

Critical Note On Residuary Powers

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This article is written by Kritika Soni, a student of National Law Institute University, Bhopal

Introduction

The separation of powers is a key aspect of a federal system of governance in a country. The main goal of establishing a federal state is to create a division of powers between the central government and the individual states. The Indian Constitution divides the various subjects of legislative power between the Parliament and state legislatures into three lists namely the Union List, State List, and the Concurrent List.

With the society continues to progress and horizons of scientific and technical language continue to expand, it is possible that every subject matter under a legislation and within the foreseeable future could not have been contemplated by the Constitution-makers and thus, wasn't specifically enumerated in one of the three aforementioned lists^[1]. A subject of legislation may not clearly fall under any specific entry in the tree lists due to the complexity of modern governmental administration in a federal system that provides for the allocation of legislative authorities along with the ability of judicial scrutiny or review.

The Indian Constitution's Article 248 read along with Entry 97 of List I in the seventh schedule confers residuary legislative powers on the Parliament. The combined reading of the two points to the conclusion that residuary authority only applies to those subjects that are not covered by the three lists. Article 248 of the Constitution of India talks about how subject to the provisions of Article 246A, the Parliament has the exclusive power to be able to make any law with regards to a matter that has neither been mentioned in the State list nor the Concurrent list, including the power to make a law that imposes a tax not previously mentioned in either of these lists. **The judiciary (as the interpreter of the constitution) plays a critical role in determining residuary powers. It has been left up to the courts to decide whether a particular topic fits under the residuary power or not. However, as the three lists attempt a complete enumeration of all potential legislative subjects, courts have traditionally interpreted the realm of the powers to be listed in a liberal manner.**

Though regarded a federal necessity, the existence of the residuary provision in a federal constitution is also a recognition of the human imagination's limitations in visualising future events in their real and concrete forms. This constraint is exemplified by the Indian Constitution, which, despite a precise and meticulous formulation of the functions of the two administrations, nonetheless allows for the residuary clause. In India, the turning over of residual powers to the Centre was necessary since the Constituent Assembly looked forward to a strong, dominant Centre, and the country's communal partition had left no other option.

The Powers Of The Legislature

The Centre has been given residuary powers in order to strengthen itself. Jawaharlal Nehru, the Chairman of the Union Powers Committee, remarked in the Constituent Assembly how he thought that residuary powers shall always remain with the Central Government. However, some subjects might claim recognition in the future but weren't then identifiable and therefore couldn't be included in any of the three lists and so, the residuary subjects could only be related to these matters.

History Of Article 248

The Government of India Act, 1935 established a division of powers between the federal and provincial legislatures by categorising them into three lists: Central, Provincial and Concurrent. Both the central and provincial legislatures had the authority to pass laws on subjects on their own respective lists, and both had the option of passing legislations on any subject stated in the Concurrent list. However, if the federal government has already passed a legislation on any of the topics included in the Concurrent list, a provincial legislature can no longer pass a legislation on the same topic in the future. **The residuary power, on the other hand, was not granted to the Centre or the Provinces,** but was reserved for the Governor-General to allocate to the Centre or the Provinces at his discretion under Section 105 of the Act.

Though the initial proposal in the Constituent Assembly was for a federal centre with limited powers while residuary powers were to be given to the States, after partition of India took place, it was decided to have a strong centre by allocating the residuary powers to them as one of the steps towards that goal. This decision would have eliminated the necessity for List I to include a detailed list of Union topics as it would have sufficed if the exclusive and concurrent state powers had been mentioned. At the demand of Dr. Ambedkar, who claimed that the States preparing to join the Federation wanted to know more about the Federal powers than a vague description of the Federation having residuary powers, attempts to alter the drafts on this basis were abandoned.

As a result, the Constitution contains a power distribution identical to that found in the Government of India Act, with the exception that the Centre now has residuary powers.

Article 248 Read With Entry 97 Of List I

Through entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution, the residuary authority has been formally vested in the Union as an exclusive head of power. As a result, the *ad hoc* allocation of residuary power by the Governor-General, as in the Government of India

Act, 1935, has been abandoned. The residuary power has been increasingly pressed into service in the resolution of power issues between the Union and the States. Parliament's residuary powers have been used multiple times since the Constitution's inception.

