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OF INDIA

SIXTH EDITION

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COMMENTARY
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CONSTITUTION OF INDIA
PREFACE
TO THE
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VOLUME Q

This work is the *pioneer* Commentary on the Constitution of India. As the Preface to the first Edition shows, the preparation of the Commentary started on the very day the Constituent Assembly had its first sitting. The manuscript was complete within the astounding period of two months of the publication of the text of the Constitution of India, and the printing having been over in another six months, the First Edition of this Commentary, in one volume of over 800 pages, was published in November, 1950. Naturally, there were no pronouncements of the Supreme Court of India available to assist the Author in preparing his comments on the bulk of the Articles of the Constitution. The First Edition, thus, was an exploration into an untrodden region.

Born in 1950, it has celebrated its Sitver Jubitee in 1975. No other work on Indian Constitutional Law saw the light of the day until this Commentary had run into three Editions. The indebtedness of the subsequent ventures to this Commentary is obvious.

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208, Rashbehari Avenue,
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April, 1991..

THE AUTHOR

COMMENTARY ON THE CONSTITUTION OF INDIA

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"No more vital truth was ever uttered than that freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government."

—WOODROW WILSON.

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COMMENTARY
ON THE
CONSTITUTION OF INDIA

Volume Q
SCHEDULES (*Contd.*)

SEVENTH SCHEDULE[1]
[Article 246]

List I – Union List[2]

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Art. 1, Sec. 8 (1) of the Constitution empowers Congress – 'to provide for the common defence.'

From the above power together with the 'war' power, Congress has deduced, *inter alia*, the following powers, which have been upheld by the Supreme Court as legitimate, to meet a war emergency –

(i) to impose a curfew and to penalise its violation ;[3]

(ii) to evacuate from certain areas[4] or to detain for a reasonable period,[5] without trial, suspected persons.

(iii) to 'control both inter-State and intra-State rates of railroads ;[6]

(iv) to authorise the federal government to take over all the telephone lines of the country[7] or to carry on war industries to the exclusion of private enterprise ;[11]

(v) to regulate the price of essential commodities like fuel ;[8] or house rent.[9]

---

1. The reference to the Existing Laws and legislation by Parliament under each Entry is *not exhaustive*, it is only illustrative ; an attempt, however, has been made to include all important Acts.
2. The general principles for interpreting the three Lists are discussed at pp. 121 *et seq* of Vol. J.
3. *Hirabayashi* v. *U.S.*, (1942) 320 U.S. 81.
4. *Koremantsu* v. *U.S.* (1944) 323 U.S. 214.
5. Ex parte Endo (1944) 323 U.S. 283.
6. *N. Pacific Ry. Co.* v. *North Dakota*, (1919) 250 U.S. 135.
7. *Dakota Central Tel. Co.* v. *S. Dakota*, (1919) 250 U.S. 163.
8. *U.S.* v. *Pennsylvania Central Coal Co.*, (1918) 256 Fed. 703.
9. *Bowles* v. *Willingham*, (1944) 321 U.S. 503.

(vi) to commandeer ships[10] or the output of factories ;[11] or to take other steps necessary to bring about whatever production of war equipment and supplies shall be necessary to win a war.[12]

The power of conscription during war has been deduced from the power to raise 'army'[13] and 'navy', together with the present power (see under Entry 2, List I, below). This power is not dependent upon a Congressional declaration of war.[13]

This power is liberally interpreted by the Courts in order to enable the authorities to exercise power commensurate with the threatened danger. Thus, a war time legislation providing for the exclusion of persons of a particular race from an area cannot be challenged on the ground of discrimination.[14]

It also implies the power to remedy the evils which arise from war and its progress,[15] after its termination, e.g.,–

(i) to control housing and rents;[16]

(ii) to support the preservation of rights created by wartime legislation.[17]

Though the 'defence power' is an enumerated federal power, it is possible for the States, in exercise of their 'police power', to aid federal military programme by prohibiting speeches urging citizens not to support the enlistment programme of the federal government.[18]

Together with the above is to be noted the general power to tax and spend money for the common defence' of the United States [Art. 1, s. 8(1)].

(B) *Australia.*–Sec. 51 (vi) gives the Commonwealth Parliament the power to legislate with respect to–

"The naval and military defence of the Commonwealth and of the several States."

The above power has been widely interpreted, to include the power–(i) to exercise control over the States in relation to industrial disputes;[19] (ii) to fix prices;[20] (iii) to regulate relation of landlord and tenant ;[21] (iv) to regulate consumption;[22] (v) to provide for the housing of members of the Forces and their dependants ;[23] (vi) to control or conduct a clothing factory even in time of peace, so that it might meet war-time demands ;[24] (vii) to prohibit advertising in war-time;[25] (viii) to regulate the employment of women;[1] (ix) to make preparations for war in times of peace.[21]

---

10. The Lake Monroe, (1919) 250 U.S. 246.
11. *Moore & Tierney* v. *Rexford Knitting Co.*, (1918) 250 Feb. 276.
12. *Lichter* v. *U.S.*, (1947) 334 U.S. 742 *(766)*.
13. *U.S.* v. *David*, (1968) 20 L. Ed (2d) 672.
14. *Hirabayashi* v. *U.S.*, (1943) 320 U.S. 81; *Korematsu* v. *U.S.*, (1944) 323 U.S. 214.
15. *Hamilton* v. *Kentucky Districts*, (1919) 251 U.S. 146 *(161)*.
16. *Woods* v. *Miller*, (1948) 333 U.S. 138.
17. *Fleming* v. *Mohawk Co.*, (1947) 331 U.S., 111.
18. *Gilbert* v. *Minnesota*, (1920) 254 U.S. 325.
19. *Australian Woollen Mills* v. *Commonwealth*, (1944) 69 C.L.R. 476.
20. *Miller* v. *Commonwealth*, (1946) 73 C.L.R. 187; *R* v. *Bromhead*, (1947) 73 C.L.R. 237.
21. *Australian Textiles* v. *Commonwealth*, (1946) 71 C.L.R. 161.
22. *Sloan* v. *Pollard*, (1947) 75 C.L.R. 445.
23. *Real Estate Institute* v. *Blair*, (1947) 73 C.L.R. 237.
24. *A.-G. for Victoria* v. *Commonwealth*, (1935) 52 C.L.R. 533.
25. *Ferguson* v. *The Commonwealth*, (1943) 66 C.L.R. 432.
1. *R* v. *Foster*, (1919) 79 C.L.R. 43.

But the defence power is made expressly 'subject to this Constitution'. Hence, it would not enable the Commonwealth to subvert the federal structure of the Constitution.[2] Nor can the constitutional limitations be ignored on the ground of emergency.[3] Emergency does not create powers, but merely furnishes the reason for the exercise of the power.[4] Again, the scope of the possible legislation under the defence power varies from time to time according to the exigencies.[5]

In any case, the defence power cannot be used to exercise a power which has no sufficient connection with the defence power.[6] No such connection has been held to exist in the following matters : (a) for regulating the holidays of State servants[24]; (b) to regulate the number of students to be admitted to Universities though the rejected were not to be conscripted[7]; (c) to dissolve the Communist Party.[8]

Though the Constitution Act does not confer any power upon the Commonwealth Parliament in express terms to deal with the consequences of war, such power has been deduced from the defence power read with S. 51 (xxxix) which gives the incidental power and it has been held that the defence power includes not only a power to prepare for war[9] and to prosecute war, but also a power to wind up after war and restore conditions of peace,[10] which would include things like the repatriation and rehabilitation of soldiers,[11] rebuilding of a city which had been damaged by bombing,[8] deportation of refugees.[12]

After the cessation of active hostilities, however, the validity of wartime legislation has got to be tested by the Court with reference to the exigencies existing at the time when the legislation was being sought to be enforced. The Court will sustain the wartime regulations only if a sufficient connection of such regulations with defence' in its extended sense is established. Thus, the Court has invalidated an order controlling distribution of motor cars;[13] regulations relating to the employment of women,[11] petrol rationing,[14] privileges of protected persons relating to housing,[15] on the ground that sufficient connection between such regulations and defence no longer existed. On the other hand, in another case, the validity of regulations relating to the sale of land were upheld on the ground that the wartime conditions had not yet changed.[16]

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2. Ex parte Victoria, (1942) 66 C.L.R. 488 (*506*).
3. *Gratwick* v. *Johnson*, (1945) 70 C.L.R. 1.
4. *Andrews* v. *Howell*, (1941) 65 C.L.R. 255.
5. *Dawson* v. *Commonwealth*, (1947) 73 C.L.R. 157.
6. *Stenhouse* v. *Coleman*, (1944) 69 C.L.R. 457 (*474*).
7. *R.* v. *University of Sydney*, (1943) 67 C.L.R. 95.
8. *Australian Communist Party* v. *Commonwealth*, (1951) 83 C.L.R. 1.
9. *Marcus Clark* v. *Commonwealth*, (1962) 87 C.L.R. 177.
10. *Dawson* v. *Commonwealth*, (1946) 73 C.L.R. 175 (*176*) ; *Marcus* v. *Commonwealth*, (1952) 87 C.L.R. 177.
11. *R.* v. *Foster*, (1949) 79 C.L.R. 43 (*82*).
12. *Koon Wing* v. *Calwell*, (1949) 80 C.L.R. 533.
13. *Crouch* v. *Commonwealth* (1948) 77 C.L.R. 339.
14. *Wagner* v. *Gall*, (1949) 79 C.L.R. 43.
15. *Collins* v. *Hunter*, (1949) 79 C.L.R. 43.
16. *Hume* v. *Higgins*, (1949) 78 C.L.R. 116.

(C) *Canada*. – 'Defence' is a matter within the exclusive competence of the Dominion Parliament under s. 91 (7) of the B.N.A. Act, 1867.

"Militia, military and naval service, and defence".

As in the U.S.A. and Australia, so also in Canada, the 'defence' power of the Dominion Parliament has been liberally interpreted so that it could in war assume Provincial powers[17], which was not possible in time of peace.[15]

"However the wording of ss. 91-92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on 'property and civil rights in the Privinces', yet in a sufficiently great emergency such as that arising out of War, there is implied the power to deal adequately for the safety of the Dominion as a whole".[19]

INDIA

'Defence'. 1. The defence power of the Union is liberally construed in all countries (see above). It would not, however, empower the Union to subvert the federal nature of the Constitution or to encroach upon fundamental rights, except in so far as it is provided for in the Emergency Provisions in Part XVIII Vol. N, pp. 180 ff.). Since the legislative powers of the States are also enumerated in our Constitution, the Union shall not be entitled to legislate, under its 'defence' power with respect to a subject which, in its 'pith and substance', is included in a power enumerated in the State List.[20]

2. 'Defence' deals with the use of the naval, military and air forces for defending the country against external aggression and includes activities necessary for preparation for defence and for demobilization, on the termination of a war.

3. It would not, however, include public order (Entry 1 of List II) and criminal law and procedure (Entries 1 and 2 of List III). Hence, the State Ligislature is competent to punish 'enemy agents' even though the acts done by enemy agents might be done with the intent of giving assistance to the military opertions of the 'enemy' or impede the operations of the armed forces of India.[20]

If, however, a matter is directly concerned with defence, the creation of offences and punishment therefore would belong exclusively to Parliament, under Entry 93 of List I. What matters is the 'pith and substance' of the legislation.[20]

Preparation for defence. This expression confers wide power, but the exercise of the power should be legitimate having regard to the purpose specified. Thus, a law that called up the whole of the civil population between the ages of 16 and 60 in times of peace would be a fantastic fraud on the power, but it would be a valid exercise if such military service is called upon during years of war, or when war is impending.[21] It includes the manufacture of war materials in times of peace.[22]

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17. Ref. Concerning the Regulation of Chemicals, (1943) S.C.R. 1.
18. In re Board of Commerce Act, (1922) 1 A.C. 191.
19. *Pulp & Power Co. v. Manitoba Free Press*, (1923) A.C. 695.
20. *Rehman v. State of J. & K.*, A. 1960 S.C.1 (para. 15).
21. Cf. *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (161).
22. *Ashwander v. T.V.A.*, (1936) 297 U.S. 288.

'Such acts as may be conducive . . . . . effective demobilisation'.—These words remind one of the American decisions to the following effect : The War power includes not only the power to wage war[23] and

"to prosecute it by all means and in any manner in which war may be legitimately prosecuted"[24].

and to bring it to a successful conclusion but also the power, after the cessation of active military operations, to take measures against its renewal and also to remedy the evils which have arisen from the war and its progress.[25] It follows, therefore, that the 'war' power does not terminate with the cessation of hostilities.[26] Thus, it is open to the Legislature, even after the cessation of the war,[27] to legislate, under the war power,—

(i) For the presservation of rights created by wartime legislation.[28]
(ii) To meet the shortage of supply caused by the War.[26]
(iii) To maintain such wartime legislation which tends to increase efficiency of productions.[25]
(iv) To recover excess profits realised on war contracts where the ultimate source of payment was the Government.[29]

So far as the municipal Courts are concerned, they cannot question the validity of a legislation, legitimately necessary for the successful prosecution of war, on the ground that it is opposed to the rules of international law or usage.[30] The power no doubt remains with the Courts to determine whether the legislation has any possible relation to the successful operation of war or whether the constitutional limitations imposed by the Bill of Rights have been violated, but once the relation is established, the Courts resolve all doubts in favour of the War power, and so it has been said—

"The complete and undenied character of the War power of the United States is not disputable".[31]

Analogous Provisions. —Entries 2, 4-7 relate to different aspects of defence operations.

Legislation by Parliament.—Civil Defence Act, 1968; Enemy Property Act, 1968.

The National Service Act, 1972, provides for the registration of persons for rendering national services, that is, any service which is likely to assist the defence of India, civil defence or the efficient conduct of military operations, including social service.

2. Naval, military and air forces; any other armed forces of the Union.

OTHER CONSTITUTIONS

(A) *U.S.A.* —Art. 1, Sec. 8 (12) gives Congress the executive power—'to raise and support armies'.

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23. *Home Building Association* v. *Blaisdell*, (1933) 290 U.S. 398.
24. *Miller* v. *United States*, (1870) 11 Wall. 268.
25. *Hamilton* v. *Kentucky Co.*, (1919) 251 U.S. 146 (*161*).
26. *Woods* v. *Miller*, (1947) 333 U.S. 138 (*141*).
27. *Ludecke* v. *Watkins*, (1948) 335 U.S. 160.
28. *Fleming* v. *Mohawk* Co., (1946) 331 U.S. 111.
29. *Lichter* v. *U.S.*, (1948) 334 U.S. 742.
30. *Littlejohn* v. *United States.*, (1926) 270 U.S. 215.
31. *Pacific Ry. Co.* v. *N. Dakota*, (1920) 250 U.S. 135.

This power has been held to include the power to raise forces by **conscription,**[32-33] to penalise resistance to recruitment,[33] to draft business **organisations to support the fighting men.**[34]

Art. 1, Sec. 10 (3), on the other hand, imposes a corresponding prohibition upon the States :

"No State shall, without the consent of Congress . . . . . keep troops or ships of war in time of peace, ... or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay".

Though the States are thus forbidden to maintain an Army or Navy, they do maintain 'National Guard' units, for suppression of internal disturbances within the State.

The other powers of Congress relating to the matter are –

(a) **"To provide and maintain a Navy" [Art. 1, Sec. 8 (13)].**

(b) **"To make rules for the government and regulation of the land and naval forces" [Art. 1, Sec. 8 (14)].**

It has been held that none of the above powers would enable Congress to authorise trial by a Court martial of a person who has no relation with the Armed forces when the Court martial seeks to exercise its jurisdiction, e.g., an honourably discharged ex-serviceman.[35] **For offences committed while in service an ex-serviceman must be tried in the ordinary Courts (established under Art. III), except where he has been dishonourably discharged and is in the military prison serving a sentence imposed by a prior court-martial.**[36]

(B) *Canada.* – See s. 91 (7).

(C) *Australia.* – S. 51 (vi) of the Constitution Act (see p.2, *ante*).

(D) *Government of India Act*, 1935. – See Entry 1 of List I of that Act.

INDIA

Scope of the present Entry. 1. The present Entry confers exclusive jurisdiction upon Parliament to legislate relating to the raising, maintenance, operation and discipline of the armed forces of the Union.[37] Entry 93 of list I also vests exclusive jurisdiction in Parliament to create offences in relation to the conduct and discipline of the armed forces.[35]

2. But offences under the general criminal law would come under Entry 1 of List III.[37]

'Other armed forces of the Union'. This expression includes armed forces other than the three well-known forces of State (viz., the naval, military and air forces),[38] such as the Central Reserve Police Force.[38]

Entries 1-2 of List I and 18 of List II. The power to legislate relating to land given as gallantry award to armed personnel belongs to the State Legislature under Entry 18 of List II, and not to Parliament under the present Entries of List I.[39]

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32. *U.S.* v. *David*, (1968) 20 L. Ed. (2d) 672.
33. Selective Draft Law Cases, (1918) 245 U.S. 366; *Lichter* v. *U.S.*, (1947) 334 U.S. 742.
34. *Schenck* v. *U.S.*, (1919) 249 U.S. 47.
35. *Toth* v. *Quarles*, (1935) 350 U.S. 11 (14).
36. *Kahn* v. *Anderson*, (1921) 255 U.S. 1.
37. *Tripathi* v. *State*, (1988) Cr. L.J. 528 (para. 11) J. & K.; cf. *Jagjit* v. *State of Punjab*, (1978) 2 S.L.R. 524.
38. *Akhilesh* v. *Union Territory*, A. 1981 S.C. 806 (para. 5).
39. *Mohinder* v. *State of Punjab*, A. 1983 P. & H. 253 (paras. 3, 5).

