
UNIT 10 DIVISION OF POWERS*

Structure

10.0 Objectives

10.1 Introduction

10.2 Division of Power: The Theoretical and Conceptual Background

10.3 Division of Power in the Constitution of India

10.3.1 The Union List

10.3.2 The State List

10.3.3 The Concurrent List

10.4 Residuary Powers of Legislation

10.4.1 Sarkaria Commission

10.5 Administrative and Financial Distribution of Powers

10.6 Let Us Sum Up

10.7 References

10.8 Answers to Check Your Progress Exercises

10.0 OBJECTIVES

After going through this unit, you will be able to:

- Understand the rationale for provision about the division of power in Indian Constitution;
- Assess the importance of division of power for a federal polity;
- Recognize the various lists in which powers are divided between Centre and the State;
- Analyse the link between nature of federalism and division of power provision; and
- Point out the articles in which division of power provision is maintained in Indian Constitution.

10.1 INTRODUCTION

The division of power as a concept was theoretically enumerated by John Locke. It was modified by Montesquieu and got reflected in the Constitution of the United States of America. In essence, federalism is a division of powers between the National governments and State governments. In federalism, there should be a clear division of powers so that the units (states) and the Centre are required to enact and legislate within their sphere of activity, and none violates its limits and tries to encroach upon the functions of others. Indeed, federalism is an agreement between two or more units which are independent and autonomous. In a federal system, different units of governance enter into an agreement to support each other on common interests and respect each other's autonomy in deciding about their interests. This agreement is evident in the Constitution of India. The Seventh Schedule (Part XI) contains three Legislative Lists which mentions subjects for

* Pratip Chattopadhyay, Assistant Professor, Dept. of Political Science, University of Kalyani, Nadia, West Bengal.

legislation by the Union government, state governments and jointly by the Union government and state governments: List I- Union List, List II -State List and List III - Concurrent List.

10.2 DIVISION OF POWER: THE THEORETICAL AND CONCEPTUAL BACKGROUND

Division of power is conceptually linked with the history of the evolution of modern nation-state and its administrative aspect. It was basically inscribed in the idea of separation of power. Jean Bodin was the first modern writer to demand a separation of power. In his book *The Spirit of The Laws* (1748), Montesquieu enunciated and explained his theory of Separation of Powers. He wrote - (a) If the legislative and executive powers are combined in the same organ, the liberty of the people gets jeopardised because it leads to tyrannical exercise of these two powers; (b) If the judicial and legislative powers are combined in the same organ, the interpretation of laws becomes meaningless because in this case the law-maker also acts as the law interpreter and he never accepts the errors of his laws; (c) If the judicial power is combined with the executive power and is given to one-person or one organ, the administration of justice becomes meaningless and faulty because then the police (Executive) becomes the judge (judiciary); (d) Finally, if all the three legislative, executive and judicial powers are combined and given to one person or one organ, the concentration of power becomes so big that it virtually ends all liberty. It establishes despotism of that person or organ. As such, the three powers should not be combined and given neither to a single organ nor to two organs. These three powers should be used by three separate organs of the government. It is essential for safeguarding the liberty of the people. Later on the British jurist Blackstone and the founding fathers of the American constitution, particularly, Madison, Hamilton and Jefferson, extended their full support to the theory of separation of powers. They regarded Separation of Powers essential for protecting the liberty of the people.

In practical terms, the federating states enter an agreement and create a national state and the instruments in the form of laws by which their relations are governed. The exact line which is drawn to separate the matters of common concern to the whole federation varies according to the views of those who enter into the agreement as regards the relative functions of the federating states and the national government. It also depends upon the view adopted by the federating states as to what matters in their actual circumstances, geographical, economic, social or what, really matters of common concern are. But once it is demarcated and fixed by the federating agreement, its maintenance is of the essence of federalism.

The scheme of distribution of powers in each federation was determined by the peculiar political conditions under which it came into existence. In the United States of America when the sovereign states proposed to federate they were anxious not to surrender an unlimited area of power to the new national government. Therefore, they were reluctant to leave the residue powers to it. Hence, there is only one list containing the powers of the national government, and the residue remains with the units. When the Canadian federation was formed, the Canadians had before them the example of the working of the American Constitution: The American constitution suggested that the Unions must have

more powers. Hence, the scheme of distribution of powers adopted in the Canadian Constitution is different. The matters with respect to which the national government and provinces are competent to legislate are enumerated in two sections, leaving the residual powers to the Dominion Parliament. The makers of the Australian Constitution were mostly influenced by the American Constitution. They also adopted only one list which enumerated the powers surrendered by the states to the national government, the residue remaining to the states.