The range of residuary powers is quite broad. For example, under entry 3 (List III), Parliament has the power to legislate on preventive detention for the reasons specified therein. Furthermore, under entry 9 (List I), Parliament can legislate with relation to preventative detention on the specific grounds listed under this entry. These two entries, however, do not cover the complete spectrum of preventive detention as they can also legislate on preventive detention for any reason not specified in these two entries, by using its residuary power. As a result, the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 [COFEPOSA] was established by the Parliament, allowing for preventative detention in cases of smuggling and foreign exchange racketeering. Entry 36, List I (foreign exchange), and Parliament's residuary power both support this Act[2].

Taxing Power Under Residuary Authority

In the realm of taxing powers, the residuary powers have been fully utilised. Because taxing powers are clearly listed in the Lists, they cannot be interpreted as supplementary or incidental to any other legislative entry. Again, taxing rights have been granted solely in exclusive fields; no taxing powers have been granted in concurrent fields. These circumstances appear to have prompted the use of residuary power to defend the legality of taxing measures for ages.

- **Gift Tax** – On the basis of residuary powers, the Kerala[3] and Madras[4] High Courts upheld the Parliament's authority to pass the Gift Tax Act, 1958, which imposed a tax on gifts relating to agricultural land. Both these High Courts decided that the ability to impose a tax on gifts of agricultural land under entry 18 of List II could not be considered incidental to the capacity to legislate with respect to land. That power could also not be found in List II, entry 47, which deals with duties connected to agricultural land succession. On similar grounds, the Allahabad High Court held in *Shyam Sunder v. Gift Tax Officer*[5] that a tax on buildings and land was distinct from a tax on gifts of land, and that legislation relating to a tax on gifts of land and buildings would not fall under entry 49 of List II, namely, tax on land and buildings. The Gift Tax Act was legitimately passed by Parliament under article 248 of the Constitution, as amended by List I entry 97.

In *Second Gift Tax Officer, Mangalore v. D. H. Nazareth*[6], the Supreme Court upheld the decisions of the aforementioned High Courts. The Act was enacted by Parliament, according to the Supreme Court, and no entry in the Union List or State List specifies such a tax. As a result, Parliament pretended to use its rights under Entry 97 of the Union List, as well as Article 248 of the Constitution. Because there is no other entry that covers the gift tax, Parliament's residuary powers were used to establish the statute.

- **Sugarcane Tax** – Though indirectly, the residuary powers have been used to support the States' irregular exercise of taxing power. The Supreme Court ruled in *Diamond Sugar Mills Limited v. State of Uttar Pradesh*[7] that a factory's premise was not a "local area" within the meaning of List II entry 52. The Uttar Pradesh Sugarcane Cess Act, 1956, which imposed a levy on the entry of sugarcane into a factory's premises for use, consumption, or sale on the assumption that the factory's premises were a "local area," was repealed. The Madhya Pradesh High Court, based on this ruling, invalidated the Madhya Pradesh Sugarcane Regulation of Supply and Purchase Act, 1958, which imposed a similar tax. The Sugarcane Cess (Validation Act) 1961 was passed by the Central Government, which validated the levy of a sugarcane cess under 10 Acts in 7 States, including the Madhya Pradesh Act.

The legitimacy of the central legislation was called into question in the case of *Jaora Sugar Mills v. State of M.P.*[8]. The Supreme Court's judgement was delivered by Gajendragadker C. J., who held that section 3 of the Central Act did not simply validate the invalid State Acts, because it would not have been competent for Parliament to confer jurisdiction on State Legislatures in that way, but that section 3 of the Central Act had included all States and Notifications in the Central Act at all material times. Under Article 248 read with article 97, Parliament had the competence to levy the cess that had been imposed by the illegal State Acts.

This case demonstrates that the Union can always come to the rescue of the State by asserting residuary powers to uphold unconstitutional State legislation if it so desires. This gives cooperative federalism a whole new meaning.

- **Expenditure Tax** – The Expenditure Tax Act of 1957 was affirmed by the Andhra Pradesh High Court because expenditure tax, which was not particularly provided for in any of the entries under List II/III, was inside the ambit or scope of entry 97 of List I[9]. The fact that the expenditure on which the tax was sought to be levied was not necessarily confined to the expenditure actually incurred by the assesses himself, did not render it anything other than an expenditure tax as long as it was a tax on expenditure. The Supreme Court confirmed the legality of the Expenditure Tax Act of 1957 in an appeal, on the basis that it falls under the residuary powers provision[10].
- **Wealth Tax** – The legitimacy of the Wealth Tax Act of 1957 was the subject of a number of disputes in various High Courts. In the case of *UOI v. H. S. Dhillon*[11], a Supreme Court bench of seven judges decided on significant problems regarding the taxing authority of the Parliament and the state legislatures. The issue was whether Section 24 of the Finance Act of, 1969, which changed the requirements of the Wealth Tax Act of 1957 so as to include the capital value of agricultural land in calculating net wealth, was within Parliament's legislative competence. It was found that the Parliament was competent to enact Section 24 of the Finance Act.