Existing Laws.—Indian Reserve Forces Act (IV of 1888) ; Indian Naval Armament Act, 1923; Central Reserve Police Force Act (LXVI of 1949) ; Assam Rifles Act (V of 1941) ; National Cadet Corps Act (XXXI of 1948) ; Territorial (Army) Act (LVI of 1948) ; Armed Forces (Emergency Duties) Act (XV of 1947) ; Indian Rifles Act (XXIII of 1920) ; Indian Air Force Volunteer Reserve (Discipline) Act (XXXVI of 1939) ; Indian Soldiers (Litigation) Act (IV of 1925).

Legislation by Parliament.—Army Act (XLVI of 1950) ; Air Force Act (XLV of 1950) ; Army and Air Force (Disposal of Private) Act XL of 1950 ; Reserve and Auxiliary Air Forces Act (LXII of 1952); State Armed Police Forces (Extension of Laws) Act (LXII of 1952); Commander-in-Chief (Change in Designation) Act (XIX of 1955) ; Lok Sahayak Sana Act (53 of 1956) ; Navy Act (62 of 1957) ; Border Security Force Act, 1968; Central Industrial Security Force Act, 1968, Armed Forces (Special Powers) Continuance Act, 1967.

The National Security Guard Act, 1968 provides for the constitution of an armed force of the Union for combating terrorist activities in a State with a view to protecting States against 'internal disturbance'.

The Special Protection Group Act, 1988 provides for the constitution of an armed force of the Union for providing proximate security to the Prime Minister and the members of his family.

[40]*2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.*[40]

Scope of Entry 2A. Entry 2A was inserted along with Art. 257A by the Constitution (42nd Amendment) Act, 1976. The Janata Government sought to do away with both, by bringing the 45th Amendment Bill. Curiously, Art. 257A has been repealed but the consequential Entry 2A failed to be omitted owing to the Congress opposition in the Rajya Sabha, to the latter part of the 45th Bill. Hences Entry 2A, which is consequential upon CL. (3) of Art. 257A, remains on the Constitution.

The result has been anomalous, as will appear from below.

Deployment of Union armed forces in a State. A Full Bench of the Gauhati High Court[41] has held that while the members of the Border Security Force are deployed in a State, that State can appoint a Commission of Inquiry as to violation of public order relating to their activities in the State. While the decision of the Full Bench on the foregoing question may be justified by the majority decision of the Supreme Court in the *Karnataka case,*[42] there are certain observations made by the Full Bench[41] which are not free from question :

That the Central Government cannot deploy its armed forces in aid of the civil power in a State without any requisition or consent of the State Government (paras. 27, 37),[41] because maintenance of public order in a State is the exclusive responsibility of the State, under Entry 1 of List II.

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40. Inserted by the Constitution (42nd Amendment) Act, 1976.
41. *Border Security Force* v. *State of Meghalaya*, A. 1989 Gau. 81 (F. B.).
42. *State of Karnataka* v. *Union of India*, A. 1978 S.C. 68.

But before coming to any conclusion on this point, we should advert to the substantive provision in Art. 355,[43] which applies irrespective of the division of legislative powers between the Union and the States.

The relevant portion of Art. 355 is –

"It shall be the duty of the Union to protect every State against internal distrubance".

This Article imposes a duty upon the Union to send its armed forces to protect a State from internal disturbance without any application or requisition from the State concerned. Of course, 'internal disturbance' is a wide expression and may include serious breaches of public order which the State is unable to repel by its Police forces.

The power under Entry 2A of List I has been conferred by the Constitution upon the Union so that it may discharge its duty under Art. 355. The word 'deployment' in this Entry is not qualified by any words to signify that the Union can use this power only if the State concerned seeks the aid of the Union.

Of course, under Entry 1 of List II, maintenance of public order is an exclusive State subject. But that Entry explicitly excepts the power of the Union to deploy its armed forces 'in aid of the civil power'. Obviously, this exception refers to Entry 2A of List I, and the expression 'in aid of the civil power' in Entry 1 of List II does not say that the Union can come into aid of the civil power only if the State requests the Union for such aid. Any such construction would render nugatory the provision in Art. 355, referred to above.

Legislation by Parliament. The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 confers special powers upon members of the armed forces when deployed in the disturbed areas in Punjab and Chandigarh, in aid of the civil power.

3. Delimitation of cantonment areas, local self-Government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 2 of List I included –

"local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas."

This Entry did not give to the Central Legislature the power to control rents.[44]

INDIA

'Cantonments'. The specific enumeration of subjects in the Entry shows that the Union Parliament shall have exclusive jurisdiction over cantonment areas, only in respect of the specified subjects,[44] such as –

(i) delimitation; (ii) local sef-government; (iii) constitution and powers of cantonment authorities; (iv) regulation of house accommodation, including control of rents.

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43. Author's Comparative Federalism (P.H.I., 1987), pp. 365 ff. : Commentary on the Constitution of India, 6th Ed., Vol. O, pp. 5-7.
44. Cf. *United Provinces* v. *Governor-General*, A. 1939 F.C. 58 (*69*).

Administration of justice, which is a State subject under entry 3 of List II, includes administration of justice in cantonments just as in other areas of the State.

"Regulation of house accommodation". – The Supreme Court[45] has settled the law on this point, by laying down the following propositions:

(i) The present Entry vests in Parliament the exclusive power to regulate house accommodation in Cantonment areas, without any qualifying words, so that the power comprehends all aspects, including regulation of grant of leases, ejectment of lessees and ensuring that accommodation is available on proper terms as to rents, though with respect to the areas outside the Cantonment areas, the power to legislate with respect to such matters belongs to the State Legislature.[45]

(ii) The foregoing power with respect to Cantonment areas is not confined to accommodation required for military purposes only, but extends to all house accommodation in the Cantonment areas, whether owned or occupied by the military or the civil population.[45]

(iii) The foregoing power of Parliament also includes the power to direct or control who is to make the constructions, under what conditions the constructions can be altered, who is to occupy the accommodation and for how long.[45]

(iv) The power to acquire or requisition property in Cantonment areas is to be drawn not from the present Entry, but from Entry 42 of List III.[45]

(v) The relationship of landlord and tenant in respect of house accommodation in Cantonment areas is covered by the present Entry, though outside such area, the power is to be derived from the Concurrent Entries 6 and 7 of List III.[45]

Entry 3 of List I and 18 of List II. "Relation of landlord and tenant" and "collection of rents" are generally included with respect to all lands within a State, in Entry 18 of List II.

Enrtry 3 of List I, however, includes regulation of house accommodation (including control of rents) in such areas. Hence, the question arises as to how much is excepted out of the ambit of Entry 18 of List II, with respect to lands in Cantonment areas.

(i) The observation of the Federal Court in the *United Prov.* v. *Governor-General*[44] are authority for the proposition that Entry 3 of List I takes out of the jurisdiction of the State only those subjects which are specified in this Entry (which corresponds to item 2 of List I of the Government of India Act, 1935). Hence, 'control of rents' not having been specified in item 2 of List I of the Government of India Act, 1935, there was good ground for coming to the conclusion that control of rents was altogether excluded from the jurisdiction of the Central Legislature and this power remained with the Provincial Legislature with respect to all lands within the Cantonment and that the only power that the Central Legislature had was that of *'regulation* of house accommodation' within the Cantonment area.

(ii) The question is how far the situation has changed by the insertion of the words "including the control of rents" in the corresponding Entry 3 of List I of the Constitution. Prima facie, it must be assumed that the framers of the Constitution made this insertion in the light of the view taken by the Federal Court that nothing in relation to Cantonments came within the Union jurisdiction unless specifically mentioned in the Union List. It would follow that, by inserting

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45. *Indu Bhushan* v. *Rama Sundari,* (1969) 2 S.C.C. 289 (292-294, 296, 298).

the words "control of rents", the Constituent Assembly intended to include the entire subject of rent control in Cantonment areas within the Union jurisdiction, just as the "regulation of house accommodation" had been taken out of the State jurisdiction to be given over to the Union.

But a narrow view was taken by the Bombay,[46] Nagpur,[47] and Patna[47] High Courts. The Rajasthan High Court[48] however, held that there is nothing in Entry 3 if List I to indicate that the scope of the words "control of rents" shall have to be restricted with reference to the words 'house accommodation'. In the Author"s opinion, the view of the Rajasthan High Court[48] is preferable, namely, that two independent powers, i.e., regulation of house accommodation and control of rents, have been conferred upon Parliament. In fact, control of rents of all houses in the cantonment area may be necessary in order to effectively use the power relating to regulation of house accommodation. It may be noted that it is upon this view that Parliament has enacted the Cantonment (Extension of Rent Control Laws) Act, 1957, to provide for the extension, by the Central Government, of any State law relating to rent control to Cantonment areas, the very thing which was declared incompetent for Parliament in the Bombay and Nagpur decisions noted above.[46]

The above view of the Author, expressed at pp. 348-9 of Vol. V of the Fifth Edition of the *Commentary on the Constitution of India*, has since been affirmed by the Supreme Court in *Indu Bhushan's case*[45] referred to above, holding that not only control of accommodation but also control of rents with respect to all houses in Cantonment areas belongs to Parliament under the present Entry and that the power of the State Legislature under List II or III does not extend to houses within the Cantonment areas.

Existing Laws.– Cantonments Act (II of 1924); Cantonments (House Accommodation) Act (VI of 1923).

Legislation by Parliament.– U.P. Cantonment (Control of Rent and Eviction) Act (X of 1952); Cantonments (Extension of Rent Control Laws) Act (46 of 1957).

4. Naval, military and air force works.

OTHER CONSTITUTIONS

(A) U. S. A.– Congress exercises exclusive control over –

"places, purchased. . . . . for the erection of forts, magazines, arsenals, dockyards" [Art. I, Sec. 8(17)].

(B) *Government of India Act*, 1935.– The first part of item 2 of List I of that Act was identical with the present Entry.

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'Naval, Military and Air Force Works'. Military works such as forts, air-fields, arsenals, naval docks, etc., are situated in different parts of the country. The Union Parliament shall have exclusive jurisdiction over these works and shall have power to establish other works as may be required from time to time.

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46. *Patel* v. *Viswanath*, A. 1954 Bom. 204; *Darukhanwalia* v. *Khemchand*, A. 1954 Bom. 254.
47. *Jagtanand* v. *Satyanaranji*, A. 1961 Pat. 207.
48. *Nawal* v. *Nathu*, A. 1962 Raj. 190.

Analogous Provisions. Such works form property of the Union, and would accordingly be exempt form taxation by the State wherein they are situated, unless otherwise provided by Parliament itself (Art. 285). The power to acquire lands to erect such works, is conferred by Entry 33 of List I.

Existing Laws. – Indian Works of Defence Act (VII of 1903).

5. Arms, firearms, ammunition and explosives.

OTHER CONSTITUTIONS

Government of India Act, 1935 – Items 29 and 30 of List I of that Act covered the present Entry.

Existing Laws. – Indian Explosives Act(VI of 1884); Explosive Substances Act (VI of 1908).

Legislation by Parliament. – Arms Act, 1959 ; Malabar War-Knives Act (XXIV of 1954).

6. Atomic energy and mineral resources necessary for its production.

'Atomic Energy'. – This term has been defined in Sec. 3 (a) of the Atomic Energy Act (XXIX of 1948), thus :

" 'Atomic energy' means the energy released from atomic nuclei as a reult of any process, including the fission process, but does not include energy released in any process of natural transmutation or radio-active decay which is not accelerated or influenced by external means."

Legislation by Parliament. – Atomic Energy Act (33 of 1962).

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

Entries 7, 52 of List I and 24 of List II. 1. Industries, generally, belong to the State List (Entry 24 of List II). But this Entry is subject to the provisions of Entries 7 and 52 of List I.[49]

2. Under Entry 7 of List I, an industry would be excluded from the State jurisdiction once Parliament makes a declaration that that industry is necessary for the purpose of defence or for the prosecution of war.[49] Similar effect would take place if Parliament makes a declaration that à particular industry should be controlled by the Union 'in the *public interest*', under Entry 52. But under Entry 52 a mere declaration to that effect would not oust the State jurisdiction ; the ouster will be to the extent that Parliament assumes control by a law made for the purpose, of which the declaration forms an integral part.[49] This difference between Entries 7 and 52 follows from the difference in phraseology in the two Entries.[49] [See, further, under Entries 52 of List I and 24 of List II, *post*.]

Power to acquire property for the declared industry. 1. The power to legislate for acquisition of property is an independent power and is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of any of the specific heads of legislation under any of the three Lists in Sch. VII.[49]

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49. *Ishwari* v. *State of U.P.*, A. 1980 S.C. 1955 (paras. 6, 23-24).

2. In the result, even when an industry is taken over by the Union under Entry 7 or 52 of List I, the concurrent power of the State Legislature under Entry 42 of List III survives.[49]

8. Central Bureau of Intelligence and Investigation.

OTHER CONSTITUTIONS

Government of India Act, 1935.–Entry 1 of List 1 included– "Central intelligence bureau".

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'Central Bureau of Intelligence'. The object of this Entry is that there should be a Bureau at the Centre which would collect all information about crime throughout the territory of India and check whether the information was correct or not. The Union would then be able to inform State Governments so that they might be in a position to exercise their police powers in a much better manner than they might be able to do otherwise and in the absence of such information. The word 'investigation' in this entry, as Dr. Ambedkar explained, does not mean the investigation into a crime preparatory to filing a charge against an offender under the Criminal Procedure Code, which is a matter for the Police and is exclusively a State subject (Entry 2, List II). 'Investigation' in the present Entry means a general enquiry for purposes of information. So, there is no possibility of double or parallel investigations into a single crime by the Union and the State authorities.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India ; persons subjected to such detention.

OTHER CONSTITUTIONS

Government of India Act, 1935.–Item 1 of List I of that Act included–

"preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States."

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'Preventive detention.' Preventive detention for reasons other than those mentioned in the present Entry are included in Entry 3 of List III, and that power includes incidental powers.[50] Subject to Art. 254, the concurrent power of the State Legislature, under Entry 3 of List III, is co-extensive with that of Parliament.[50]

2. In the absence of any specific provision in the Constitution restricting the power conferred by the present Entry, the Court cannot invalidate a law of preventive detention made in exercise of this power, on the ground that it is calculated to interfere with the liberties of the people.[51]

'Connected with defence'.–Effective prosecution of a war in which India is engaged, maintenance of peaceful conditions in tribal areas, etc., come within matters connected with the defence of India.[52]

50. *State of W.B.* v. *Ashok*, A. 1972 S.C. 1660 (para. 7).
51. *A.K. Roy* v. *Union of India* A. 1982 S.C. 710.
52. Cf. *Shibnath* v. *Porter*, A. 1943 Cal. 337(383) SB.

'Connected with Foreign Affairs' – The scope of this expression is to be determined with reference to Entry 10, which follows. The expression is wide enough to cover the power to provide for the preventive detention of a foreigner, for the purpose of making arrangements for their expulsion from India or for any other reason.[53]

The Constitution (Declaration as to Foreign States) Order, 1950 declares that a Commonwealth country shall not be 'Foreign State' for the purpose of this Constitution. But this Order cannot be brought into aid for interpreting the expression 'Foreign affairs' in entry 9 of List I of the Constituion. This latter expression, therefore, would include Pakistan and it would be permissible to detain a person who is acting in a manner prejudicial to the relations of India with Pakistan.[54]

'Security of India'. – The word 'security' occurs not only in the present entry but also in Entry 3 of List III. If the security only of a particular State is concerned, the power of preventive detention would be concurrent, but if the security of India itself is at stake, the Union Parliament shall have exclusive power to legislate under the present Entry.

Under Art. 352, security of the State may be threatened either by external aggression or armed rebellion.

In the present Entry, the expression 'security of State' is used to refer to those serious and aggravated froms of public disorder which endenger the existence of the State itself, e.g., crimes of violence intended to overthrow the Government,[55] rebellion against the government as distinguished from breaches of public order, such as riot, affray promoting enmity between classes.

Analogous Provision. – Preventive detention for reasons other than those mentioned in the present Entry are included in Entry 3 of List III

Legislation by Parliament. – National Security Act, 1980. [This Act, a amended, includes grounds under Entry 9 of List I as well as Entry 3 of List III; see under Entry 3 of List III, *post*].

The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 provides for detention to prevent illicit traffic in narcotic drugs which have a deleterious effect on the national economy.

10. Foreign Affairs ; all matters which bring the Union into relation with any foreign country.

OTHER CONSTITUTIONS

(A) *U.S.A.* – There is no specific enumeration of any 'general' power of Congress over foreign affairs. But the Supreme Court has held[56] that while the federal power over internal affairs depends upon affirmative grants of the Constitution, the power over external affairs is inherent in the external sovereignty of the United States, and exists even apart from the enumerated powers over war and peace, treaties and the like. The federal power over external affairs is exclusive : the States have no international status.

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53. *Hans Muller* v. *Supt. Presy. Jail*, (1955) S.C.A. 487 (*492*).
54. *Jagannath* v. *Union of India*, A. 1960 S. C. 625(*628*).
55. *Santosih Singh* v. *Delhi Admn.*, A. 1973 SC 1091 (*1093*).
56. *U.S.* v. *Curtiss-Wright Corporation*, (1936) 299 U.S. (*304.*).

So far as the Courts are concerned, they regard questions relating to foreign affairs, in general, as 'political' in nature, and, hence, non-justiciable, e.g., –

(a) Whether a particular treaty has survived a war between the parties to the treaty.[57]

(b) Whether a particular authority in another State is to be recognised by the United States to be the Sovereign of that State,[58] even though it involves liability to make payments to that authority.[59]

(c) Whether the United States have acquired dominion over an alien territory by conquest, occupation or the like.[60]

(d) Whether the vessel of a foreign State should be immune from seizure in execution of a civil process.[61]

In all such matters, the executive determination is regarded by the courts as final.[57]

(B) *Australia.* – See. 51 (xxix) of the Constitution Act deals with – "External affairs."