Mahatma Gandhi talked about decentralisation of power by talking about a *Ram-Rajyain* which there will be layers of powers starting from the village-panchayat and then proceeding up-to-the national level. So far as the administrative history of British India is concerned, the British Indian Constitution Act of 1935 enumerated the legislative powers in three lists – Federal, Provincial and the Concurrent and the residue powers were given to the Governor-General to be assigned by him either to the Central government or the provinces. This particular arrangement was necessities by the then prevailing conditions in the country, the Hindus favouring a strong Centre while the Muslims are favouring strong provinces.

The distribution of powers in each federation reflects in the nature and character of the policy agreed upon by those who were responsible for drawing up the Constitution. Whatever may be the variations in the details of the distribution of legislative powers, one fact is common to all federations; is there is a distribution of legislative powers, and this distribution determines the distribution of executive authority.

10.3 DIVISION OF POWER IN THE CONSTITUTION OF INDIA

The basic provisions regarding the distribution of powers between the Central and Provincial (state) governments in the Indian Constitution are present in Part XI (Article 246) of the Constitution. This part is divided into two chapters – legislative relations and administrative relations. Indian Constitution has followed a system in which there are two lists of legislative powers, one for the Centre and the other for the State. The residue is left for the Centre. This system is similar to the one in the Constitution of Canada. Following the Constitution of Australia, an additional list has been included in the Constitution of India, namely the Concurrent List. The Constituent Assembly of India followed the system of division of power as was envisaged in the Government of India Act of 1935 regarding the provisions about divisions of power in India. The items that can be legislated by the Union government, the state governments and jointly both by the union government and state government are mentioned in the lists known as List I – Union List, List II- State List and List III- Concurrent List.

10.3.1 The Union List

The Union List consists of ninety-seven items. It is the longest of the three lists. It includes items such as defence, armed forces, arms and ammunition, atomic energy, foreign affairs, war and peace, citizenship, extradition, railways, shipping and navigation, airways, posts and telegraphs, telephones, wireless and

broadcasting, currency, foreign trade, inter-state trade and commerce, banking, insurance, control of industries, regulation and development of mines, mineral and oil resources, elections, audit of Government Accounts, constitution and organization of Supreme Court, High Courts and the Union Public Service Commission, Income-tax, Customs duties, export duties, Corporation tax, taxes on capital value of assets, estate duties, terminal taxes, etc. Parliament has exclusive powers of legislation about items mentioned in this list.

10.3.2 The State List

The State List consists of sixty-six items. Some of the most important of these items are as follows – public order, police, administration of justice, prisons, local government, public health and sanitation, education, agriculture, animal husbandry, water supplies and irrigation, land rights, forests, fisheries, money-lending, State Public Service Commission, land revenue, taxes on agricultural income, taxes on lands and buildings, estate duty, taxes on electricity, taxes on vehicles, taxes on luxuries, etc. The selection of these items is based on local interest, and it envisages the possibility of diversity of treatment with respect to different items in different States of the Union.

10.3.3 The Concurrent List

The Concurrent List consists of forty-seven items. These are items with respect to which uniformity of legislation throughout the Union is desirable but not essential. As such they are placed under the jurisdiction of both the Union and the States. The list includes items such as marriage and divorce, transfer of property other than agricultural land, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration of foodstuffs, drugs and poisons, economic and social planning, trade unions, security, labour welfare, electricity, newspapers, books and printing presses, stamp duties, etc. The Parliament of India and state legislatures have concurrent powers of legislation over the items included in this list. Once Parliament enacts a law on an item in this list, the parliamentary law shall prevail over any state law on an item. There is, however, one exception to this general rule. According to this a later law of the state legislature on any item in the Concurrent List shall prevail over an earlier law of Parliament on the same subject if the state law was reserved for the consideration of the President and received his assent. This enables a State to pass a more advanced piece of legislation than an existing parliamentary law. This also provides for any special conditions and circumstances that may prevail in any State.

10.4 RESIDUARY POWERS OF LEGISLATION

Residuary powers are the powers to legislate on the issues which are not mentioned in the three lists mentioned above. In India, the residuary powers are vested in the Union. Although the states in India have the exclusive power of legislation over every item in the State List, there are certain exceptions to this general rule. In these exceptional cases, the centre has residuary powers to legislate. These exceptions are:

- a) Article 249 of Indian Constitution provides that if the Rajya Sabha has declared by a resolution supported by not less than two-thirds of the members

present and voting that it was necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall become lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter during the period the resolution remained in force. The Rajya Sabha, however, could extend the period of such a resolution for a further period of one year from the date on which it would otherwise have been operated.

