a meaningful existence to Centre State relation. It does not say that because this law enacted by Parliament under Article 248 read with Entry 97 let it be validated, no let there be a proper scrutiny to be done. Obviously the case becomes relevant and interesting where the Supreme Court has refused to read amending power of the Parliament under Article 368 in *IC Golaknath*. Interestingly the court has traced the power to amend the Constitution under Article 248 because court was of the view in this case that Article 368 only refers to procedure to amend the Constitution and substantive power lies under Article 248.

I believe you are aware of the fact that this position has been negated in *Kesavananda Bharati v. State of Kerala* and rightly so because court in *IC Golaknath* case has refused to accept or fail to acknowledge the difference between constituent power and constituted power and constituent power is very well located under Article 368 and that is what is a reference of *Kesavananda Bharati v. State of Kerala*. A learned scholar who has produced an authoritative text Mr. HM Seervai also says that if a subject of legislative power was not only present to the minds of the framers but was expressly denied to Parliament it cannot be located in the legislative power of Parliament. So courts look at it what the scholarly view point. The court says that if it is denied then let us not look at Entry 97 with Article 248 that would not be a very prudent way of regarding the Centre State relation in the Indian context. In the case of *International Tourist Corpn. v. State of Haryana*, where when the question was raised that whether Government of Haryana has got a competence to make a law, i.e., Punjab Passengers and Goods Taxation Act 1952 on entry of passenger and goods in the State and whether that law comes in conflict with central law, i.e., National Highways Act 1956.

The court says that before exclusive legislative competence claimed by Parliament referring to residuary power it is desirable to look at that whether State has got a competence to make law on that subject matter or not. So in this case the court looks at the relevant Entry of List II and says that relevant Entry refers to the subject matter on which law can be made by the State Legislature to tax on passenger and goods entry. So in this case the court says that reference of residuary power should come only when an exercise has been undertaken to identify the subject matter in List II and List III. This judgment gives more space to the State and brings in this element of an interpretation or understanding that let parliamentary competence or let the competence of the Parliament on making law invoking residuary power should not be done at ease. There has to be a thorough examination otherwise the State Legislature will find it difficult to enact law.

Another important case of *State of Karnataka v. Union of India* where the court said “*Item 97 of the Union List corresponds to the residuary legislative powers of Parliament under Art 248. It gives effect to Art 248. The Constitution makers cannot always mention and exhaust every conceivable topic. It is in order to meet precisely such a situation that Art 248 read with Entry 97 was inserted.*” So a caution has to be adopted. There is a need to adopt a caution. Cautionary approach is the way ahead way. So that is what we need to understand and a reference of the

writings of Mr. Seervai also comes in where Mr. Seervai says that as far as locating a power to make a law on the basis of residual subject, one has to very well refer Article 246 read with Entry 97 and Article 248 is just iteration of that proposition.

Now *Union of India v. Harbhajan Singh Dhillon* case is another important case to understand that what is there in exercise of residual power. In this case what you find is that that should there be a process to be allowed where we find that on a matter of wealth tax capital valuation of agricultural land should also be included because agricultural land is been excluded from the domain of the Central Legislature. Now in this case what you find that the majority judgment presents a picture that when it comes to validating the exercise of the residuary power, it is good enough if the excise to be taken only is that whether the reference has been drawn, whether the subject matters given in List II has been thoroughly examined or not and rest of the excise is not needed. If the subject matter is not there in List II no more examination or inquiry is needed. Then one has to presume that such power is there with Parliament by reading List I or List III.

The words “any other matter in Entry 97” cannot be read to mean that it has any reference or topics excluded in Entry 1 to 96 that does not mean so. In *HS Dhillon* the court says that if it is not there in the List II let us not unnecessarily take into the exercise whether the subject matter has a reference from Entry 1 to 96 or not. Court said that is not something which one has to really get into. So the word “any other matter” have reference to matters on which Parliament has been given power to legislate by the enumerated Entries 1 to 96 of List I. It does not matter that on which it has been it has not been given power to legislate. So Entry 1 can be read with Entry 97 or Entry 25 can be read with Entry 97 of List I.

So this is what it says that no need to really get into that exercise. So it says that any other matter referred under Entry 97 do not mean a topic mentioned by way of exclusion. It does not mean that it is a separate entry altogether. What it says that let there be an integrated approach. So something has a got a reference in other Entries read it with Entry 97 to validate the law. So the field of legislation as it says demarcated from Entries 1 to 96, but the demarcation does not mean that if Entry 97 List I confers an additional power. So it is not the case of exhausting exercises at both the ends. First look at List II and find out whether the reference is there in any of the Entries

or not. Then again look at List I and finally you come to exercising the residuary power. The court says that is not something which is needed.

Now dissenting opinion says and dissenting opinion is more about giving a desirable space to the law making authority of the Provinces. It says that the expression “any matter not enumerated in the Concurrent List or State List” in Article 248 must mean in the context of Article 246(1). It says that the residuary power which is given under Article 248 cannot include power which is exclusively given to Parliament. So if it is already given to Parliament from Entry 1 to Entry 96 the subject matters are clearly there read with Article 246. Let that be done in that way. It says that the residuary power contained in Article 248 and Entry 97 must be construed as meaning of power in respect of matters not enumerated in any of the three Lists.

So, minority judgment here you would find is advising to take more caution before approving before validating parliamentary legislation invoked under Article 248 read with Entry 97. This discourse and observation of the minority judgment invites deliberation and debate when you talk about giving autonomy when you talk about enabling the State Legislature to make a law on this spheres which is reasonably falling within their domain. This minority judgment adds to the argument and it brings in a perspective in coherence with a true federal system and structuring that is what we need to understand.

That is all for this session. Thank you very much.