This expression has been generically interpreted to include –

(a) the external representation of the Commonwealth by accredited agents ;

(b) the conduct of the business and promotion of the interests of the Commonwealth in outside countries;

(c) Extradition ;

(d) and, generally, any matter affecting the Commonwealth as a whole in its relations with other countries ;[62] e.g., rendition of fugitive offenders,[63] legislation as to the observance of treaties ; legislation for the Mandated Territories;[64] giving effect to international Conventions.[64]

(C) *Canada*, – In the Br. N. America Act, there is no separate entry relating to 'foreign affairs.' The Canadian Parliament derives this power from its general power to make laws for the ; 'peace, order and good Government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces'. No aspect of 'foreign affairs' is assigned by the Constitution Act to the Provinces.

(D) *Government of India Act*, 1935.– Item 3 of List I included – "External affairs . . . . . ."

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'Connected with Foreign Affairs'. – The expression is wide enough to cover the power to provide for, the preventive detention of foreigners for the purpose

57. *Clark* v. *Allen*, (1947) 331 U.S. 503.
58. *Oetjen* v. *Central Leather Co.*, (1918) 246 U.S. 297.
59. *U.S.* v. *Pink*, (1941) 315 U.S. 203.
60. *Jones* v. *U.S.*, (1891) 137 U.S. 202.
61. Ex parte Peru, (1941) 315 U.S. 578.
62. Wynes, Legislative & Executive Powers, 3rd Ed., 389.
63. *McKelvey* v. *Meagher*, (1906) 4 C.L.R. 265.
64. *R* v. *Burgess*, (1936) 55 C.L.R. 608.
65. *Jolly* v. *Mainka*, (1933) 4 C.L.R. 242.

of making arrangements for their expulsion from India or for any other reason.[66] A law which provides for the detention of foreigners cannot but bring this country into relation with a foreign State.[66]

'Foreign Affairs'.– What are foreign affairs are practically enumerated in entries 11 to 21, just following. Anything that does not come within entries 11-21, but yet relates to the relation between the Union and any foreign country, will come under Entry 10.

The present entry is the residuary entry as to Foreign Affairs.[67] This entry is not so much the grant of a specific power, but confers complete and exclusive authority upon the Union Parliament to deal with all matters which bring the Union into relation with any foreign country".[68] If a matter properly comes within this entry in 'pith and substance', the Union power would not be subject to any limitation by reason of any corresponding State power.

The Constitution (Declaration as to Foreign States) Order, 1950 declares that a Commonwealth country shall not be a 'Foreign State' for the purposes of this Constitution. But this Order cannot be brought into aid for interpreting the expression 'Foreign affairs' in entry 9 of List I of the Constitution. This latter expression, therefore, would include Pakistan and it would be permissible to detain a person who is acting in a manner prejudical to the relations of India with Pakistan.[69]

Analogous Provisions.– Entry 16, List I : Foreign jurisdiction; Entry 36 of List I: foreign exchange.

Existing Laws. – Reciprocity Act (IX of 1943); Foreign Recruiting Act (IV of 1874); Maintenance Orders Enforcement Act (XVIII of 1921).

Legislation by Parliament. – Foreign Awards (Recognition and Enforcement) Act, 1961; Foreign Contribution (Regulation) Act, 1976.

11. Diplomatic, consular and trade representation.

'Diplomatic representation'.– Diplomatic agents represent a State for conduction intercourse with foreign States. They are duty accredited by a 'letter of credence' issued by the State which they represent. The duties of diplomatic agents or Public Ministers, as they are also called, are as follows :

(a) *Ceremonial.*– This includes the presentation of the letter of credence, making calls, attending States marriages, funerals and other ceremonials of the State to which they are accredited.

(b) *Negotiations.*– Informal understandings and agreements are negotiated by the diplomats to be followed by treaties etc. if they mature.

(c) *Observations.*– A diplomatic mission, with the help of its assistants and attaches, observes the foreign policy and conduct of the country to which they are accredited and supplies the home Government with reliable information.

(d) *Guardianship of countrymen.*– The diplomatic agency looks after its countrymen while in the foreign State concerned, and makes proper representations to the foreign office of that State where necessary.

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66. *Hans Muller* v. *Supdt.*, (1955) 1. S. C. R. 1285 (*1289*).

67. It is even wider and more explicit than s. 51 (xxxix) of the Australian Constitution.

68. These words are adopted from the observations in the Australian case *R* v. *Burgess*, (1936) 55 C.L.R. 608 (*684*) – "the expression 'external affairs'...is frequently used to denote the whole series of relationship which may exist between States in time of peace or war."

(e) *Pleading the country's cause.* – Above all, it is the business of the diplomat to represent the policies and actions of his country in the most favourable light.

Diplomatic agents are classified as follows :

1. *Ambassadors, legates and nuncios.* – These form the highest rank. They alone have the representative character.

2. *Envoys, Ministers or other persons accredited to Sovereigns.* – While ambassadors have access to the foreign Sovereign, Ministers have access to the Secretary for Foreign Affairs of the country to which they are accredited. Special envoys are employed to conduct negotiations of specific matters.

3. *Ministers Resident, accredited to the various Courts.* – These are generally sent to the minor States.

4. *Charge d' Affaires, accredited to Ministers for foreign affairs.* – A charge d' affaires takes control of the mission during the temporary absence of the head of the mission. A charge d' affairs is entitled to have the audience of the Foreign Minister only.

5. *Attaches.* – Attaches do not hold diplomatic rank but their names are included in the diplomatic lists as members of the staff of a diplomatic mission. These officers are attached to a diplomatic mission for the purpose of supplementing the political and consular work, by specialised study and observation and to help the home Government with reports on matters of defence (military and naval attaches), economics and commerce (commercial attaches, trade commissioners, press attaches, information officers).

Prior to the enactment of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 the High Commissioners exchanged between the Commonwealth countries were not entitled to any immunities which belong to 'diplomatic agents'. By this Act read with the Diplomatic Privileges Act, 1964, the U.K. has conferred on these High Commissioners (including those of India and Pakistan) the same privileges and immunities as belong to diplomatic agents, their staffs, families and servants.

Privileges and Immunities of diplomatic agents. As the representative of a sovereign State, and in order that he may exercise his functions in a foreign State, certain privileges are given by International Law to a diplomatic agent in the State to which he is accredited –

(i) *Immunity from criminal action.* – The diplomat, his family and suits are immune from criminal action and arrest in the accredited State. The only remedy for crimes committed by them is to apply to the State which they represent, for the recall of the diplomat. But if they conspire against the foreign State, they may be expelled.

(ii) *Exemption from civil jutrisdiction.* – The Minister, his family and suite are also exempted from the civil jurisdiction of the State to which they are accredited, subject, of course, to any agreement between the two States concerned. Members of suite includes all persons associated in the performance of the duties of an embassy or legation, e.g., a charge D'affaires, a Secretary, an assistant miitary attache, and any person on the list of staff which is recognised by the State to which the embassy is accredited.[69]

69. Dicey, Conflict of Laws, 1949, pp. 135, 141; Halsbury, 3rd Ed., Vol. V, pp. 270-2; Hood Phillips (1987), pp. 288-89; Starke, International Law (1984), pp. 211 ff.; 402 ff.; Wade & Bradley (1985), P. 325.

Generally speaking, they cannot be sued for torts, breach of contract, or for recovery of debts; they cannot also be summoned to depose in Courts of the accredited State. But action lies against a person belonging to the suite of a diplomatic agent, if such person engages in trade.

(iii) *Extra-territorial position.*—The diplomat is regarded as an extra–territorial person and so his official residence is immune from search or visit of the police, except when the privilege is abused, e.g., when a foreign subject is illegally detained in the embassy.[69]

(iv) *Exemption from taxation.*—Diplomatic agents and their property are exempt from taxation and customs duty in the State to which they are accredited.

'Consular representation".—While dip1omatic agents are appointed to act as the medium of intercourse between the Government of one State with that of another, consuls are appointed to reside in foreign countries for the purpose of looking after the interests of the subjects of the State which they which they represent, as may reside in that foreign territory.[69] A consul, in short, is a guardian and friend of fellow-subjects residing in the foreign country. When a commission appointing a consul to a foreign country is communicated to the Government of that country, the foreign officer of that Goverment acknowledges the status and powers of the consul by means of a document called *exequatur*, and this document may be revoked by the foreign Government at any time.

The duties of consuls, generally, may be summarised as follows:

"(a) Administration of the estates of subject of their own country when dying in the foreign country; (b) arbitation on matters brought before them by fellow-subjects; (c) care of fellow- subjects in distressed conditions; (d) celebration of foreign marriages; (e) grant of visa to passports to the home country; (f) collection of statistics and aid to collection of income-taxes from fellow subjects residing in the foreign country; (g) communication and report to own Government cases of injustice to fellow-subjects, conditions of markets in the foreign country, and on many other matters".[69]

Consuls are not entitled to all the *immunities* and *privileges* of diplomats. The consulate and its records are immune from invasion by the authorities of the State to which the consul is accredited. The consul himself is, however, subject to the jurisdiction of the civil and criminal Courts of the country in which he resides and is liable to arrest for serious crimes. He may be summoned as a witness but may not be compelled to bring official documents with him.

Providing for accommodation for a foreign consulate. The Supreme court has held that finding accommodation for a foreign consulate does not come under the present Entry. Requisition for such a purpose would come under Entry 36 of List II[70] (which is now Entry 42 of List III).

Existing Laws.—Diplomatic and Consular Officers (Oaths and Fees) Act (XLI of 1948).

12. United Nations Organisation.

'United Nations'.—The United Nations[71] is an international organisation formed with the object of securing international peace and security, and development of friendly relation and co-operation between the nations. It came into being in 1945 under the Charter of the United Nations, signed at San Fransisco on 26th June, 1945, by the representatives of 50 States, in pursuance of the

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70. *State of Bombay* v. *Gulshan*, (1955) 2 S.C.R.867.
71. Starke, Introduction to International Law (1984), pp. 601 ff.

proposals made at Dumbarton Oaks in the autumn of 1944. In April, 1946, the United Nations officially replaced the League of Nations as an international organisation. India is a member of the United Nations, and a "non-permanent" member of its Security Council. –

Obligations of members and the settlement of disputes. – The obligations of the Members of the U.N. are as follows :–

(a) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(b) All members shall refrain in their international relations from the threat or use of force againt the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

(c) All Members shall give the United National every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving asistance to any State against which the United Nations is taking preventive or enforcement action [Art. 2].

(d) Whenever any dispute arises between States, the continuance of which is likely to endanger the maintenance of international peace and security, they are, in the first place, to seek a solution by any form of peaceful means according to their own choice, such as negotiation, enquiry, peaceful means according to their own choice, such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and the like (Art. 33). But Members are under no obligation to submit matters which are essentially within the *domestic* jurisdiction of any State, to peaceful settlement, nor shall the United Nations have jurisdiction to intervene in such matters [Art. 2 (7)].

(e) Any Member of the United Nations may draw the attention of the Security Council or the General Asembly to the existence of any dispute that may endenger international peace and the Security Council itself may investigate whether any such dispute or situation exists [Arts. 34-35].

(f) The Security Council, when it deems necessary, may call upon the parties to any dispute to settle it by peaceful means and the Council may recommend appropriate procedure or methods of adjustment (Arts. 33, 36). Parties, themselves, may also request the Council to make such recommendations (Art. 38). If the parties fail to settle a dispute by peaceful means, they shall refer it to the Security Council, and then the Security Council may either recommend terms of settlement itself or suggest some new means of settlement (Art. 37). As a general rule, the Security Council shall refer all *legal* disputes to the International Court of Justice.

Organisation of the United Nations. – The principal organs of the United Nations are three, *viz*., the General Assembly, the Security Council, and the International Court of Justice. The General Assembly is merely a deliberative body. It can only make its recommendations to the Security Council or to the members of the United Nations themselve who are free to accept or reject the recommendations. It has no power to lay down anything in the nature of international legislation or to enforce any sanction.

The Security Council, on the other hand, is in the nature of an executive body for the settlement of international disputes by peaceful means and as has been

already stated, the Security Council shall refer all legal disputes to the International Court of Justice. The members of the United Nations have agreed to accept and carry out the decisions of the Security Council. Once, therefore, a decision is taken by the Security Council, it has got an international sanction. But it is difficult to obtain a decision on wider matters owing to the provision in the Charter that the concurrence of all the permanent members must be obtained to a decision so that if any of the permanent members exercises its veto the Security Council cannot take any action.

The International Court of Justice decides, in accordance with internatiional law, all, legal disputes a between the States who are members of the United Nations and who seek a decision by the international Court of Justice by their consent. Apart from this, the General assembly or the Security Council may require the Court to give advisory opinion on legal questions. Under certain conditions States who are not members of the United Nations may also submit their disputes for adjudication by the Court. Apart from special agreement in relation to a particular dispute, the States who are members of the United Nations may at any time make a general declaration that they would submit to the jurisdiction of the Court all legal disputes concerning the interpretation of a treaty or any question of international law and the like. But in any case, the binding force of the judgment is the consent of the parties themselves.

Existing Law. – United Nations (Security Council) Act (XLIII of 1947; United Nations (Privileges and Immunities) Act (XLVI of 1947).

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

Existing laws. – The Carriage by Air act (XX of 1934) was passed to implement the rules framed by the Warsaw Convention, 1929, relaring to international carriage by air. The Carriage of Goods by Sea Act (XXVI of 1925) was passed to implement the decisions of the Brussels Conference, 1922, on Maritime Law. The Indian Dock Labourers Act (XIX of 1934) was passed to give effect to the Geneva Convention of 1932. Other Acts : Exchange of Prisoners Act (LVIII of 1948).

Legislation by Parliament. – Air (Prevention and Control of Pollution) Act, 1981, to implement the decisions of the UN Conference on Human Environments, 1972 ; Environment Protection Act, 1986, to implement the decisions of the U.N. Conference on Human Environments, 1972. So also Water (Prevention and Control of Pollution) Act.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and convention with foreign countries.

OTHER CONSTITUTIONS

(A) *England.* – Treaty–making is a Prerogative of the English Crown and treaties are negotiated and concluded by the Executive without reference to the Legislature and for their international validity, no ratification by Parliament is necessary.[72] But the private rights of a subject are not affected by a treaty unless its terms are embodied in an Act of Parliament.[73] The cases in which ratification by Parliament are necessary may be summarised[74] as follows :

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72. *The Parliament Belge*, (1879)4 P.D. 129.
73. *Walker* v. *Baird*, (1892) AC. 491 (497).

(a) Treaties which alter of add to the existing law of Great Britain and require to be enforced by British Courts,[72] in other words, which affect the private rights of a subject.[73-74] (b) Treaties imposing monetary liability on Great Britain, since under the English Constitution, no money may be raised or expended without legislation. (c) Treaties which attempt to increase the power of the Crown.[75] (d) Treaties involving the cession of British territory.[76] (e) Treaties made expressly subject to the approval of Parliament. Many modern treates are now made in this form.

The law of England as regards treaties was explained by the Judicial Committee thus :[77]

"Within the British Empire there is a well- established rule that the making of a treaty is an executive act, while the performance of its *obligations*, if they entail an alteration of the existing law, requires legislative action. Unlike some other countries (e.g. U.S.A.), the stipulations of a treaty duly ratified, do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of the law, they have to run the risk of obtaining the assent of Parliament to the necessary statute of statutes. To make themselves as secure as possible they will often in such cases before final ratification, seek to obtain from Parliment an expression of aproval. But it has never been suggested, and it is not the law, that such an expresion of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it".

"In all cases, however, the Courts are competent to enquire into matters involving the construction of treaties and other act of State; and the plea of an Act of State or that the matter involves the constructioin of treaties affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject or a resident alien friend".[73]

(B) U.S.A. – Art. II, Sec. 2 (2) of the Constitution of the United States says –

"He (the President) shall have power, by and with advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

In practice, it is the President who negotiates treaties and later obtains the ratification of the Senate. The Senate thus acts as a restraining body and has refused its asent to no less than over 60 treaties proprosed by the President. It has been observed that this plan of giving the effective power of treaty-making to *one* of the Houses of the Legislature and the ultimate power of control to its minority (since a 2/3 majority of the Senate is required for assent), is unique in the world.[78] The object of excluding the House of Representatives from the plan was to secure secrecy and despatch and an extraordinary majority of the Senate was required for assent in order to prevent treaties from being made lightly. The House of Representatives cannot be said to be happy over its exclusion for, in 1945, it passed a resolution for amendment of the Constitution to provide that "hereafter treaties shall be made by the President by an act with the advice of both Houses of Congress".[79]

In the United States, the Constitution itself declares a treaty to be the 'supreme law of the land' [Art.VI, Sec. 2]. It is consequently to be regarded in Courts as equivalent to an Act of the Legislature and it operates without the aid of any legislative provision. A treaty will therefore be enforced by the Courts even though there is no legislation to implement it, provided, of course, the treaty is not contrary to the Constitution of the United States.[80]

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74. Conversely, a treaty cannot confer any right of action upon a subject, without legislation [*Civilian War Claimants' Assocn.* v. *King*, (1932) A. C. 114].
75. *The Zamora*, (1916) 2 A.C. 77.
76. Keith., Constitutional Law, 1939, p. 343; Wade & Bradley, Constitutional Law (1985), pp. 320ff. ; Hood Phillips (1987), pp. 285ff. ; de Smith (1989), pp. 140ff.
77. *A.-G. of Canada* v. *A.-G. Ontario*, A. 1937 P.C. 82 (*86*).
78. Ogg & Ray, Introduction to American Government, p. 646.
79. 91 Cong. Rec. 4368.
80. *Foster* v. *Nelson*, (1829) 2 Pet. 253; *Geofroy* v. *Riggs*, (1890) 133 U.S. 258 (*267*).

Within the domestic sphere, it is treated, in all respects, as an Act of Congress, so that it may repeal an Act of Congress and also be repealed by the latter.[81] In no other State can it be said that a treaty is part of the law of the land.