- b) Article 250 empowers the Parliament to make laws on any item included in the State list for the whole or any part of India while a proclamation of Emergency is in operation. The maximum period for which such a law can be enforced is the period for which emergency lasts and six months beyond that period.
- c) By Article 252, Parliament also becomes entitled for legislating two or more states by their consent. If two or more States request the Central government to legislate on a particular subject mentioned in the State List in so far as their State is concerned, the Parliament shall legislate on these subjects as well. If any such law is to be amended or repealed, it can be done only by Parliament alone, but the initiative for it rests with the State.
- d) Under Article 253 Parliament has the power to legislate 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 conferences, association or any body. This provision entitles Parliament to legislate even in respect of those subjects that were included in the State List.
- e) Article 356 stipulates that if the President is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provision of the Constitution, he might declare that the power of the Legislature of that State would be exercisable by or under the authority of the Parliament. The effect of Article 356 would be that the legislature of the State in question would stand dissolved or suspended and the lawmaking power would rest in the Parliament during the period of proclamation of emergency was in force.
- f) Not only does the Parliament enjoy predominance over law-making in the States, the Union executive also exercises some control on this activity there. Clause 3 of Article 31 dealing with the right to property provides that if the legislature of a State adopts a Bill providing for the compulsory acquisition of movable or immovable property for public purposes, such a Bill will not be effective unless it has been reserved for the consideration of the President and has received his assent. Article 200 states that the Governor shall not assent to but shall reserve for the consideration of the President any Bill which in the opinion of the Governor would, if it becomes law so derogate from the powers of the High Court as to endanger the position which that Court has by the Constitution designed to fill. Under Article 200 the Governor can reserve a Bill of the State Legislature for the consideration or assent of the President. Whether he can do so on his discretion or on the

directive of the Union authorities has not been stated in the Constitution. The general implication, however, is that the Governor will reserve the Bill for the consideration of the President only if some important political issues are involved.

10.4.1 Sarkaria Commission

In June 1983, the central government appointed Sarkaria Commission under the chairmanship of Justice R.S. Sarkaria to review the scope and working of constitutional provisions on centre-state relations. After discussion with various state governments on several issues in Union-state relations, the commission submitted its report on October 27, 1987. The Sarkaria Commission favoured a strong Centre as the only safeguard to national integrity. It recommended that residuary power of legislation regarding taxation matters should remain with Parliament while the residuary powers for issues other than taxation should be placed in the Concurrent List. But it did not support centralization of power in the Union government. The Commission also recommended establishment of a permanent Inter-State Council under Article 263 of the Constitution as a forum to discuss many of the problems of common Union-State interests. It sought to promote a balanced approach towards division of powers in India. It suggested that whenever the Union proposes to undertake legislation with respect to a matter in the Concurrent List, there should be prior consultation not only with the State governments independently but also collectively with the Inter-Governmental Council should be established under Article 268. In the light of Sarkaria Commission report, the National Front Government established the Inter-State Council through a presidential notification on May 25, 1990. The Council was to consist of the Prime Minister, Chief Ministers of all States, Chief Ministers or Administrators of Union Territories and six ministers of cabinet rank of the Union Government. The Council is headed by the Prime Minister and in his absence by the cabinet minister nominated by him. The council prepares guidelines for identifying issues to be brought before it and is expected to meet at least thrice every year. It also recommended that the persons of high integrity should be appointed as Governors of states and Article 356 should be used sparingly and last resort when other alternatives were not available. The usage of Article 356 under which President rule is imposed in states should be subject to judicial review. It also recommended a review of operational feasibility of the scope for levying taxes and duties, a constitutional amendment to make corporation tax sharable between the Union and the States, and amendment to the Inter-State River Water Dispute for making it necessary for Union government to constitute a tribunal. The tribunal was to be constituted within one year of receipt of an application from a State and to make the award of the tribunal effective within five years.

In April 2007, the UPA (United Progressive Alliance) government appointed Punchhi Commission under the chairmanship of Justice MM Punchhi. Its purpose to review the roles and responsibilities of various levels of governments - centre-state relations, Panchayati Raj Institutions and local bodies, and their inter-relations. The Commission submitted its report in 2010. It made 312 recommendations. These also included recommendations to deal with internal security and communal violence.

Note: 1) Use the space below for your answers.

2) Check your answers with the model answers given at the end of this unit.

1) Explain the Division of Power in the Constitution of India.

.....
.....
.....
.....
.....
.....

2) What were the recommendations of Sarkaria Commission?

.....
.....
.....
.....
.....

