

Centre State Relations in India

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

Lecture 16: Power of Parliament to legislate for matters in State List

Greetings to all of you. We are discussing legislative relations in module 4 and today in lecture 16, we will be talking about Centre State relation in normal situation. We know very well that the Constitution refers to unitary model, Constitution refers to change in the structuring when emergency comes in. When situation of crisis comes, Constitution suggests a different nature of Centre State relation and that is something which we will be discussing in due course. In today's session, we are trying to bring in this perspective that how the Constitution addresses the situation or scenario where law making authority needs to be transferred to the Centre and such need arises not because of any crisis, such need arises either because of the need of uniform law across the country or the desire of the constituent units, desire of the provinces of such law from the Parliament. So, in today's session, we will be studying law making power of Parliament on the subject matters exclusively conferred upon exclusively entrusted to the State. We will try to understand that what is the historical basis of allocating this kind of power upon the Central Legislature, how it has been debated in the Assembly and then we will also understand that what is the scope of Articles 249, 242 and along with that we will also study Article 253 which is another important provision which enables the Parliament to make a law on a state subject. And as we have been referring to commission reports, Sarkaria Commission as I said has given important recommendations on Centre State relations, so we will also look at those recommendations.

When you talk about federal relation in its ideal way, you would agree that principle of federalism demands that there should not be any encroachment on each other's spheres. So, Parliament shall

acknowledge the space given to the State and it should be vice versa also. Obviously, the State thinking of invading or encroaching upon the power given to the Parliament is very ambitious. So, legislative power should not be invaded, should not be unconstitutionally expanded, but then for making the legislative exercise filled with constitutional spirit approved by constitutional norm, we find under the Indian Constitution Parliament has been entrusted with the law making power on the State subject under Articles 249 and 252, where it is been suggested that that Parliament shall make law on the subject matters given in List II which otherwise has categorically been disallowed. Now, one way of reading this is that, that a Parliament has been empowered to make a law and a reference has been given, a methodology has been given, then validation of law-making power by the Parliament on a State subject should necessarily be based on the method, the process given in the Constitution and that is given under Articles 249 and 252. Now, when members were debating the power on Article 249 as a Draft Article 246, what came to their mind is bringing in the Upper House for identifying the need and authorizing the power upon the Parliament because Upper House technically represents Provinces, represents the States.

So, it has been suggested that that if Rajya Sabha passes a resolution that law making by the Parliament is desirable in the interest of the country, then such a resolution can very well authorize and empower Parliament to make a law. Now, the question which was discussed that what shall be the time limit of such resolution, because you cannot allow the resolution to be prevalent or valid for eternity, otherwise that would amount to a severe compromise of the autonomy of the State. So, there has to be a limited timeline on which it has to be done. So, Dr. Ambedkar says that let the resolution be of a specific time limit, it should not be forever. In that regard it was suggested that let it be for 1 year, Mr. Shibban Lal Saxena said that let it be for 3 years or it can be for 1 year and then extendable up to 3 years. Now, what we find is that Article 249 has also been amended through 101st constitutional amendment on the matter of GST, which says that even on a matter of GST Parliament can make a law. GST has been provided under Article 246A. Now, you find that the mechanism what is there of empowering Parliament to make a law on the State subject, draws a reference from the Canadian Constitution, where Canadian Constitution empowers law making authority, empowers the Parliament to enact a law on the State subject. Section 91 of the Act says that Parliament can legislate for peace order and good government of Canada.

And please take note we are referring to law making power of the Parliament in ordinary times not in emergency. In emergency we know very well that the Constitution deals with such situation separately. Here we are discussing and we are highlighting that this power is power there with the Centre or with the Parliament to be excised when everything is functioning as per the constitutional norm, everything is happening perfectly alright there is no issue. So, Article 249 has no reference, no parallel reference under the Government of India Act 1935. You would not find such kind of reference and obviously for a very reason for a reason that Governor General was interested with sufficient power to address a situation. What is important to take note is that, that the ground on which Rajya Sabha can take up the matter and pass a resolution is national interest.

Now suddenly a question can be raised that whether a resolution passed by Rajya Sabha becomes a subject matter of judicial review can quote review the element of national interest while passing such a resolution. Article 249 says that Rajya Sabha can pass a resolution which needs to be supported by not less than two-thirds of the members present and voting and what is important is that they need to look at that such a resolution is necessary or expedient in the national interest that Parliament has to step in and make a law on the State subject. And then it further says that the power of Parliament to make a law shall be in reference to entire country or shall be in reference to a part of the country. When it was being debated in the Constituent Assembly it was said that it should be for a State or a part of the State also that has been omitted and what has been provided now is that that part of the whole or any part of the territory. That power of making the law conferred upon the Parliament is there when the resolution is valid.