The treaty power of the Federal Government extends to "all proper subjects of negotiation between this Government and those of other nations."[82] And, since the States have no reserved power' regarding treaties, it has come to be established that the federal distribution of powers between the national government and the State is no limitation upon the treaty power of the former.[83] Thus, in pursuance of a treaty, duly made under the authority of the United States,[84] Congress–(a) may legislate about migratory birds, which are property of the States (b) may override State inheritance tax laws,[83] the alien land laws of a State.[86] On the other hand, a treaty being the supreme law of land, any State law, whether made before or after the treaty, which is requgnant to it, will be void.[87]

But the situation is diferent when an Act of Congress is in conflict with a treaty, for, Art. VI, s. 2 declares both treaties as well as 'laws of the United States to be supreme law of the land; so, in case of conflict between a treaty and an Act of Congress, the Court will first try to reconcile them so as to allow both to stand,[88] but if the conflict is patent and irreconcilable, that one which is *later* in point of time shall be allowed to prevail.[89]

Minor agreements which are not termed treaties and are called "executive agreements" are entered into by the President without the consent of the Senate, and the Courts uphold them as good.[90] Though regarded as minor agreements, they are not always so and one of the legitimate criticisms against the practice is that it is resorted to as a device of avoiding rejection by the Senate, if placed before the latter as a treaty. In fact, no less than 3/5 of the total number of international agreements entered into by United States are executed by the President in this manner.

Sometimes, while legislating on a subject or by means of a resolution of both Houses, Congress authorises the President to enter into an agreement with respect to the subject (which is within its legislative power) and such delegation has been upheld by the Courts as constitutional.[91]

While the power to make treaties is given to the Federal Executive with the consent of the Senate [Art. 11, Sec. 2 (2), the States are, on the other hand, –

"(a) absolutely forbidden – 'to enter into any Treaty, Alliance, or confederation [Art. I, Sec. 10 (1)]; and also (b) forbidden, 'without the consent of Congress –

'to enter into any agreement or compact with another State or with a foreign power' [Art. I,sec. 10 (3).

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81. The Cherokee Tobacco, (1871) 11 wall. 616.
82. *Holmes* v. *Jennison*, (1840) 14 Pet. 540 (*569*).
83. *Edye* v. *Robertson*, (1884) 112 U.S. 580.
84. *Missouri* v. *Holland*, (1920) 252 U.S. 416.
85. *Nielson* v. *Johnson*, (1929) 279 U.S. 47.
86. *Jordan* v. *Tashiro*, (1928) 278 U.S. 123.
87. *Ware* v. *Hylton*, (1796) 3 Dall. 199 ; *Geofroy* v. *Riggs* (1890) 133 U.S. 258.
88. *Cheung Sum* v. *Nagle*, (1925) 268 U.S. 336.
89. Head Money Cases (1889) 112 U.S. 580 ; *Cook* v. *U.S.*, (1933) 288 U.S. 102.
90. *United States* v. *Belmont*, (1937) 301 U.S. 324.
91. *U.S.* v. *Curtiss-Wright Corpn.*, (1936) 299 U.S. 304 (*135*).

This means that while a State is prohibited from entering into any international alliance or agreements of a *non-political nature*, it may be permitted by Congress to enter into agreements of a *non-political* nature.[92]

(C) *Australia*. – As in the United Kingdom, treaty-making is an executive power, the Crown's prerogative being exercisable by the Governor-General (s. 61). But, if the rights or obligations of the individuals are sought to be affected by the treaty, legislation would be required and the Commonwealth Parliament can derive this power from s 51 (xxix) which gives it power with respect to 'external affairs'. There is no separate placitum relating to 'treaty'.

Legislation by the Commonwealth, under this power, to implement treaties, has been upheld as valid, even though impinging on a State subject, e.g. intra-State air navigation.[93]

(D) *Canada*. – Sec. 132 of the Br. North America Act confers upon the Dominon Parliament and Government, the powers for performing all obligations of –

"Canada or any Province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries".

A distinction has, however, been made made between treaties between the British Empire and foreign countries which Canada has undertaken to implement as a part of the British Empire,[94] and conventions which Canada has agreed to implement as *an independent unit*.

As regards the latter, it has been held that Sec. 132 is inapplicable and such legislation may be undertaken by the Dominon Legislature only with the consent of the Provinces concerned, if the subject-matter of the treaty is one assigned exclusively to the Provincial Legislature. The Privy Council has observed:[95]

"In a Federal State where legislative authority is limited by a constitutional document or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation . . . . . the obligation imposed by treaty may have to be performed, if at all, by several legislatures ; and the executive have the task of obtaining the legislative assent not of the Parliament to whom they may be responsible but possibly of several Parliaments to whom they stand in no direct relation. The question is not how the obligation is formed, that is the function of the executive; but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures".

Lord Atkin[95] put it nicely –

"While the ship of State sails on large ventures and into foreign waters she retains the water-tight compartments which are an essential part of the original structure."

Thus, it was held that the Dominion Parliament had no power to enact the Weekly Rest in Industrial Undertakings Act and the Minimum Wages Act, etc., in performance of the international convention agreed to by Canada as an independent member of the League of Nations, because the Acts related to exclusively Provincial subjects, – "property and civil rights in the Province", under Sec. 92 (13) of the Br. N. America Act.[95]

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92. *Virginia* v. *Tennessee*, (1893) 148 U.S. 503.
93. *R* v. *Poole*, (1939) 61 C.L.R. 634.
94. *Aeronautics Case*, (1932) A.C. 54.
95. *A.G. for Canada* v. *A.G. for Ontario*, A 1937 P.C. 82 (86):
"For the purposes of Secs. 91 and 92, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained".

Outside the scope of Sec., 132, thus, legislation to perform a Canadian treaty is not an exclusively Dominion legislative power.

As in the United Kingdom, in order to be enforceable as municipal law, legislation is required for implementing a treaty.[96] Legislation would also be required if it seeks to affect rights of private individuals, or involves appropriation of public monies or taxation.[97] Mere approval of a treaty by Parliament is not sufficient for these purposes, there must be legislation.

"If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But..... it is not the law that such an expression of approval operates as law, or that it precludes the assenting Parliament or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it".[9]

(E) *Government of India Act*, 1935.– See item 3 List I.

INDIA

'Treaties'.– Broadly speaking, treaties are contracts between Sovereign States. But all international engagements are not treaties in the strict sense of the term which comprises only solemn agreement such as treaties of peace, alliance, neutralty and arbitration.

'Agreements'– While treaties proper are formally concluded in the names of the heads of States, other agreements are less formally concluded by duly authorised agents of the Government and many be subject to ratification or confirmation by the head of the State. Examples of agreements are those between different parts of the British Empire, e,g, the Ottawa Agreement of 1932. A most loose form of agreement was the Munich Agreement of 1938 between Hitler, Mussolini, Chamberlain and Daladier, which was in substance nothing more than the expression of opinion by these statesmen that their peoples desired a peaceful settlement.

Conventions.– Conventions are multi-lateral agreements or law-making treaties, such as the Slavery Convention (1926); Convention on International Exhibitions (1928).

Declarations.– Agreements declaratory of International Law are called Declarations, e.g. Declaration of London, 1909.

Protocols.– Protocols are supplementary treaties, either amending or supplementing other treaties.

Pacts.– The term Pact has been familiar since the Locarno (1925) and Kellogg (1928) Pacts. A recent instance is the Nehru-Liakat Pact (1950) as to the treatment of minorities in India and Pakistan.

Exchanges of notes.– These are used for clearing moot points.

'Implementing of treaties'.– This Entry gives Parliament the power to make laws to give effect to treaties, and in the exercise of that power Parliament may invade the State List, if necessary (Art. 253).

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96. *Arrow River Co.* v. *Pigeon Timber* Co., (1932) S.C.R. 495 (Can.).
97. Employment of Aliens, in re, (1922) 63 S.C.R. 293 (Can.).
97a. Re Berubari Union. A. 1960 S.C. 845 (859).
98. *Maganbhai* v. *Union of India*, A. 1969 S.C. 783 (*789,807*).
99. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225 (*232-8*).

In other words, even though the implementation of a treaty related to a State subject, Parliament alone would have the power to make a law for the implementation of such treaty, by virtue of Art. 253,[98] and Entry 14 of List I. Art. 253 thus avoids the conflict of jurisdiction in this behalf which arose in Canada (p. 22, *ante*).[99]

How far is legislation necessary to make treaties. Though treaty–making is a legislative subject in the Union List, it does not necesarily follow that a treaty negotiated and entered upon by the Head of the State in India will not be binding unless it is ratified by Parliament, in every case. *Our* Supreme Court[99] has held that from the fact that the legislative powers are divided between the Union and the State by the Legislative Lists, for federal purposes, it does not follow that in order to enable the Executive to function there must be a law already in existence and that the powers of the Executive are limited merely to the carrying out of these laws. Within the limits of the federal distribution of powers, the Executive can carry on the general administration of the State without any legislative sanction to do each act except where (a) expenditure of public funds is involved or (b) the Executive requires powers which it does not already possess under the existing law, e.g., to encroach upon private rights, or where legislation is required by some specific provision of the Constitution.

I. In other words, the position in India is similar to that in *England*, (p. 20, *ante*), but for the fact that we have a written Constitution, the provisions of which require legislative ratification of a treaty in order to bind the citizens and also the State itself, in certain cases. Thus, in India legislation would be required to give effect to a treaty in the following cases –

(a) Where it provides for payment of money to a foreign power,[98] which must be withdrawn from the Consolidated Fund of India.

(b) Where the treaty affects the justiciable rights of a citizen of India.[98]

(c) Where it requires the taking of private property [Art. 300 A]; life or liberty [Art. 21] or the imposition of a tax [Art. 265], which can be done only by legislation.

Outside these exceptional cases, it is competent for the Executive in India to enter into treaties binding on the State by virtue of the power conferred by Art. 73.[98] But without legislation, a treaty or convention cannot create any right or remedy in favour of any person against the Government which may be a party to the treaty or convention.[100]

II. An amendment of the Constitution itself would be necessary to cede Indian territory to a foreign State, by reason of Art. I.[97a]

But no amendment of the Constitution, nor even legislation is necessary, for an agreement to refer a dispute regarding boundaries with a foreign State, for, settlement of a boundary dispute does not amount to 'cession of territory'.[98] This can, therefore, be done by the Executive and the settlement so arrived at should be recognised by the municipal Courts.[98]

The Kutch Award.– Kutch was an Indian State which acceded to India by an agreement signed by the Ruler on 4. 5. 48. It was placed under the Central administration and came to be known as the Chief Commissioner's Province of Kutch, under s. 2 (1) (c) of the State Merger (Chief Commissioner's Provinces) Order, 1949.

100. Cf. *Monteireo* v. *State of Goa*, A. 1970 S.C. 329 (para.15).

By the States Reorganisation Act, 1956, Kutch was made a part of the State of Bombay, with effect from 1-11-56. It was taken out from Bombay and made a part of the State of Gujarat, by the Bombay Reorganisation Act, with effect from 1-5-60.

A part of the territory of State is covered by water during most part of the year and is known as the Runn of Kutch, which is contiguous to the Province of Sind which was included in West Pakistan. In 1948, Pakistan laid a claim to a part of the territory of the Runn of Kutch, which led to open hostilities between India and Pakistan, in April, 1965. In June, 1965, Government of India entered into an agreement with Pakistan to refer the dispute for settlement to an international Tribunal, which came to be presided over by a nominee of the Secretary-General of the United Nations, – Judge Gunnar Lagergren of Sweden. The Judges being divided, the award of the Tribunal was given by the Chairman, who accepted the claim of Pakistan, as propounded by the Pakistani Ambassador Entezam, which was delineated in Map C, appended to the Award, dated 19-2-68. Our Supreme Court[22] has described the boundary so fixed by the Award, dividing the Runn of Kutch between Gujarat and Pakistan, as follows :

"The new boundary begins at the northern tip of the Khori Creek and after going straight up north reaches the mainland of Sind and then follows roughly the configuration of the land till it comes south of Rahim ki Bazar. It thus follows Erskine's Survey. Thereafter instead of following the mainland it dips to the South East just south of Sadariajagot and then goes up North West to join the mainland and to follow the boundary symbols. . . . . after following the line of the mainland and the existing boundary symbols, the new boundary again dips to the South East to a point a little north of the 24th parallel and runs parallel to it thus embracing Dharabanni and Chhadbet to Pakistan. Thereafter it goes north to join the main land of Sind again and follows the boundary symbols which it follows till it reaches the Nagar Parkar area . . . . . On the West and East sides of Nagar Parkar there are two narrow but deep inlets. The new boundary instead of running along the banks of the inlets jumps across the two inlets at their southern extremeties, thus including them in Pakistan . . . . . The new boundary thence proceeds along the mainland till it reaches the demarcated boundary at the Jodhpur end . . . . . "

The Supreme Court has held[98] that the implementation of the aforesaid Award was within the competence of the Government of India, in the exercise of its executive power, on the following grounds :

(i) There was a dispute between India and Pakistan as to the alignment of an undefined boundary with respect to Kutch, so that the Award did not involve cession of Indian territory.

(ii) No constitutional amendment nor legislation was necessary to implement this Award (treating it as a Treaty) by the Government of India.[98]

Similar view had been taken as regards the implementation of the Radcliffe Award.[2]

Treaty-power and constitutional limitations.

(A) U.S.A. – Though the treaty-power of Congress is free from the limitation imposed by the federal distribution of powers (p. 21, *ante*), it has been held that it is subject to the other limitations upon the legislative power of Congress under the Constitution. In *Reid* v. *Covert*,[3] the Supreme Court has observed –

". . . . . no agreement with a foreign nation can confer power on Congress or any other branch of the Government which is free from the restraints of the Constitution".

1. Re Berubari Union, A. 1960 S.C. 845 (*859*).
2. *Ramkishore* v. *Union of India*, A. 1966 S.C. 644.
3. *Reid* v. *Covert*, (1957) 354 U.S. 1 (*16*).

A legislation implementing a treaty would thus be unconstitutional –

(i) If it infringes the rights guaranteed to the individual by the Bill of Rights or any other part of the Constitution[3];

(ii) If it seeks to change the character of the government or in that of one of the States;[4]

(iii) If it seeks to cede any part of the territory of a State without its consent.[4]

The 'Commerce Power' it may be noted, has been held subject to the obligation to pay compensation, under the Fifth Amendment.[5]

(B) *Australia*. – The power with respect to 'external affairs' from which the treaty power is deduced, is "subject to this Constitution". Hence, the legislative power of the Commonwealth Parliament for implementing treaties is subject to all the limitations imposed upon legislative power by the Constitution.[6]

(C) *India*. – A Single Judge of the Calcutta High Court (Basu, J.) held[7] that –

(a) Neither the sovereign power to cede territory to a foreign State nor the power to make a treaty is, in India, immune from the obligation to pay compensation to the citizen whose private property has necessarily to be 'acquired' by the Government before giving it to another State,[7] and that the foregoing obligation to pay compensation had not been abrogated by the Constitution (Ninth Amendment) Act, 1960, which sought to implement the Agreement to transfer the territory of Berubari to Pakistan.[7]

The Single Judge[7] had relied upon the decision of the *American* Supreme Court in *Reid* v. *Covert*[3] where the Court had emphatically laid down that no treaty (whether of cession or otherwise) can immunise the Executive or the Legislature 'from the restraints of the Constitution' – one of which was the Bill of Rights.

The Supreme Court[8] overturned the decision of the Single Judge[7] on the primary ground that the obligation to pay compensation to the citizen under Cl. (2) of Art. 31 would not arise because of the exception Cl. (2A) of that Article which provided that unless the ownership of a property was 'transferred' to the State, there was no 'acquisition' thereof in order to fasten the obligation to pay compensation. In the opinion of the Court (speaking through Grover, J.),[8] though the citizens were deprived of their property by reason of the cession, there had been no 'acquisition' by the State.

The decision of the Single Judge[7] raised a deeper question, namely, whether the State could exercise its *power* to cede the territory without 'acquiring' the property on payment of compensation. This question was, in fact, stated as question no. 1 in the Supreme Court judgment (para. 5).[8] To this question, however, the Supreme Court gave no answer except to rely on the American decision in *U.S.* v. *Perchman*,[9] to the effect that cession involved transference of sovereignty from one Sovereign to another and that the citizens of the ceding territory thereafter ceased to have any rights enforceable against the ceding State.

4. *Geofroy* v. *Riggs*, (1890) 133 U.S. 258.
5. *Monongahela Navigation Co.* v. *U.S.A.*, (1892) 148 U.S. 463 (477).
6. *R.* v. *Burgess*, (1936) 65 C.L.R. 608.
7. *Sudhangshu* v. *Union of India*, (1967) 72 C.W.N. 349 (364; 384; 370).
8. *Union of India* v. *Sudhansu*, A. 1971 S.C. 1594.
9. *U.S.* v. *Perchman*, (1833) 7 Pet. 51.

It is to be noted that no question of fundamental rights of the citizens of the ceding State was raised *in Perchman's case.*[9] That question was raised in *Reid* v. *Covert*,[3] but that case was not even mentoined in the Supreme Court judgment. Even though the equestion of applicability of Art. 31(2) can no longer arise in India owing to the repeal of that Article in 1978 (44th Constitution Amendment Act), there are other potent fundamental rights on the Indian Constitution, such as Art. 14, 19 or 21. Hence, it is still pertinent to reconsider the question raised by the Single Judge,[7] namely, whether the Executive or the Legislature can exercise its treaty-making power (including cession), regardless of constitutional limitations, including the fundamental rights of the citizens.

The modern *American* answer to this question is in the negative.