10.5 ADMINISTRATIVE AND FINANCIAL DISTRIBUTION OF POWERS

The Constitution emphasises that there should be administrative cooperation between the Union and the states. According to Article 261, full faith and credit shall be given to public acts, records and judicial proceedings of the Union and States in all part of Indian territory. The manner in which these acts and records will be provided, and their effect determined will be provided by Parliamentary enactments. According to Article 262, which deals with waters of inter-state rivers and river valleys, Parliament may by law provide for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any inter-state river or river-valley.

The Constitution also has provisions about financial relations between the Unions and State governments for raising enough funds. Article 292 which authorizes the Union government to borrow upon the security of the Consolidated Funds of India within the limits which may fixed by Parliamentary law from time to time. For this, the Constitution does not fix any territorial limit. Article 293 fixes territorial limits on the borrowing of states. They cannot borrow from outside India. The states can borrow within the territory of India upon security of the Consolidated Funds of the State. The limits of borrowing may be fixed by the legislature of such state by law. Article 285 exempts the property of the Union from all taxes imposed by a State or by any authority within a State unless

Parliament by law provided otherwise. During the proclamation of financial emergency, the President can suspend the provisions relating to the division of taxes between the Union and the State and grants-in-aid to the States. Based on the recommendations of the Tenth Finance Commission, an alternative scheme for sharing taxes between the Union and States has been enacted by the 88th Constitutional Amendment Act in 2000. According to this amendment 29 percent out of gross proceeds of Union taxes and duties is to be assigned to the States in lieu of their existing share in the income-tax, excise duties, special excise duties and grants in lieu of tax on railway passenger fares.

Check Your Progress Exercise 2

Note: i) Use the space below for your answer.

ii) Check your answer with the model answer given at the end of this unit.

1) Explain the provisions in the Constitution about administrative and financial powers between the Union and the states.

.....
.....
.....
.....
.....

10.6 LET US SUM UP

The constitutional provisions in Indian can be traced to division of powers given in the Government of India Act, 1935. The division of power provision in the Constitution of India is elaborately outlined in three Lists-the Union, State and Concurrent. The residuary powers or the powers denote the powers to legislate on issues which are not mentioned in any of these lists. They vest with the Union government. The centre-state relations were reviewed by Sarkaria Commission. Among its recommendations included those on residuary powers. Regarding them, it suggested that residuary power to legislate on taxation should remain with the centre, and those relating to regulation on issues other than taxation should be in the Concurrent List. It also recommended establishment of an Inter-State Council. The Constitution also has provisions for managing Union and state relations in administrative and financial matters.

10.7 REFERENCES

Abdulrahim P. (cd.) (1998). *Dimensions of Federal Nation Building*. New Delhi, India: Centre for Federal Studies and Manak Publication.

Bakshi, M. P. (2003). *The Constitution of India*, New Delhi, India: Universal Law Publishing.

Basu, D.D. (2011). *Introduction to the Constitution of India*. Nagpur, India: Lexis Nexis Butterworths Wadhwa.

Narang, S. A. (2000). *Indian Government and Politics*. New Delhi, India: Gitanjali.

Rao, M. Govinda and Nirvikar Singh (2005). *Political Economy of Federalism in India*, New Delhi, India: Oxford University Press.

10.8 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress Exercises 1

- 1) Part XI of the Indian constitution provides scheme of division of power between the Union and the states. The subjects on which the Union, the states and jointly the Union and states can legislate are divided into three lists: The Union List, The State List and the Concurrent List. The Union List consists of subjects on which only the Union government can legislate. The State List has subjects on which the state governments can legislate. And the Concurrent List has subjects on which both Union and the states together legislate. The subjects which are not mentioned in these three lists can be legislated the power which is called residuary power. The residuary power vests with the Union.
- 2) The Sarkarian commission was constituted by the Union government in 1983 to review the scope and working of federalism in India. It was chaired by Justice R.S. Sarkaria. It submitted the report in 1987. Among the important decisions of the commission were about the residual powers and the coordination among the Union and the states on matters of common interests. Regarding the residual powers, it recommended that the residual powers to legislate on matters about taxation should vest with the centre but about the matters other than taxation matters the subsidiary powers should be placed in the Concurrent List. About matters of better coordination and of common interests between the Union and the states, the commission recommended establishment of Inter-State Council.

Check Your Progress Exercises 2

- 1) The Constitution emphasises that there should be administrative cooperation between the Union and the states. The Constitution has provisions for distribution, control of river water and resolution of inter-water disputes. There also provisions in the constitution which explain sources and limitations of funds to be borrowed by the Union and the states. While the centre can borrow from any sources from outside the country, the states can borrow only form within the territory of the country.