So, it is suggested that it is stated that resolution shall remain valid in force for one year and which can further be passed for continuance of the resolution for one year. Now what is important to take note is that that resolution may be passed, but law may not be enacted. So, these are two different exercises, two different exercises. One exercise is to pass a resolution by Rajya Sabha and another exercise is to pass a law in pursuant to that reference. So, situation may arise where you may see Rajya Sabha passing a resolution, but the Parliament may not be taking it up.

Technically speaking Article 249 is to be seen as an exception to Article 246(3) which refers to the law-making power of the State Legislature on the State subject. And conferring this authority upon Rajya Sabha as I said possibly gets legitimacy and validation from this premise that Rajya

Sabha represents the State. And that's why in India when you are discussing on positioning of Lok Sabha vis-a-vis positioning of Rajya Sabha, Article 249 certainly establishes if not higher than equal importance with Lok Sabha on certain important subject matters. We know very well for example, on Money Bill Rajya Sabha has not been given equal power, but then we do have provisions like Article 249 which is exclusively with the Rajya Sabha that resolution has to be passed by Rajya Sabha. Now as I said that should it become a matter of judicial review to me answer appears to be no because that would amount to be a political question that would amount to a political question.

Anyway, the life of such law would not be forever it is only when the resolution is there. So, when the Parliament assumes power under Article 249 one has to understand that the legislative competence of the State is taken away, vanishes. The legislative competence one may say that temporarily transfer to the Concurrent List because it is earlier in the State List. Now for the purpose of Article 249 because parliamentary legislation is allowed because the law to be made by the Parliament or Parliament has been allowed to make a law one can presume that is temporarily transferred. This is only for understand there is no such transfer happening in an actual sense. So, what is the use of Article 249 you find that the law made right after the commencement of the Constitution in 1950 on the issue of black marketing. There is a law made on Essential Supplies (Temporary Powers) Amendment Act of 1950 and the Supply and Prices Goods Act. Resolutions were being passed in 1951 to enact laws on Entries 18 and 30 of List II. You have the Evacuee Interest (Separation) Act, 1951, to resolve the problem related to rehabilitation of the people who have were displaced from Pakistan. And then in addition Rajya Sabha has also passed the resolution with regard to policing, public order, however, law has not been enacted resolution has only been passed. What Sarkaria commission has said Sarkaria Commission has said that Article 249 provides an easier way of addressing extraordinary situation.

It suggests that this is very effective and efficient way of bringing in legislation where provincial legislation becomes either incomplete or ineffective. Incomplete in a sense of addressing the situation, ineffective in a sense that something which connects with which relates with the other borders and other States also. So, Sarkaria Commission very rightly said that Article 249 is also one such provision where it can be used as suggested in the national interest and unnecessary invocation of power by employing emergency provisions can be avoided. However, there was a

proposal there was a discussion that let there be a consultation with Inter-Governmental Council, the Sarkaria Commission said that Rajya Sabha is good enough to look into the views of the state to accommodate the views of the State and to pause a resolution on this matter.

Article 252 as I said is another important area another important subject where law making power has been given to Parliament on the State subject. It says that when one or more State Legislature passes a resolution then becomes a legislative body to make the law on the State subject. It was suggested that let one or more States be replaced with two or more States and this is something which was adopted in the Assembly, i.e., Draft Article 229. Now, when you look at the provisions under Article 252 it says that it is like two or more States, they are delegating their law-making authority to Parliament. They are stating that that let Parliament make a law on the State subject where both the States are competent to make law because of the situation at hand. So, what is required to be done is the resolution to be passed by the Houses of those State Legislatures and the law made by Parliament shall be applicable on those States which are passed the law and it can further be extended in even those States which passes resolution afterwards.

Once law is met by Parliament repealing of the law should be done only by Parliament and not by the State Legislature because this amounts to as I said in reference to Article 249 withdrawing or surrendering the legislative competence. When you look at some comparison with regard to Article 252 you find that Australian Constitution Section 51 connects with similar provision Section 103 of the Government of India Act 1935. Section 103 refers to a similar situation where two or more Legislatures they decide to empower Parliament to make a law then it shall be lawful if such legislation comes from the Union Legislature. And we find that a law has been made in pursuant to Article 252 to regulate the exploitation of Damodar River. Damodar Valley Corporation was established on the basis of resolution passed by both the States for purposes of irrigation for purposes of generating electricity because the Damodar is a river which flows which runs in both the States (West Bengal and Bihar). So, if the law is made under Article 252 on the subject matter, then that subject matter for all purposes is to be considered to be not with the State Legislature anymore is not to be seen in that way.