Sarkaria Commission

The Sarkaria Commission on Centre-State Relations, which issued its report in 1988, rejected the idea of vesting residuary powers in the states, despite agreeing with the Supreme Court's assessment that these powers cannot be interpreted so broadly as to erode state legislatures' sovereignty. The Commission, on the other hand, agreed with the proposal to move Entry 97 from the Union List to the Concurrent List.

Because the Constitution-makers did not include any entry relating to taxation in the Concurrent List, the Sarkaria Commission recommended that Parliament retain this residuary power of legislation with regards to taxation. This would avoid double taxation, Union-State frictions and time-consuming litigation. The Commission warned that the authority to tax may be used not merely to raise revenue but also to regulate economic activity, and that there could be instances where a state, under the guise of introducing a new taxing issue, legislates in a way that's harmful to the national interest. However, it supported the transfer of other residuary powers to the Concurrent List because it believed that the States' exercise of such authority would be subject to the Union supremacy principles built into the Constitution's framework, particularly Articles 246 and 254.

Landmark Judgements

These are the landmark judgements in addition to the ones already mentioned above:

- **I. C. Golaknath v. State of Punjab**[12]– the SC had held that the power of the Parliament to amend the Constitution was derived from Article 248 read along with entry 97 of List I and that Article 368 dealt only with amendment procedure. However, in view of the 24th Amendment of

the Indian Constitution and the SC's decree in *Keshavananda Bharti v. State of Kerala*^[13], article 368 should be held to include both the power and procedure for amendment and there is no case for invoking a residuary power for constitutional amendment.

- *UOI v. H. S. Dhillon*^[14] – Before this judgement, the judicial view was basically that any 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 residuary authority could not be used if the challenged legislation fell under any of entries under List II. Furthermore, if the challenged legislation came within one of the List I/III entries, the residuary would not be necessary. It was argued that entry 97, List I, was the final resort rather than the initial step in the consideration of such issues. However, the Dhillon case appears to have shifted this viewpoint where the Supreme Court held by a majority that if the subject-matter of the challenged legislation does not fit under any of the entries in List II/III, Parliament can use the residuary authority or combine it with any article in List I.
- *Attorney General for India v. Amratlal Prajivandas*^[15] – following the Dhillon case, the SC observed that the test to determine the legislative competence of the Parliament was that whenever this competence came into question, one must look to the entries under List II. If the said law is not identical to any of entries in List II, no further inquiry is necessary as Parliament will be competent to enact the said law either by virtue of the entries in List I & III, or by virtue of the residuary power contained in Article 248 read with entry 97, List I.

Conclusion

The residuary powers, which were meant to have a fairly limited extent due to the Constitution's detailed enumeration of legislative subjects in the three lists, have turned out to be far more expansive. The use of residuary powers to justify gift, wealth, expenditure, and other taxes, in particular, demonstrates that it has given the Union a new dimension. Since the Supreme Court's landmark ruling in the Dhillon case, a new approach to constitutional interpretation of legislative entry has arisen.

Hereafter there is no need to justify the exercise of Union power on the basis of one or more entries in the Union List. All that's enough is to show that the power in question does not belong to the State. This logical way of approach to the entries has really rendered the detailed enumeration of powers in List I redundant, though it may still serve some purpose in showing the scope of Union's residuary powers and for determination of the scope of the specifically enumerated powers in the state and concurrent lists.

[1] Ali Mehdi, *Residuary Legislative Powers in India: Retrospect and Prospects* (1990)

[2] M. P. Jain, *Indian Constitutional Law*, 6th ed., (Nagpur: LexisNexis Butterworths Wadhwa, 2010) p. 607

[3] *M. T. Joseph v. Gift Tax Officer*, AIR 1962 Ker 97

[4] *Dandapani v. Additional Gift Tax Officer*, AIR 1963 Mad 419

[5] AIR 1967 All 19

[6] AIR 1970 SC 999

[7] AIR 1960 SC 652

[8] AIR 1966 SC 416

[9] *Azam Jah v. Expenditure Tax Officer*, AIR 1970 AP 86

[10] *Azam Jah v. Expenditure Tax Officer*, AIR 1972 SC 2319

[11] AIR 1972 SC 1061

[12] AIR 1967 SC 1643

[13] (1973) 4 SCC 225

[14] AIR 1972 SC 1061

[15] AIR 1994 SC 2179