As early as 1871, the American Supreme Court had held[10] that (notwithstanding the supremacy of a Treaty under Art. VI(2) of the Constitution of the U.S.A.),–

"a treaty cannot change the Constitution or to be held to be valid if it be in violation of that instrument".[10]

The above view was developed by the majority of the Court in *Reid's case*[3] to hold that the fundamental right of a citizen to jury trial (7th Amendment) could not be taken away by entering into any treaty. The majority observed, *inter alia*, –

". . . . . It would be . . . . . alien to our constitutional history and tradition to construe Art. VI as permitting the United States to exercise power under an international agreement *without observing constitutional prohibitions*. In effect, such construction would permit *amendment* of that document in a manner not sanctioned by Art. V. The prohibitions of the Constitution were designed to apply *to all branches of the National Government* and they cannot be nullified by the Executive and the Senate combined" (pp. 16-17).[3]

"The United States is entirely a *creature of the Constitution*. It can only act in accordance with *all the limitations* imposed by the Constitution" (pp. 5-6).[3]

During the three decades that have followed, the majority opinion in *Reid's case*[3] has not been questioned in any decision of the American Supreme Court. On the other hand, it has been approved by reputed commentators.[11]

The question raised by the Single Judge, is likely to come up before the Indian Supreme Court again, because the problem of exercise of treaty-making power, as against the citizen's rights, is still alive in the cases of the transfer of enclaves to Bangladesh (e.g. Chilahati, Tinbigha). All such intriguing problems can be avoided if it can be held, for instance, that before ceding any part of Indian territory to a foreign State, Government of India must provide alternative site for residence of the displaced citizens, whose right to reside in the Indian territory is guaranteed by Art. 19 (1) (f).

[This follows from the observation in *Reid* v. *Covert* [3], cited *above*].

Legislation by Parliament. – See p. 19, *ante*.

The Marking of Heavy Packages Act (XXXIX of 1951) – to give effect to the International Convention drawn up in Geneva on 30-5-29, for the marking of weight on heavy packages transported by sea or inland waterways. The Tea Act (XXIX or 1953) – to implement the International Agreement regarding the control of cultivation of tea in, and export of tea from, India. The Suppression of Immoral Traffic in Women and Girls Act, 1956, to implement the New York

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10. The Cherokee case, (1871) 78 U.S. 616 (*620-21*).
11. Cf. Tribe, American Constitutional Law (1988), pp. 228, 305; Stone & Ors., Constitutional Law (1986), p. 216.

Convention of May, 1950. The International Finance Corporation (Status, Immunities and Privileges) Act (42 of 1958) implements the international agreement for the establishment and operation of the International Finance Corporation as regards the status, immunities and privileges of that Corporation.

The Geneva Conventions Act, 1960[12] was enacted by Parliament to implement the Geneva Convention of August, 1949, to which India was a party, the object of which was "the protection of civilian persons in time of war". The Tokyo Convention Act, 1975, to implement the Tokyo Convention of 1963, regarding offences committed on an aircraft. The Anti-Hijacking Act, 1982, to implement the Convention for Suppression of Unlawful Seizure of Aircraft, 1970. The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982, to implement the Montreal Convention of September, 1971.

15. War and peace.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The power "to declare War" is vested in the Federal Congress. [Art. I, Sec. 8 (11)]. No other authority can involve the United States in a war.[13] Usually the declaration is made by a joint resolution of the two Houses signed by the President.

(B) *England.* – The power to declare war and peace is a Prerogative of the Crown.[14] A legal state of war between the U.K. and a foreign State can be constituted only by a declaration of the Crown, even though hostilities might have actually commenced earlier. Similarly, a state of war can be terminated in law only by a similar declaration.

The constitutional position in England is, thus, contrary to that in the U.S.A., for legislative assent is not necessary to declare war. But, in practice, Parliament is usually consulted.

INDIA

Because of the present Entry, it would follow that the President cannot involve India into a war without the sanction of Parliament. This does not mean, however, that, as Commander-in-Chief of the Defences Forces [Art. 53(2)], the President cannot take emergency action, in anticipation of Parliament's sanction [see Vol. E, pp. 203-204].

16. Foreign Jurisdiction.

INDIA

'Foreign Jurisdiction'.– 'Foreign jurisdiction' is founded on the doctrine of 'Extra-territoriality', recognised by International Law. Extra-territoriality is an exception to the territorial sovereignty of a State over persons, things and places within its territorial limits. By the fiction of extra-territoriality, certain persons and things, etc., are deemed, for the purposes of jurisdiction and control, to be outside the territory of the State within which they are for the time being and are treated as within the jurisdiction of some Foreign State, the jurisdiction of which is to that extent enlarged.[15] In short, 'foreign jurisdiction' may be said

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12. Cf. *Monteiro* v. *State of Goa*, A. 1970 S.C. 329 (para. 7).
13. Of course, the President as Commander-in-Chief, may act in such way that war becomes inevitable [Munro – Government of the United States, 454].
14. Halsbury, 2nd Ed., Vol. VI, 503.
15. Pitt Cobbett, Cases on International Law, 1947, Vol. I, pp. 276 ff.

to be the jurisdiction exercised by one State within the territory of another State, by virtue of the rules of International law, and sometimes by treaty or agreement as well. Thus, by such treaty or agreement, a State may retain its jurisdiction over its subjects while they are in a foreign State.[16]

Exemption from local jurisdiction may also be accorded to persons who have no such privilege under the rules of International law, by legislation, such as the International Organisations (Immunities and Privileges) Act, 1950[17], replaced by the International Organisations Act, 1968, 1981, in England, under which members of international organisations and their staff have such privilege.

The present Entry empowers the Indian Parliament to enact similar laws.

The principal cases of foreign or extra-territorial jurisdiction, recognised by International law, are –

"(i) Sovereigns, whilst travelling or residing in foreign countries. (ii) Ambassadors and other diplomatic agents, having a representative character, and their residences. (iii) Public vessels, whilst in foreign ports or territorial waters. (iv) The armed forces of a State when passing through foreign territory."

I. *Sovereigns.* – The Head of a Foreign State, visiting another State, is immune from taxation and his person and residence are inviolable. He cannot be subjected to the jurisdiction of the local Criminal Courts nor is he subject to the jurisdiction or process of the local Civil Courts, unless he voluntarily submits to such jurisdiction.[18]

Even an agreement of a sovereign, whether embodied in a commercial contract or otherwise, to submit to the jurisdiction of the court of a foreign country is wholly ineffective if the foreign chooses to *resile* from it.[19] Nothing short of actual submission – a submission in the face of the Court will give the Court jurisdiction over the foreign Sovereign.[20] The submission must take place when the Court is asked to exercise its jurisdiction and there can be no inquiry by the Court into the conduct of the foreign sovereign prior to that date.[18]

The fact that a Sovereign enters into a contract in a foreign country under an assumed name, as a private individual, does not amount to a submission to jurisdiction.[18]

The consequences following from the immunity from jurisdiction are –

(i) A Court cannot implead a foreign as a party to a legal proceeding against his will.[21]

(ii) The Court cannot seize or detain property which is in his possession or control.[21]

It has, however, been held in England that a Court of Equity may proceed to administer a trust fund, even though a foreign Sovereign has interest in that fund, provided the fund is in the hands of some person who is subject to the jurisdiction of the Court.[22]

(iii) No Municipal Court can issue process against a foreign Sovereign[23] or his property.[24-25]

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16. Halsbury, 3rd Ed., Vol. 7, 295.
17. The corresponding Act in India is the United Nations (Privileges and Immunities) Act, 1947.
18. *Mighell* v. *Sultan of Johore*, (1894) 1 Q.B. 149.
19. *Duff Development Co.* v. *Kelantan*, (1924) A.C. 797.
20. *Kahan* v. *Pakistan Federation*, (1951) 2 K.B. 1003.,
21. *Compania Naviera* v. *Cristina*, (1938) A.C. 485.
22. *Sultan of Johore* v. *Bendahara*, (1952) 1 All E.R. 1261 (*1267*) P.C.

The immunity from local jurisdiction extends to the Sovereign's family and suite when accompanying him and to property which belongs to him or is in his possession or under his control,[26] and to the public property of the foreign State.[26] If property locally situate in this country is shown to belong to, or to be in possession of, an independent foreign sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it,[27] whether the sovereign is a party to such litigation or not.[24]

Even in a third party litigation, if a foreign sovereign claims interest in the property involved, the court cannot proceed, unless the claim of the foreign sovereign is merely illusory or founded on a manifestly defective title.[28]

The immunity has also been extended to a legal entity, representing a foreign Sovereign,[24] such as an agent,[24] or servant ;[24] or a Department of the foreign State[30], even where a corporate body is carrying on the public functions of the foreign State, thus constituting a Department of that State.[31] The certificate of the Ambassador of the foreign State as to whether an agency or corporate body constitutes a Department of the foreign State is accepted by the Court where the immunity is claimed unless the fact is disproved by the other party, with reference to the law of the foreign State.[30]

Even where an agent wrongfully acquires property on behalf of the principal and the principal gets possession or control of the property, the principal, i.e., the foreign Sovereign, may refuse to have his title investigated by a municipal Court.[24] In such a case, a third party cannot recover the property from the agent of the Sovereign on the ground of mistake, or other wrongful act which would have been a good ground for recovery if the defendant were the agent of a private person.[24]

Waiver of the immunity from jurisdiction. (i) The immunity is waived either when the Sovereign voluntarily submits to the jurisdiction or himself initiates the proceeding in the Court of the foreign country.[22]

(ii) When a Sovereign submits to the jurisdiction of a Court, the waiver of immunity continues through all proceedings which are continuation of the proceeding in which he had waived the immunity,[22] but not if the subsequent proceedings are, in fact, new and distinct proceedings.[19]

(iii) When the foreign Sovereign himself institutes a suit or voluntarily submits to jurisdiction, he will make himself liable to set-off or counter-claim arising out of the same transaction in respect of which he has submitted to jurisdiction[32] but not in respect of claims arising out of separate transactions.[33]

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23. *Strousberg* v. *Costa Rica*, (1880) 44 L.T. 199.
24. *Rahimtoola* v. *Nizam of Hyderabad*, (1957) 3 All E.R. 441 (*446*) H.L.
25. *U.S.A.* v. *Dollfus*, (1952) 1 All E.R. 572 (*587*) H.L.
26. *The Parliament Belge*, (1880) 5 P.D. (C.A.) 197.
27. *Haile Selassie* v. *Cable & Wireless*, (1938) 3 All E.R. 384 (C.A.).
28. *Juan Ysmael* v. *Republic of Indonesia*, (1954) 3 All E.R. 236 (*240*) P.C.
29. *Compania Mercantil* v. *U.S. Shipping Board*, (1924) K.B. 816 (C.A.).
30. *Krajina* v. *The Tass Agency*, (1949) 2 All E.R. 274 (C.A.).
31. *Baccus* v. *Servicio Nacional*, (1956) 3 All E.R. 715 (C.A.).
32. The Newbattle, 10 P.D. 33.
33. *South African Republic* v. *La Compagnie*, (1898) 1 Ch. 190.

(iv) If a Sovereign of one State acquires property within the territory of another State, so far as that property is concerned, he is deemed to waive the privilege of immunity, and actions connected with that property are subject to jurisdiction of the local Courts.[34]

On the other hand –

The immunity is lost only by '*actively* electing to waive the privilege' upon being sued.[35] Appearance to plead against jurisdiction is not such waiver.[36] Even the bringing of a suit as plaintiff does not constitute waiver of the general immunity to be sued.[37]

Submission to jurisdiction, again, does not constitute immunity, unless it is made with full knowledge of the facts constituting the right of immunity or with the authority from the sovereign or his proper representative.[31]

Recognition of status of foreign Sovereign. When any question arises in a municipal court as to whether a person is a foreign sovereign or not, the Court will take as conclusive the statement or certificate from its own Government (usually the Secretary for foreign or external affairs) instead of itself entering into an investigation of this question,[22,38,39] because the recognition of a foreign sovereign, as we have seen, is a 'political' question. The material fact for ascertaining the question of immunity is the status of the defendant not on the date of institution of the proceeding or the date of the writ but on the date when the question of immunity comes up for determination by the Court.[39]

Suits by foreign Sovereigns. The immunity of a Sovereign from being sued in a foreign country does not extend to make it a disability to sue. Thus, a foreign Sovereign (if duly recognised)[40] is entitled to sue in another country not only in respect of his public rights but also in respect of his private rights and property,[41] – but not in respect of 'acts of State' or disputes with other States which are beyond the jurisdiction of Municipal Courts.[42]

When a foreign Sovereign is entitled to sue, the question arises in what style he should be described as plaintiff where the suit is brought to enforce the *public* rights or interests of the State which he represents. In *England*, it has been held[43] that while in a *monarchical* State it is the Sovereign who represents the person, property and interest of the State and it is the Sovereign who is recognised by other States in International Law, in the case of *republican* States, the State is regarded as a juristic person and the personality, property and interest and all other attributes of sovereignty inhere in the *State* itself and so the State itself, in its corporate capacity, should be the plaintiff. *India*, being a Republic, this is of special interest to us.

In some cases, the actual party to a contract, such as a Minister (even though he is not the State itself) has been allowed to sue on the ground that the contract was with him.[44]

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34. The Charkieh, (1873) 4 A. & E. 59.
35. *Suarez* v. *Suarez*, (1918) 1 Ch. 176.
36. *Magdalena S.N. Co.* v. *Martin*, (1859) 3 E. & E. 94.
37. *Kingdom of Rumania* v. *Guaranty Trust Co.*, (1918) 250 Fed. Rep. 341.
38. *Mighell* v. *Sultan of Johore*, (1894) 1 Q.B. 149.
39. *Sayce* v. *Ameer*, (1952) 1 All E.R. 326 (*330*).
40. *Emperor of Austria* v. *Day*, (1861) 30 L.J. Ch. 690.
41. Pitt Cobbett, Cases on International Law, 1947, Vol. I, p. 107.
42. *Secy. of State* v. *Kamachee*, (1859) 13 Moo. P.C. 22.
43. *U.S.A.* v. *Wagner*, (1867) 2 Ch. App. 582; *Republic of Costa Rica* v. *Erlanger*, 19 Eq. 33.
44. *Yzquierdo* v. *Clydebank Co.*, (1902) A.C. 524.

In the case of a republic, the style should be '*Republic of* . . . . . ' and not 'Government of . . . . . '[45]

II. *Diplomatic Agents.* – See under Entry 11.

It is to be noted that this immunity from local jurisdiction is confined to diplomatic agents who are duly accredited by a foreign State, and not to diplomatic agents of foreign countries who merely happen to be in another State as an ordinary foreigner,[46] unless diplomatic privileges are extended to them by local legislation.

The immunity may be waived, with the permission of the Sovereign, in the same manner as in the case of immunity of the Sovereign himself.

Even where a person acquires diplomatic immunity during the pendency of proceedings in which he has taken steps, he is entitled to have the proceedings stayed.[47]

III. *Public Vessels.* – *Public property* of one State, when within the territorial limits of another State, is exempt from the local jurisdiction.[48]

A special application of this rule is to be found in respect of 'Public Vessels'.

"A public vessel is one owned and commissioned by the Government of a . . . . . State . . . . . so long as it is recognised externally as a separate international person. In the category of public vessels are included not only ships of war, but also unarmed Government vessels, store ships, and transports"[48].

The public character of a vessel is primarily evidenced by her flag and pendant but the ultimate proof is to be found in the commission issued by the Government of the State to which she belongs or the declaration of that Government. The immunity has been extended even to vessels chartered or requisitioned by a foreign State, while in its control and possession.[49]

A public vessel, while merely passing through the terrritorial waters of a foreign State, in time of peace, is altogether exempt from territorial jurisdiction of that State. When she is at a foreign port or is stationary in foreign waters, she is entitled to a number of privileges, such as exemption from jurisdiction of local Courts, local dues and the exemption from local jurisdiction extends to her officers and crews. But the privilege may be waived, e.g., when the chief officer of the ship takes the aid of the local police and takes part in the trial[50]. Again, if the crews offend on the shore, they may be arrested and punished and if they escape to the ship after offending on the shore, the territorial power may ask for their surrender.

IV. *Armed forces.* – The military forces of a friendly State, in time of peace or war, are entitled to privileges similar to those of public vessels, while in the territory of another State. The jurisdiction over the troops while in the foreign State, is retained by the State to which the forces belong, in the absence of agreement to the contrary. But where the forces of a belligerent State come upon a neutral territory, in time of War, it is the duty of the neutral State to intern and disarm them and until the conclusion of peace, the neutral State has jurisdiction over such belligerent forces.[51]

45. *Colombian Government* v. *Rothschild*, 1 Sim. 94.
46. Dicey, Conflict of Laws, 1949, p. 134.
47. *Ghosh* v. *D'Rozario*, (1962) 2 All E.R. 640 (C.A.).
48. Pitt Cobbett, Cases on International Law, 6th Ed., Vol. I., p. 289.
49. *Republic of Spain* v. *Arantzazu*, (1939) A.C. 256.
50. *Chung Chi Cheung* v. *The King*, (1939) A. C. 160.
51. *Hague Convention* v. 1907, Art. 11.

Existing Laws.—The Foreign Jurisdiction Act, 1947[52] provides for the administration of foreign countries or territories over which the Government of India has or may have jurisdiction by treaty, capitulation, grant, usage, sufferance or other lawful means, outside the territory of India, as defined in Art.1(3) of the Constitution. Thus,

(a) This Act was applied for assuming jurisdiction over Chandernagore after de facto transfer of that territory by the French Government to India, with effect from the 2nd May, 1950, and certain Indian laws were extended to Chandernagore, by a notification under s.4 of this Act.[53]

(b) By other notifications under this Act.[54-55] Government made the French Establishments (Administration) Order, 1954, providing for the administration of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, and the French Establishment (Application of Laws) Order, 1954, extending certain Indian laws to such territories.