And Article 242 says that an Act of Parliament relating to that State may be amended or repealed only by another act of Parliament only by another Act of Parliament passed or adopted in the

manner provided in Clause 1. And what is that – by resolution for amendment or repeal of those State Legislature in whose interest the Act was passed followed by an Act of Parliament. So, there has to be again a resolution and then in pursuant to in reference to that resolution there has to be a law again enacted for amendment or repeal as resolution has been passed. In this case of Union of India v. Valluri Basavaiah Chowdhary, the court clarifies that resolution passed by the State Legislature does not mean that it has to get an approval from the Governor. Governor is not part of that process and in another case of R.M.D.C. v State of Mysore, it is said that that State Legislature surrenders the legislative power on such matter when the resolution is passed.

Sarkaria Commission has also talked about this parliamentary legislation on the State subject in reference to Article 252. Commission suggested that the act passed by Parliament under Clause 1 may be amended or repealed either by Parliament in the same manner as provided under Clause 1 and also by the State Legislature. At the end why it is suggested because the authorization is coming from the resolution from the State Assembly or State Legislature. So, state should also have been given this power. The only rider of which the Commission suggest is that let the amendment or repealing by the State Legislatures shall take place only after it has been reserved for the consideration of the President of the Article 200 of the Constitution.

So, that is what the process because then Centre has to be kept in loop. So, that is why this is something which is been suggested and commission has also suggested that the act passed by the Parliament shall not be for perpetual duration, but for a specific term not exceeding 3 years. Now, when you look at the impact of Articles 249 and 252 on federal structuring as I said that Articles 249 and 252 makes a very tacit impact or impression on Centre State relation. What is that tacit one? That it authorizes the Parliament to make a law on the State subject. So, in a way it approves the unitary structuring, but then one may say that the safeguards which are there is under Article 249 the resolution passed by the Upper House/Rajya Sabha and in another case it is the resolution passed by the States. So, those are the safeguards provided. So, safeguards would very well give the credibility of the entire exercise done by the Parliament.

After Articles 249, 252 there is another provision which we need to discuss where also impliedly power to make law on State subject is exercised by the Parliament that is in reference to Article 253 which empowers Parliament to make a law for any part of the country or for the entire country

for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference association or other body. This again symbolizes sovereignty of India. This again symbolizes that Union government is empowered to enter into an international agreement, international treaty and such international treaty can be given a legislative flavor through a parliamentary legislation. Interestingly if you look at the wordings of Article 253 it says or any decision made at any international conference, association or other body we need to give a very narrower understanding to it. Why narrower understanding? Because it is not that whatever has been decided at such international conference acquires the status of treaty or agreement. We know very well that these days there are international bodies of civil societies, of universities for example, trade unions for example, university. So, it is not that the decision becomes a binding decision that is not the case. And Article 253 has got a notwithstanding clause non-obstante clause it says “notwithstanding the outgoing provisions of this chapter” meaning thereby that whatever arrangement is given in Articles 245, 246, 249, 250 all those are subject to Article 253 very comprehensive power.

When you analyze Article 253 it presents this picture it portrays that or it brings in this legal understanding that in India international agreement or treaty becomes part of the law of the land only after enactment of the law by Parliament only when municipal law has been made. So, unlike United States where certain treaties are being brought within the category of self-executing treaty where the moment treaty is signed and ratified it becomes part of domestic law that is not the scenario in India. In India you would find that we have followed dualism theory where signing of such international agreement requires a further legislative effort a law to be made by the Parliament. And Article 253 also connects with Directive Principle given under Article 51(c) fostering respect for international law and treaty obligation in dealings of organized people with one another. One may say that this Article 51(c) and Article 253 is to be read together because in a global world it is desirable to follow on certain subject matters global standards and for that necessary authorization, empowerment has to be there with the legislative body and rightly so in this case with the Parliament to give effect to such treaty or agreement.

We find that the Environment Protection Act of 1986 is made impossible to that. That's what when you read the preamble of this act though there is no reference of Article 253 but there is a reference of the international agreement which took place on the matter of environment and development.

Under Article 253 you find one more challenge and that challenge is these days we find we observe that international community they are discussing a global standard on wide range of subject matters. For example, you find agreeable global standard on the matter of intellectual property there is a discussion on agreeable global standard on the matter of agriculture and agricultural subsidy, public health. So, you find that nations are debating and deliberating on arriving at the global standard. Now question comes in if the subject matter of international treaty connects with the State list if it relates with the State list what mechanism you see in place where opinion of the State has been taken note of before entering into an international agreement on such subjects.

For example, public health, agriculture these are State subjects and exclusive power has been given to the Union on treaty or international agreement and Article 253 says that Parliament shall have exclusive power to make law on such agreements but then right at the base of such agreement is a subject matter which connects with the State subject exclusive state subject how shall we see accommodation of the views of the States on such subject matters. So, this becomes an important question to look at. One way of addressing this question is to have a wider consultation with the States before finalizing any agreement or treaty, so that consensus can be arrived at consultation can be done with the Provinces, States upon whom the power to legislate has been conferred with by the Constitution. These are the references for this lecture. Thank you very much.