17. Citizenship, naturalisation and aliens.

OTHER CONSTITUTIONS

(A) *England.*—In common law, there was little distinction between nationality and citizenship, both being referred to by the expression 'British subject'. The status, so referred to, was determined by *jus soli* i.e., by birth within the British dominion and a British subject was bound to the Crown by the tie of 'natural allegiance', which was due from all men born within the British dominions immediately upon their birth.[58]

The concept of a 'British subject' has, however, been ever widened by legislation starting from the Naturalisation Act, 1870, and culminating in the British Nationality Acts.[59] By reason of this legislation, even an alien may become a British subject by naturalisation and, by the British Nationality Act, 1948, the concept of allegiance as a basis of British nationality or the status of a British subject was dispensed with by this Act by defining the expression 'British subject' in s.1(1) thus :

"Every person who under this Act is a *citizen of the United Kingdom* and Colonies or who under any enactment for the time being in force in any country mentioned in sub-sec. (3) of this section [i.e., a Commonwealth country] is a citizen of that country shall by virtue of that citizenship have the status of a British subject".

By sub-section (2) of the same section, the expression 'British subject' was declared to have the same meaning as the expression 'Commonwealth citizen'. The result is—

(a) Not only a citizen of the United Kingdom, that is to say, a person born within the United Kingdom and their descendants and those acquiring such citizenship by registration or naturalisation, but every citizen of a Commonwealth country was also to be a 'British subject' for the purposes of 'nationality'.

(b) Since many of the Commonwealth countries were republics, owing no allegiance to the British Crown, allegiance to the British Crown was thus no longer a necessary ingredient of British nationality, according to the new law.

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52. Originally enacted with the title–Extra-Provincial Jurisdiction Act (XLVII of 1947).
53. Notn. No.131-Eur.-1/1-5-50.
54. Notn. No. S.R.O. 3314-5, 30.10.54.
55. *Masthan Sahib* v. *Chief Commr.*, A. 1963 S.C. 533 (*538*).
56. 2 Bl. Comm. 369.
57. Vide Wade & Bradley, Constitutional Law, 1985, pp. 437 ff. ; Hood Phillips, 1987, 447 ff.
58. *Butchers' Association* v. *Crescent Livestock Co.*, (1872) 16 Wall. 36.
59. *Robtelmes* v. *Brenan*, (1906) 4 C.L.R. 395.

(c) Another marked feature of this legislation was that it made a distinction between nationality and citizenship by laying down that while only persons born within the United Kingdom and the Colonies shall be 'citizens of the United Kingdom and the Colonies', other persons who were not citizens of the United Kingdom or any of its Colonies, but were citizens of the Commonwealth countries would also come within the category of 'British subjects.'

Extensive changes have been made by the British Nationality Act, 1981, under which only British citizens by birth descent or naturalisation are entitled to live in the U. K., as of right.[57] The immigtration of Commonwealth citizens is controlled by the Immigration Act, 1971.[57]

(B) *U.S.A.*—Citizenship, in the U.S.A., is a dual concept. Under the 14th Amendment, citizenship of the United States is acquired by birth within the territories of the United States, or by naturalisation. United States citizens automatically acquire citizenship of a State by residing within it. It is possible for a person to be a citizen of the United States without being a citizen of any State, e.g., while a United States citizen is abroad. On the other hand, residence within the State is an additional element required for a United States citizen to become a State citizen. Federal and State citizenships have distinct rights and obligations.[58]

(B) *Australia.*—Under Sec. 51 (xix) of the Constitution Act, the Commonwealth Parliament has the power to legislate with respect to—

"Naturalisation and aliens".

The power is concurrent, by reason of Sec. 107. This entry includes the power-(a) to determine the conditions upon which aliens may be permitted to enter and remain in this country,[59] (b) to provide for their expulsion and deportation,[60] and (c) to impose any extra-territorial restraint which is necessary to make deportation effective.[61]

As to aliens, it has been held that the Dominion Parliament can, under the above power, require a foreign company to take out a Dominion license, even though the company desires to carry on its business only within the limits of a single Province. Provincial Legislatures cannot legislate against aliens as such, but may legislate as regards franchise, which is a Provincial power.[62]

(C) *Canada.*—Sec. 91 (25) of the Br. N. America Act gives the Dominion Parliament exclusive authority in respect of "Naturalisation and aliens".

It has been held that by this Entry, the Dominion Parliament is vested with authority in all matters which directly concern the rights, privileges and disabilities of aliens in Canada.[63] But this power enables the Dominion Parliament to determine what shall constitute alienage or naturalisation, and not the consequences thereof, such as the privileges resulting from naturalisation.[62]

By virtue of this power the Dominion Parliament has enacted the Canadian Citizenship Act, 1946[64] (now 1970).

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60. *R* v. *Macfarlane*, (1923) 32 C.L.R. 518.
61. *A.G. for Canada* v. *A.-G. for Alberta*, (1916) A.C. 597.
62. *Cunningham* v. *Tomey Homma*, (1903) A.C. 151.
63. *Union Colliery* v. *Bryden*, (1899) A.C. 580.
64. Cf. Bowie, Studies in Federalism, 1954, pp. 653-655.

INDIA

Nationality and citizenship.—The distinction between these two terms have already been explained, under Art. 5, in Vol. A. Briefly speaking, nationality is the quality or status of belonging to some particular nation or State, from the international standpoint; while citizenship is the status of a individual in relation to a State from the internal aspect.

In general, it may be said that there are certain general principles of international law relating to nationality,[65] apart from which it is competent of a State to legislate as to who should be treated as its nationals,[66] e.g., the British Nationality Acts. There are, however, other States who have no specific legislation on nationality. The Indian Citizenship Act of 1955 may be treated as a composite law relating to nationality and citizenship, enacted by virtue of the present Entry. Though this Entry does not mention 'nationality', that is implied, because of the word 'alien' which refers, in relation to a particular State, to anybody who is not a national of that State.[67]

Naturalisation.—This is an act by which the citizenship of a State may be conferred upon an alien.

In England, at common law, it was not competent for an alien to become a British subject by any means. Naturalisation was provided for by legislation by the Naturalisation Act, 1870, as a resudlt of which British subjects came to include 'natural-born' and 'naturalised' British subjects. The provisions in this behalf are now contained in s. 10 of the British Nationality Act, 1981.[68] In order to obtain naturalisation, the alien has to make an application to the Home Secretary, who grants a certificate of naturalisation, on being satisfied that the applicant fulfils the conditions specified in the statute.

Similar provisions for granting of a certificate of naturalisation are to be found in s.6 of the Citizenship Act, 1955 of India,[69] under which the competent authority is the Central Government.

In the *U.S.A.*, the process of naturalisation under the Immigration and Nationality Act, 1952, is judicial.

'Aliens'.—This Entry gives the Union the power to expel aliens from its territory, which power belongs to every sovereign State.

'Citizenship'.—Part II of our Constitution simply provides for acquisition of citizenship at the commencement of the Constitution. Art. 11 together with the present Entry empowers Parliament to legislate on the subject of citizenship including loss of citizenship[70] and the procedure prescribed by such law will be 'procedure established by law'.[70]

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65. Cf. Clive-Parry, Nationality and Citizenship Laws, 1957, pp. 9-10, 17-18, 22-3., 26-6.
66. Rep. of the International Court of Justice, (1955) 4. 23.
67. Clive-Parry, Nationality & Citizenship Laws, 1957, pp. 7, 9. [In Constitutional Law, the term alien is used to refer to 'non-citizens'].
68. Hood Phillips, Constitutional & Administrative Law, 1987, p. 453 ; Wade & Bradley (1985), p. 40.
70. *State of U.P.* v. *State Md.*, A.1969 S.C.1234 (*1237-8*).

Existing laws.—The Registration of Foreigners Act (XVI of 1939) provides for the registration of foreigners in India and the Foreigners Act (XXXI of 1946) empowers the Central Government to prohibit or regulate the entry into and presence in India of foreigners.

Legislation by Parliament. – Citizenship Act (LVII of 1955).

18. Extradition.

OTHER CONSTITUTIONS

(A) *England.* – Extradition means the seizure of an alien to hand him over to a foreign State, on the ground that he is a fugitive from justice. This power is entirely founded on statute, namely, the Extradition Act, 1870,[71] which provides for extradition only to a State with which a reciprocal treaty in this behalf has been made, for the surrender of persons who are charged with having committed the offences mentioned as 'extraditable offences' in the treaty concerned.[72]

The procedure for extradition is quasi-judicial and an order for extradition is made by a Magistrate, on being satisfied that there is a prima facie case for extradition. His decision is final and cannot be reviewed by any other Court,[73] except on the ground that the real purpose for which extradition is sought for is to punish the person for a 'political offence'[74] which means that the country, seeking extradition, wants to punish the person for his political opinion or some issue connected with the political control or government of that country.[75]

(B) *U. S. A.* – International extradition is an exclusively federal subject.[76]

(C) *Government of India Act*, 1935. – Item 3 of List I included – 'Extradition'.

INDIA

'Extradition.' – 'Extradition is the delivery up of a person who has committed a crime in one country and taken refuge in another, by the authorities of the country where he has taken refuge to those of the country where the crime is committed. It is founded on the principle of international justice and is based on mutual treaties between States. Apart from treaties there is no legal obligation upon a State to surrender a fugitive to another State which claims him as an offender;[76] because every sovereign State has jurisdiction over persons within its territory. But there is nothing to prevent a State from granting extradition under municipal legislation, without a treaty.[77]

On the other hand, like other treaties, a treaty of extradition is not per se enforcible by the municipal Courts. The subject would not be bound unless the treaty is implemented by municipal legislation :

The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such, should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crime to justice. But in the application of this principle in

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71. Corresponding provisions for surrender of fugitives between the U. K. and any other part of the Commonwealth and another are made in the Fugitive Offenders Act, 1881, 1967.
72. *R. v. Wilson*, (1923) 1 K. B. 24.
73. *Schtracks* v. Govt. of Israel, (1964) A. C. 556 (H.L.).
74. Castioni, re, (1891) 1 Q. B.540.
75. Kolczinski, ex parte, (1955) 1 Q.B.540.
76. *United States v. Rauscher*, (1886) 119 U.S. 407.
77. *Ram Babu Saksena v. The State*, (1950) S.C.J. 406 (*409*) ; *State of W. B. v. Jugal*, A. 1969 S.C. 1171 (*1183*).

certain matters, such as the conditions upon which, and the class of crimes in respect of which, extradition is to be granted and the formalities to be observed upon an application for extradition are primarily matters for two political powers concerned to arrange in the first instance by treaty; having arranged them by treaty, the next step is by legislative enactment to give them the form of law and to express in an Act of Parliament the condition and the limitations imposed upon the grant of extradition and the class of crimes to which extradition is to apply.[78]

It is to the expression of the Legislature in Acts of Parliament that judicial tribunals can refer".[78]

Thus, it has been held[79] that the extradition treaty between the former Dholpur State and the British Government, not having been incorporated into the law of that State by legislative enactment, cannot be regarded as the municipal law of the Dholpur State and hence the arrest and detention of a citizen of India in pursuance of such treaty is not valid, and is entitled to be set free, by *habeas corpus*.

The claim for extradition may be preferred only by a State within which the offence was committed,[80] the principle of international law being that criminal law and jurisdiction are primarily territorial.

"By the law of nations, each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilised method."

A person extradited for one offence cannot be tried for another, so long as he is not freed from the restraint involved in the extradition process.[76, 81-25]

Extradition does not lie for a 'political offence'. In order to constitute a 'political offence' there must be two or more parties in the State, each seeking to impose the Government of its choice upon the other ; if an offence is committed by one party or the other in pursuance of that object, it would be a 'political offence'.[82] Some offences, such as treason, political conspiracy, are manifestly political in character but ordinary crimes such as homicide may also be deemed to be political if it was committed in the course of some political movement and solely with the political end in view.[74]

Legislation by Parliament. – The Extradition Act (34 of 1962) deals with the procedure relating to extradition of 'fugitive criminals' and replaces the Indian Extradition Act, 1903. The formalities prescribed by the Act must be strictly complied with.[83]

But even where the Act does not apply, it would not be without jurisdiction for the Government of India, at the instance of a Magistrate in India, to requisition another country to deliver up a person for trial in this country if the Government of India is able to pursuade that country in this behalf.[77] When a man is brought for trial before a Magistrate in this country, he cannot plead that he was brought here illegally, from a foreign country.[77, 84]

19. Admission into, and emigration and expulsion from, India; passports and visas.

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78. Re Arton, (1896) 1 QB. 101 (111-2).
79. *Birma* v. *State*, A. 1951 Raj. 127 (*129*).
80. *The Queen* v. *Ganz*, 9 Q.B.D. 93 ; *Att.-Gen. of Hong Kong* v. *Kwok-a-Sing* L.R. 5 P.C. 179.
81. *Buck* v. *The King* (1917) 55 S.C.R. 133 (*Can.*).
82. Re Meunier, (1894) Q.B.415.
83. Cf. *Hans Muller* v. *Supdt.*, A.1955 S.C. 367 (*375*).
84. *Emp.* v. *Savarkar*, (1911) 35 Bom. 225.

OTHER CONSTITUTIONS

(A) *England.* – 1. The immigration of aliens into the United Kingdom is regulated by the Aliens Restriction Acts, 1914-19, and the Orders and Regulations made thereunder.

No alien, excepting certain excepted persons, such as an accredited diplomatic representative[85], immigrating from abroad, can land in the United Kingdom without the authority of an immigrating officer; and such authority is only to be given where the alien can prove that he fulfils a number of conditions, e.g., that he is in a position to support himself and his dependents, and he is not medically unfit. Aliens are only allowed to land at certain specified ports.[86] Persons who have been guilty of extradition offences, or against whom an expulsion order has been made, are excluded. There is also provision for the registration of resident aliens over the age of 16, with certain particulars.

An alien who has landed without obtaining leave or to whom leave has been refused, is liable to be detained, until he is removed from the United Kingdom.[86] The master of a ship or the pilot of an aircraft has the power to detain a passenger pending investigation for these purpose.[86]

An alien who has been refused leave to land is liable to be removed, either to the country of which he is a national or to the country from which he embarked.[85]

Apart from this, a deportation order may be made under the Aliens Order, 1963, by the Home Secretary, against any undersirable alien, "if he considers it to be conducive to the public good." The Home Secretary is not bound to make any enquiry before making an order of deportation[87] but it may be subjected to judicial review in a proceeding for *habeas corpus*[88] or in action for false imprisonment[89] on the ground of *ultra vires* or *mala fide*[90] use of the statutory power.

II. So far as the citizens of the Commonwealth countries are concerned, it has been seen that they were not treated as aliens, by the British Nationality Act, 1948. Until 1962, therefore, there was no restriction imposed upon the Commonwealth citizens as regards entry into the United Kingdom and departure therefrom.

But, notwithstanding the fact that a Commonwealth citizen is a British subject according to the British Nationality Act, 1948, the United Kingdom has passed the Commonwealth Immigrants Acts, 1962, 1968 empowering an immigration officer to refuse admission to or admit only on conditions, any citizen of a Commonwealth country, excepting only those holding United Kingdom passports. The Act also provides for the deportation from the United Kingdom of Commonwealth citizens who have been convicted of offences punishable with imprisonment.

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85. Halsbury, 3rd Ed., Vol. I, pp. 511-4.
86. *R* v. *Brixton Prison.* (1942) 2 All E.R. 232.
87. Venicoff, ex parte, (1920) 3 K.B. 72; Soblen, ex parte, (1963) 2 Q.B. 243 (C.A.).
88. *Eshugbayi* v. *Govt. of Nigeria,* (1931) A.C. 662 (P.C.).
89. *Kuchenmeister* v. *Home Office,* (1958) 1 Q.B. 496.
90. Sacksteder, Ex parte, (1918) 1 K. B. 578.

(B) *U.S.A.* – It is curious to note that Congress has drawn its power to control immigration of aliens from its 'Commerce power'[91] – which has been interpreted to include any sort of intercourse [Art. 1 (8)]. The power to deport has also been deduced from the power relating to 'Naturalisation' [Art. 1. s. 8 (4)].[92]

A. Numerous laws[92] have been passed to regulate the immigration of aliens. Those who are totally excluded from admission are – (a) insane persons ; (b) persons likely to become public burdens ; (c) persons suffering from serious physical and mental ailments ; (d) polygamists ; (e) persons convicted of serious crimes ; (f) persons who are believed to be seeking admission in order to engage in sabotage or to overthrow the government ; (g) persons who are or have previously been affiliated with the Communist Party.[93] An alien who is admitted, must pass a literary test, and pay a head tax.

It has, however, been held that in order to exclude an alien on the ground of membership of the Communist Party, it must be shown that he had "committed himself to the Communist Party in consciousness that he was joining an organisation known as the Communist Party which operates as a distinct and active political organization".[94]

B. Deportation is to be distinguished from exclusion. While exclusion denies the right of entry to an alien, deportation means the expulsion of aliens who have already entered the United States with leave of the Government. Additional rights and privileges have therefore been conceded to a person sought to be deported which are not available to an alien who is sought to be excluded.[95]

The federal laws[96] authorise the Commissioner of Immigration to deport – (a) any alien whose entry in the U.S.A. is found to have been unlawful ; (b) any alien who tries to foment revolution, to spread subversive political doctrines (e.g., communism) or who is convicted of certain crimes, or who becomes a public charge within 5 years of entrance.

From the deportation orders, there is a right of appeal to the Courts, which may interfere only if the deported prson proves that the order is not supported by substantial evidence. The English doctrine that an alien has a right to reside within the State only so long as the supreme power should think fit, has been followed in the U.S.A.[97]

It has been held that a law providing for deportation is not subject to the constitutional inhibition against ex post facto legislation.[98] But a proceeding for deportation is not outside the guarantee of 'due process' and the alien is entitled to a hearing,[99] though not to a judicial hearing,[100] and a solidity of proof is required when the person sought to be deported has lived in the U.S.A. for a long time.[1]

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91. Cf. *Truax* v. *Raich*, (1915) 239 U.S. 33.
92. Cf. Immigration & Nationality Act, 1952.
93. *Harisiades* v. *Shaughnessy*, (1952) 342 U.S. 580.
94. *Rowoldt* v. *Perfetto*, (1957) 355 U.S. 115.
95. *Shaughnessy* v. *U.S.*, (1953) 345 U.S. 206 (*212*).
96. Cf. Aliens Registration Act, 1940.
97. *Chae Chan Ping* v. *United States*, 130 U.S. 581 ; *Harisiades* v. *Shaughnessy*, (1952) 342 U.S. 580 (*587*).
98. *Mahler* v. *Eby*, (1923) 264 U.S. 32.; *Lehman* v. *Carson*, (1956) 353 U.S. 685 (*690*).
99. *Wong Yang* v. *McGrath*, (1950) 339 U.S. 33.
100. *Chin Yow* v. *U. S.*, (1907) 208 U.S. 8.

C. A. passport is a document addressed to foreign powers, requesting that the bearer of it (an American citizen) may pass safely and freely ; it is of the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen.[2]

The issuing of a passport is discretionary with the Secretary of State. Though he acts upon some evidence of citizenship, no law requires him to make any sort of quasi-judicial inquiry.[3] But the right of movement not only within the country but also beyond the frontiers of the country is a part of the 'liberty' guaranteed by the 14th Amendment and, cannot, accordingly, be denied to a citizen, without due process of law.[3] It follows, therefore, that a passport can be denied to a citizen on the ground that he was engaging in criminal or unlawful conduct but not because of his beliefs or association, without any overt act,[3] or without the showing of "the gravest imminent danger to the public safety".[4] Congress can regulate this power only subject to the above limitations and if it has to delegate the power to the Executive, it must lay down definite standards,[1] which will be strictly constructed by the courts.[3]

(C) *Australia.*—Sec. 51 (xxvii) of the Constitution Act empowers the Commonwealth to legislate with respect to—'Immigration and emigration'.

The following are not 'immigrants' within the meaning of the above entry, so as to enable Parliament to regulate their admission into Australia—

(i) A person born in Australia, who returns from abroad to Australia, as his home.[5] But if he enters the country not with any intention of residence or settement, he would be an immigrant.[6] (ii) Persons who, having immigrated to Australia, have made Australia their permanent homes and have become members of the Australian community[7].

An alien may not only be excluded but also be expelled at the will of the Commonwealth.[8]

"The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, and the conditions under which they may be deported from it ".[8]

The present power enables the Commonwealth to expel or deport even a British subject born in Australia.[6]

(D) *Canada.*—S. 95 of the B.N.A. Act, 1867 provides—

"In each Province the Legislature may make laws in relation to . . . . . Immigration into the Province ; and . . . . . the Parliament of Canada may from time to time make laws in relation to . . . . . Immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to . . . . . Immigration shall have effect in and for the Province so long and so far only as it is not repugnant to any Act of the Parliament of Canada".

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1. *Rowoldt* v. *Perfetto*, (1957) 355 U.S. 115 (*120*).
2. *Urtetiqui* v. *D'Arbel*, (1835) 9 Pet. 692 (*699*).
3. *Kent* v. *Dulles*. (1957) U.S. 116.
4. *Korematsu* v. *U.S.*, (1946) 323 U.S. 214 (*218*).
5. *Donohoe* v. *Wong Sau*, (1925) 36 C.L.R. 404.
6. *R* v. *Macfarlane*, (1923) 32 C.L.R. 518.
7. Ex parte *Walsh*, (1925) 37 C.L.R. 36 ; Contra *Koon* v. *Calwell*, (1949) 80 C.L.R. 533.
8. *Robtelmes* v. *Brenan*, (1906) 4 C.L.R. 395.

The power relating to immigration is thus concurrent, Dominion laws having the predominance in case of conflict. Provincial legislation is also subject to the Treaty-power of the Dominion.[9] The Dominion laws not only seek to prohibit undesirable immigrants but also provide for deportation of immigrants as well as citizens.[10]

INDIA

'Admission into, Expulsion'.—One of the rights possessed by the supreme power in every State is to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good Government.[11] *Extra-territorial constraint* is incident to the exercise of the power of deportation. Once it is conceded that the State has the right to expel aliens, it follows that it has the power to do those things which must be done in the very act of expulsion, if the right is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by a State officer on the territories of its neighbour should thereby result.[N] In short, the power of deportation of an alien, at any time, and even after long residence, is a power inherent in every sovereign State.[12]

'Expulsion from India'.—The power to provide for expulsion must be distinguished from the power to provide for extradition,[13] which is separately mentioned in Entry 18. 'Expulsion' refers to what is meant by deportation in English law (p. 38, *ante*).

Extradition is, in essence, a special branch of the law of crimes, but in expulsion, no idea of punishment is necessarily involved.

Though a foreigner and a citizen are equally liable to be expelled from India under this power, in the case of a citizen, the law would be unconstitutional if it does not comply with the requirements of cl. (5), read with cl. (1) (e) of Art. 19.[83.12] But a foreigner is not entitled to the protection of Art. 19 and cannot, therefore, challenge the validity of an expulsion on the above ground.[83]

'Emigration'.—This word has been used in the general sense of leaving the country for residing abroad, whether permanently or temporarily.

Passport.—A passport is an official document issued in the name of the head of a State, to a traveller for his safe passage to and protection in a foreign country, and is intended to be presented to the foreign Government for this purpose.[14]

"A passport is a license for the safe passage of anyone from one country to another."

But the passport does not increase the duty of the Sovereign to protect its citizens while abroad,—a duty which exists independent of any passport. On the other hand, when an alien is given a passport for protection in another State, he must be held to be in constructive residence within the realm while enjoying that protection and may be liable for treason if he joins enemies of the State issuing

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9. *A.-G. for Br. Columbia* v. *A.-G. for Canada*, (1924) A.C. 203.
10. Cf. *Co-operative Commn.* v. *A.G. of Canada*, (1947) A.C. 87.
11. *A.-G. for Canada* v. *Cain*, (1906) A.C. 542.
12. This view now finds support from Soblen, ex parte, (1963) 1 Q.B. 829 (C.A.).
13. *Ebrahim Vizir* v. *State of Bombay*, (1954 S.C.R. 933 : (1952-4) 2 C.C. 181.
14. *R.* v. *Brailsford*, (1905) 2 K.B. 730 (*754*).

the passport, even though that offence be committed abroad.[15] It also serves as a means of identification of the person to whom it is issued.[15]

In India, a passport is now issued in the following form –

"These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need".[16]

No citizen has any legal right to obtain a passport for visiting a foreign country,[17] and the passport, when issued, does not constitute an evidence of citizenship of the country by which it is issued.[18] Under the Indian Passport Act, 1920,[19] the possession of a passport had become a necessary condition of travelling abroad.[21] The majority of the Supreme Court in *Satwant Singh's case*[20] accordingly, held that the vesting of the power to grant a passport in the arbitrary discretion of an executive authority violates the guarantee in Art. 21, because the right of travel abroad is included in the 'personal liberty' guaranteed by Art. 21. As a result of this decision of the Supreme Court,[20] Parliament was obliged to pass the Passports Act, 1967, s. 6(1) which has exclusively enumerated the grounds upon which only a passport may be refused by the statutory authority, as follows :

"6. (1) Subject to the other provisions of this Act, the passport authority shall refuse to make an endorsement for visiting any foreign country under clause (b) or clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely : –

(a) that the applicant may, or is likely to, engage in such country in activities prejudicial to the sovereignty and integrity of India ;

(b) that the presence of the applicant in such country may, or is likely to, be detrimental to the security of India ;

(c) that the presence of the applicant in such country may, or is likely to, prejudice the friendly relations of India with that or any other country ;

(d) that in the opinion of the Central Goverment the presence of the applicant in such country is not in the public interest.

(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely : –

(a) that the applicant is not a citizen of India ;

(b) that the applicant may, or is likely to , engage outside India in activities prejudicial to the sovereignty and integrity of India :

(c) that the departure of the applicant from India may, or is likely to, be detrimental to the security of India ;

(d) that the presence of the applicant outside India may, or is likely to, prejudice the friendly relations of India with any foreign country ;

(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years ;

(f) that procedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India ;

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15. *Joyce* v. *Director of Public Prosecutions*, (1946)1 A.E.R. 196 (H.L.).
16. Though originally the function of a passport was only to give protection to the citizen while he was abroad, in modern times the power of refusing a passport is used to control the visit of undesirable persons to any particular foreign country or countries, on political grounds. Art. 13(2) of the Universal Declaration of Human Rights, however, seeks to stop this practice by declaring that –
"Everyone has the right to leave any country, including his own, to return to his country."
17. *Row* v. *State of Madras*, A. 1954 Mad. 240 (*244*).
18. *Mahammad* v. *Govt. of A.P.*, A. 1957 A.P. 1047 (*1052*).
19. *See now s.* 3 of the Passports Act, 1967.
20. *Satwant Singh* v. *Asstt. Passport Officer*, A. 1967 S.C. 1836.

(g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court ;

(h) that the applicant has been repatriatad and had not reimbursed the expenditure incurred in connection with such repatriation ;

(i) that in the opinion of the Central Government the issue of a passport or travel document to the applicant will not be in the "public interest."

Visa.—Visa means the authentication of a passport by a foreign authority.[21] While a passport permits a citizen to leave his own country, a visa permits an alien to enter a foreign country.

Existing Laws.—Indian Emigration Act (VII of 1922) ; Reciprocity Act (IX of 1943); Indian Passport Act (XXXIV of 1920).[22]

Legislation by Parliament.—Immigrants (Expulsion from Assam) Act (X of 1950) ; Passports Act, 1967, Foreigners Act, 1966 ; Foreign Marriage Act, 1969 ; Illegal Migrants (Determination by Tribunals) Acts, 1983, 1988; Religious Institutions (Prevention of Misuse) Act, 1988.

20. Pilgrimages to places outside India.

Existing Law.—Port Haj Committees Act (XX of 1932).

21. Piracies and crimes committed on the high seas or in the air ; offences against the law of nations committed on land or the high seas or in the air.

OTHER CONSTITUTIONS

U.S.A.—Art. I Sec. 8 (10) of the United States Constitution says—

"The Congress shall have power : To define and punish piracies and felonies committed on the high seas and offences against the law of nations."

Under this power, Congress is competent to enact laws punishing pirates, although they may be foreigners and may have committed no particular offence against the United States, provided the piracy is committed on the high seas.[23]

INDIA

Piracy'.—(i) *In International Law.*—Speaking generally, piracy is an act of robbery or depredation committed on the high seas'. Actual robbery is not an essential element of the offence and a frustrated attempted to commit piracy is also treated as piracy in international law.[24] It is the right and duty of public vessels of every nation to suppress pirates and pirates may be captured on the sea or in territorial waters, or in territory unappropriated by any State. The pirate loses his nationality and the pirate vessel loses the protection of her national flag, by reason of the offence and thus becomes liable to seizure and punishment at the hands of any State.[25]

"Piracy is the commission of those acts of robbery and violence upon the sea, which if committed upon land would amount to felony. They are the common enemy of all and the law of nations gives to every one the right to pursue and exterminate them without any previous declaration of war".[21]

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21. Wharton's Law Laxicon.
22. The title of this Act has, by s. 25 of the Passports Act, 1967, been substituted by the words—'The Passport (Entry into India) Act, 1920'.
23. *United States* v. *Palmer*, (1818) 3 Wh. 630.
24. *Re Piracy Jus Gentium.*, (1934) A.C. 586.
25. Pitt Cobbett, 1947, Vol. I, p. 518.

(ii) *In Municipal Law.*—Piracy is also treated as an offence in municipal law. In England, however, by statute, the definition of piracy has been extended beyond that of simple robbery or depredation on the high seas,—so as to include acts of hostillity committed on the high seas, against natural-born British subjects, under colour of commission from any foreign Power ; adhering on the sea to the King's enemies on the part of natural-born British subjects, and the like. But in so far as the meaning of piracy is extended by municipal law beyond the limits of international law, it is not justiciable except in the State to which the offender belongs, or in the State against which the offence was committed.[26]

Art. I, Sec. 8 (10) of the Constitution of the United States empowers the Congress not only to punish but also to define piracies and felonies on the high seas. Under this power, Congress has declared a number of acts to be piracy though they are not so according to international law, e.g., slave trade.[27]

It was under this power that the United States Congress made it a crime to counterfeit the notes and securities of foreign Governments.[28] "The law of nations requires every national Government to use 'due diligence' to prevent a wrong being done within its dominion to another Nation with which it is at peace, or to the people thereof ; and because of this the obligation of one Nation to punish those who, within its jurisdiction, counterfeit the money of another nation, has long been recognized."[28]

Though the power to 'define' piracies and offences against the law of nations is not expressly mentioned in the present Entry of our Constitution,—the generality of the Entry suggests that it would include the power of definition as well as punishment.

'High seas'.—The high seas means the waters of the sea beyond the three-mile limit of 'territorial waters' (see Vol. A, p. 160).

22. Railways.

OTHER CONSTITUTIONS

(A) *Australia.*—Sec. 98 of the Constitution Act provides that

"the power of parliament to make laws with respect to trade and commerce [Sec. 51 (i)] extends to . . . . railways the property of any State."

Sec. 51 (xxxii) gives the Commonwealth power to legislate with respect to—

"The control of railways with respect to transport for the 'naval and military' purposes of the Commonwealth."

Sec. 51 (xxxiii), on the other hand, gives the Commonwealth the power to legislate for—

"The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State."

Sec. 51 (xxxiv), again gives the Commonwealth power over—

"Railway construction and extension in any State with the consent of that State."

(B) *Canada.*—S. 92 (10) of the B.N.A. Act gives to the Dominion Parliament power to legislate in relation to—

". . . . . Railways . . . . . connecting the Provinces or extending beyond the limits of the Province."

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26. Pitt Cobbett, 1947, Vol. I, 316.
27. Willoughby, Constitutional Law (II) p. 1122 ; Willis, p. 279.
28. *United States* v. *Arizona*, (1887) 120 U.S. 479.

The jurisdiction over Railways is thus divided,—the Provincial Legislature being confined to intra-Provincial Railways only. It has also been held that even though the railway system be inter-Provincial, the Dominion Parliament shall have jurisdiction only over those works and undertakings which form part of the railway undertaking in the strict sense. Thus, an inter-Provincial system of hotels which are of service to an inter-Provincial railway but are no part of the railway undertaking, would be a Provincial and not a Dominion subject.[29]

(C) Government of India Act, 1935.—Item 20 of List I was—

"Federal railways ; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers ; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers."

INDIA

'Railways'.—This Entry gives to the Union exclusive jurisdiction to legislate regarding all railways, regarding all matters,—irrespective of their ownership or whether they are major or minor railways,—in order to ensure uniformity as between railways in the matter of rates, charges, responsibility and the like. (The present Entry thus differs from Item 20 of List I of the Act of 1935).

Analogous Provisions.—See Art. 366 (20) ; Art. 257 (3).

Existing Law.—Indian Railways Act (IX of 1980) ; Indian Railways Board Act (IV of 1950) ; Railways [Local Authorities Taxation] Act (XXV of 1941] ; Indian Railway Companies Act (X of 1895).

Legislation by Parliament.—Railway Stores (Unlawful Possession) Act, 1955 ; Railways Companies (Emergency Provisions) Act (LI of 1951) ; Barsi L. R. Company (Transferred Liabilities) Act, 1954 ; Railways Protection Forces Act, 1957 ; Railway Property (Unlawful Possession) Act, 1966.

23. Highways declared by or under law made by Parliament to be national highways.

OTHER CONSTITUTIONS

(A) *U.S.A.*—The Federal Government exercises its power over national highways by virtue of the 'commerce clause' [Art. I (8)].

(B) *Canada.*—S. 92 (10) of the B.N. Act says—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects hereinafter enumerated ; that is to say—

Local works and undertakings other than such as are of the following classes :

(a) . . . . . .

"works and undetakings connecting a Province with other Province or Provinces or extending beyond the limits of a Province ; . . . . . and such works as, although situate within a Province, are declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or or more Provinces."

It has been held that roads beings 'local works', the Provincial Legislature has the exclusive power to legislate in respect of them, but not so as to interfere with works or undertakings which connect one province with another.[30] Over such inter-Provincial undertakings, e.g., a bus service plying between two

29. *Canadian Pacific Ry.* v. *A.-G. for Br. Columbia,* (1950) A.C. 122.
30. *A. G. Ontario* v. *Winner,* (1954) A.C. 541.

Provinces, the Dominion has exclusive power, as if the excepted matters in cls. (a)-(c) of s. 92 (10) were inserted in s. 91.[30] Of course, the Provinces have the power of regulation of road traffic and may impose restrictions directed to the proper use of such roads, such as those connected with vehicle loads and the like[31] but in any case of conflict between the two jurisdictions, the question that has to be answered is whether the Provincial legislation is, in its pith and substance, a traffic regulation or an interference with an undertaking connecting between Province and Province. If it is the latter, the legislation must fail.[30]

In short, in Canada, each Province has exclusive jurisdiction over a highway in so far as it lies within its territory, but the legislative power over inter-Provincial undertakings plying over the highways is vested in the Dominion Parliament.

(C) *Government of India Act, 1935.*—There was no item in List I of that Act, corresponding to the present Entry. All roads came under Entry 18 of List II.

INDIA

'National highways'.—While roads form a State subject under Entry 13, List II, such highways as would be declared to be national highways by the Union Parliament, would form an exception to the entry in the State List, and form a Union subject.

Entries 23, List I and 56, List II.— Entry 56 of List II does not exclude national highways or waterways. Hence, taxes on passengers and goods carried by national highways or national waterways fall within State jurisdiction under Entry 56 of List II.[32]

Entries 23, List I, and 59, List II.—Use of a national highway is not immune from road tolls levied by a State because the power to levy 'tolls' is an exclusive State subject under Entry no. 59 of List II.[33]

'Highway.'—A highway is a way along which the public generally has a right to pass.[34]

Analogous Provision.—See Proviso to Art. 257 (2).

Legislation by Parliament.—National Highways Act, 1956.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels ; the rule of the road on such waterways.

Legislation by Parliament.—National Waterways Act, 1982.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters ; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

OTHER CONSTITUTIONS

(A) *U.S.A.*—(a) Art III (2) of the Constitution says that the judicial power of the United States shall extend to all cases of . . . . 'maritime jurisdiction.'

31. *R* v. *Arrow Transit Lines*, (1955) 2 D.L.R. 351 (Can.).
33. *Girdharlal* v. *State*, A. 1969 J. & K. 113 (*120*).
32. *International Tourist Corpn.* v. *State of Haryana*, A. 1981 S.C. 774 (para. 8).
34. *Tomlin's Law* Dictionary.

From this, it has been held that the Federal Government has jurisdiction over all voyages which are maritime in character and on navigable waters, even though the voyage is confined wholly within the limits of a single State.[35] All navigable waters have thus come under the federal control even though the provision of the Constitution, quoted above, refers to judicial power only.

Under the above power, together with the commerce power, the Federal Government controls the merchant marine and aids navigation by providing lighthouses, buoys, life-saving patrols, etc. It has also provided for the safety and protection of seamen, by federal legislation.

(b) Since 'commerce' has been interpreted to include navigation,[36] Congress draws its power over navigation also from the 'commerce clause'.

But the nature of authority derived from the two clauses is different : Under the clause relating to admiralty and maritime jurisdiction, the authority is (though not exclusively) to fix the law governing transactions with reference to or upon navigable waters. Under the Commerce clause, the authority is to determine the conditions under which the waters shall be navigated and to protect or to increase their navigability.[37] The power of Congress to determine what is obstruction to navigation is conclusive.[38]

The 'Commerce Clause' also gives the Federal Governemnt dominion over the navigable waters of the United States[39] and by virtue of this power Congress has enacted the Federal Power Act, to be administered by the Federal Power Commission, for the development of the country's water resources consisting of the navigable rivers.[40]

(B) *Australia.* – Sec. 98 of the Constitution Act says –

"The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping . . . . . "

The power of Parliament over trade and commerce is confined to "trade and commerce" with other countries and among the States [See. 51 (i)]. Hence, the combined effect of Sec. 51 (i) and Sec. 98 is to endow the Commonwealth Parliament, not with a substantive power to deal with navigation and shipping at large, but with power to deal with the subject only in so far as it is relevant to inter-State and foreign trade and commerce.[40]

Intra-State shipping is a State subject.[41]

(C) *Canada.* – Sec. 91 (10) of the Br. N. A. Act gives the Dominion Parliament exclusive power in relation to –

"Navigation and shipping."

This power means the right to prescribe rules and regulations for vessels navigating the waters of the Dominions ;[42] to prescribe the law of the road, the lights to be carried, evidence of ownership, transmission of interest ; to declare what shall be deemed an interference with navigation.[43]

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35. *The Lottawanna*, (1874) 21 Wall. 558.
36. *Gibbons* v. *Ogden*, (1814) 9 Wh. 1.
37. *Gilman* v. *Philadelphia*, (1865) 3 Wall. 713.
38. *U.S.* v. *Chandler Water Power Co.*, (1913) 229 U.S. 53.
39. *City of Tacoma* v. *Taxpayers*, (1957) 357 U.S. 320 (*334*).
40. *Newcastle Steamship Co.* v. *A.-G. for Commonwealth*, (1921) 29 C.L.R. 357.
41. *Huddart Parker* v. *Moorehead*, (1908) 8 C.L.R. 330 (*352*).
42. Lefroy, Canadian Constitutional Law, p. 106.
43. *Fisheries Case*, (1898) A.C. 700 (*717*).

Sec. 92 (10) curbs out an exception from the above exclusive power of the Dominion, in favour of the Provincial Legislature –

"Local works and undertakings other than . . . . lines of steamships between the Province and any British or foreign country."

So, the Province is competent to incorporate Provincial navigation companies, the operations of which are limited to the Province,[44] and intra-Provincial shipping is thus excluded from the Dominion power.

(D) *Government of India Act*, 1935. – Item 21 of List I was –

"Maritime shippig and navigation, including shipping and navigation on tidal waters . . . ."

INDIA

'Shipping and navigation in national waterways' – While Entry 24 of List I gives the Union Parliament exclusive jurisdiction in respect of shipping and navigation in those inland waterways which shall be declared by it to be 'national waterways', Entry 32 of List III makes shipping and navigation in other inland waterways a concurrent subject. Both these Entries, however, are confined to shipping and navigation by 'mechanically propelled vessels'. Navigation on inland waterways by means of any other kind of vessel, is a State subject under Entry 13 of List II.

Shipping and navigation on 'tidal waters', on the other hand, is an exclusive Union subject (Entry 25, List I).

'Ship'. – A ship, as defined by Sec. 3 (51) of the General Clauses Act (X of 1897), includes –

"every description of vessel used in navigation not exclusively propelled by oars."

'Shipping' includes every kind of business relating to ships, and may include ship building.

'Navigation'. – Navigation is "the art of sailing at sea, also the manner of trading".[45]

'Mercantile Marine'. – This means the vessels of a country engaged in carrying trade with foreign countries as well as between different parts of its own territory.

Existing Laws. – Inland Steam Vessels Act (I of 1917) ; Obstruction in Fairways Act (XVI of 1881) ; Shore Nuisances (Bombay and Kolaba) Act (XI of 1853).

Legislation by Parliament. – Control of Shipping (Continuance) Act (9 of 1958) ; Merchant Shipping Act (44 of 1958).

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

OTHER CONSTITUTIONS

(A) *Australia*. – Under Sec. 51 (vii) of the Constitution Act, 1900, the Commonwealth Parliament has the power to legislate with respect to –

"Lighthouses, lightships, beacons and buoys."

This power includes the power of imposition and collection of dues to be paid by the owners of masters of ships which pass the lights, signals, etc., and which derive benefits therefrom.[46]

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44. *Macdougall* v. *Union Navigation Co.*, (1887) 21 L.C.L. 63.
45. Tomlin's Law Dictionary.
46. Quick and Garran, Annotated Constitution, p. 565 ; Wynes, Legislative and Executive Powers, 3rd Ed., p. 181.

(B) *Canada*.– Sec. 91 (9) of the Br. N. A. Act relates to–

"Beacons, buoys, lighthouses . . . . . "

(C) *Government of India Act*, 1935.– Item 25 of List I of that Act was the same as the present Entry.

INDIA

'Lighthouse'.– A lighthouse is usually a tower, containing sigal-lights for the guidance of vessels at night, and to warn them off from dangerous coast, shoals, etc. Under the English Merchant Shipping Act, the term includes other similar beacons and signals–

"any floating, and other light exhibited for the guidance of ships and also any sirens and another description of fog signals, and also any addition to a lighthouse of any improved light or any siren or any description of fog signal."

The present entry follows the above definition of the English Act.

Existing Laws–Indian Lighthouse Act (XVII of 1927).

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

OTHER CONSTITUTIONS

Government of India Act, 1935.– Item 22 of List I was subtantially the same as the present Entry.

INDIA

'Major ports'.–This Entry gives to the Union only a limited power as regards ports–(a) It is confined to 'major ports' (see Art. 364) ; (b) It is restricted to the specified matters only, viz., 'delimitation, constitution and powers of port authorities therein'.

Other ports will come within Entry 31 of List III.

'Declared by law'.–S. 3 (8) of the Indian Ports Act (XV of 1908) says–

"'major port' means any port which the Central Government may by notification in the Official Gazette declare, or may under any law for the time being in force have declared, to be a major port."

Under the above power, the Central Government declared the following ports to be major ports–Calcutta, Bombay, Madras, Cochin.

Port.–"A port is a harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken."

"A port is a Haven and somewhat more,–

1. It is a place for arriving and unloading of ships or vessels :
2. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege :
3. It hath Ville or City or Borough, that is the campus portus for the receipt of mariners and merchants, and the securing and vending of their goods, and victualling their shops".[48]

Existing Laws.–Calcutta Pilots Act (XII of 1859) ; Calcutta Port (Pilotage) Act (XXXIII of 1948) ; Indian Ports Act, 1908.

28. Port quarantine, including hospitals connected therewith ; seamen's and marine hospitals.

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47. Tomlin's Law Dictionary.
48. *Foreman* v. *Free Fishers*, (1869) 4 H.L. 266.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Congress has no express power under the Constitution with respect to quarantine. Hence the States retain their power to legislate over this matter subject to federal legislation as may be made by Congress under its 'commerce power'.[49]

(B) *Canada.*—The Dominion Parliament has exclusive power (Sec. 91 (11)] over—

"Quarantine and the establishment and maintenance of marine hospitals."

(C) *Australia.*—Sec. 51 (ix) makes

"Quarantine"

a federal subject of legislation.

(D) *Government of India Act, 1935.*—Item 18 of List I of that Act was the same as the present Entry.

INDIA

'Quarantine'.—The term is thus explained in Webster's International Dictionary :

"It is now comprehensive enough to cover any forced stopping of travel, or of transit, or of communication, as well as compulsion to remain at a distance or in a given place, without intercourse, on account of any malignant, contagious or dangerous disease on land as well by sea."

"The prevention of disease is the essence of quarantine law".[50] It extends to the enactment provisions for inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, and regulation of vessels, persons, goods, things, animals, or plants, so far as any or all of these matters may be directed to the prevention of the introduction or spread of disease.[51]

Analogous Provision.—While the present Entry deals with quarantine at ports, Entry 81 of the same list deals with quarantine on State borders or inter-State quarantine.

29. Airways ; aircraft and air navigation ; provision of aerodromes; regulation and organisation of air traffic and of aerodromes ; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

OTHER CONSTITUTIONS

(A) *U.S.A.*—The Federal Government has derived power over transportation by air from the 'commerce clause' [Art. 1 (8)]. It gives Congress power over inter-state air traffic but control of intra-state traffic has also been assumed under the theory of 'burden' on inter-state commerce.[53]

The principal laws enacted by Congress for regulation in this sphere are the Air Commerce Act, 1926 ; the Civil Aronautics Act, 1938. Airlines Deregulation Act, 1978.

(B) *Canada.*—The power to deal with aerial navigation throughout Canada has been held to belong to the Dominion Parliament, under Sec. 132 of the Br. N. America Act ; as well as Sec. 92 (10) (a) relating to—

49. Wynes, Legislative & Executive Powers, p. 135.
50. *Smith* v. *St. Louis Ry.*, (1901) 181 U.S. 255.
52. Wynes, Legislative and Executive Powers, p. 136.
53. *Neiswonger* v. *Goodyear Co.*, 35 F. (2d) 761.

"Other undertakings connecting the Provinces . . . . and extending beyond the limits of the Province".[54]

(C) *Government of India Act, 1935.*—Item 24 of List I covered the first part of the present entry—

"Airways . . . . . aerodromes."

INDIA

'Airways'.—This Entry makes legislation regarding air navigation, inland or foreign, an exclusive Union subject.

'Aerodrome'.—Sec. 2 (2) of the Indian Aircraft Act, 1934, says—

"'Aerodrome' means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircrafts, and including buildings, sheds, vessels, piers, and other structures thereon or appertaining thereto."

Territorial air. In International law, a claim to sovereignty over 'territorial air', i.e., the air space over the territory of a State has come to be recently asserted by State, on the analogy of the principle relating to "territorial waters" (Vol. I, p. 65). Thus, by the United Nation Interim Agreement on International Civil Aviation which became effective on 6th June, 1945, every State is stated to have complete and exclusive sovereignty in the air space above its territory, including the air space over its territorial waters (Art. 8).

Existing Laws.—The Indian Aircraft Act (XXII) of 1934 provides for the control of manufacture, possession, use, operation, sale, import and export of aircraft.

Legislation by Parliament.—International Air Ports Authority Act, 1971, National Air Ports Authority Act, 1985.

30. Carriage of passengers and goods by railway, sea or air or by national waterways in mechanically propelled vessels.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 26 of List I was—

"Carriage of passengers and goods by sea or by air."

INDIA

'Carriage by railway sea or air'.—This Entry deals with carriage of passengers and goods by railway, sea or air, or by national waterways by 'mechanically propelled vessels'.

Carriage of passengers and goods by roads comes under the State List [Entry 19, List II] ; while carriage by inland waterways comes within the Concurrent list [Entry 32, List III].

'Mechanically propelled vessels' themselves come under Entry 35 of List III.

Existing Laws.—Indian Carriage by Air Act (XX of 1934); Indian Carriage of Goods by Sea Act (XXVI of 1925); Carriers Act (III of 1865); Indian Railways Act (IX of 1890).

Legislation by Parliament.—Inland Air Travel Tax Act, Railway Passengers Fares Tax Act.

31. Posts and telegraphs : telephones, wireless, broadcasting and other like forms of communication.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. I, Sec. 8(7) empowers Congress to establish—'Post-offices and Post-roads.'

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54. In re Control of Aeronautics, (1932) A.C. 54.

This power has been most liberally interpreted to include the powers of – (a) organization of the Postal Department and appointment of its officers ; (b) determination of the places and premises for post-offices, the routes over and the means by which the mails shall be carried ; (c) manufacture of stamps ; (d) punishment of crimes which endanger the security of the mails[55] ; (e) establishment of Government monopoly in the carriage of mail[56] ; (f) decision of what matters shall be carried in the mails and exclusion of indecent, injurious and fraudulent matters[57]; classification of mail matter and offering special advantages to particular classes, e.g., newspapers, in the interest of the public welfare[58]; (g) all steps for the safety and prompt delivery of the mails.[57]

But in exercise of its postal power to regulate the use of the mails, Congress cannot enforce a requirement which lies outside its constitutional province.[59]

The power of Congress over telegraph, telephone and wireless[60] has been deduced from the above power as well as from the 'commerce power'.

(B) *Australia.* – Sec. 51 (v) of the Constitution Act gives the Commonwealth Parliament power with respect to – 'Postal, telegraphic, telephonic and other like services'. It has been held that the above power covers wireless telegraph and broadcasting.[61]

(C) *Canada.* – Sec. 92 (10) of the Br. N. America Act gives the Dominion Parliament power over –

"Telegraphs and other works and undertakings connecting the Province with other Provinces or extending beyond the limits of the Province."

It has been held that these works and undertakings come within the jurisdiction of Parliament only if they are inter-Provincial.[62] Intra-Provincial communications, works and undertakings are within the jurisdiction of the Provinces.

It has also been held that the above two clauses empower the Parliament to provide for or control the carrying of mails by air[63] or to control broadcasting by radio".[64]

S. 91 (5) gives the Dominion Parliament exclusive power over the 'Postal services'.

(D) *Government of India Act, 1935.* – Item 7 of List I included the subject of the present Entry.

INDIA

'Other like forms of communication'. – Under this Entry would come the control of manufacture and licensing of sound amplifiers but not the control of their use in the interests of health and tranquillity, which would fall under Entries 1 and 6 of List II.[65]

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55. *U.S.* v. *Bullington*, 170 Fed. 121 ; *Illinois R. Co.* v. *Illinois* , (1896) 163 U.S. 142.
56. *U.S.* v, *Kochersperger*, 9 Am. Law Rep. 145.
57. Ex parte *Jackson*, (1877) 96 U.S. 727 ; In re *Rapier*, (1892) 143 U.S. 110.
58. *Lewis Publishing Co.* v. *Morgan*, (1913) 229 U.S. 288.
59. *Electric Bond & Share Co.* v. *Securities & Exchange Commn.*, (1938) 303 U.S. 419.
60. *Pensacola* v. *W.U. Tel. Co.*, (1877) 96 U.S. 1.
61. *King* v. *Brislan*, (1935) 54 C.L.R. 262.
62. *C.P.R.* v. *A.-G., Br. Columbia*, (1950) A.C. 122.
63. *James* v. *Commonwealth*, (1936) A.C. 587 (614).
64. In re Radio Communication, (1932) A.C. 304.
65. *State of Rajasthan* v. *Chawla*, A. 1959 S.C. 544 (546).

Existing Laws.—Indian Post Office Act (VI of 1898) ; Indian Telegraph Act (XIII of 1885) ; Indian Wireless Telegraphy Act (XVII of 1933) ; Post Office Certificates Act (XVIII of 1917).
Legislation by Parliament.—Telegraph Wires (Unlawful Possession) Act (LXXIV of 1950).

32. Property of the Union and the revenue therefrom, but as regards property situated in a State[66] . . . . subject to legislation by State, save in so far as Parliament by law otherwise provides.

Scope of Entry 32 of List I. On an analysis of the entry, it emerges that[11a] :

1. The Parliament can legislate in respect of property of the Union and revenue therefrom regardless of whether the property is situated in Union Territory or in a State.

2. But as regards the property situated in a State the property will be subject to legislation made by the State[12] subject to the rider which follows :

3. While the State can legislate in respect of Union property situated in a State, with regard to such legislation in respect of the Union property Parliament can enact a legislation in respect of the property belonging to the Union of India and the revenue therefrom and in that event the legislation enacted by the Parliament will prevail as against the law enacted by the State.[67]

4. The Entry is wide enough to cover *all* legislation pertaining to the property of the Union, including legislation for the eviction of unauthorised occupants from such property.[67]

'Property of the Union.' 1. See under Arts 285 ; 294 ; 296 ; 297 ; 298(2).

2. This expression is wide enough to include all kinds of property belonging to the Union Government, but not the property of any 'Government Company'[11a], even though wholly owned or controlled by the Government.[68]

'Property'. This word is of the widest condition, including not merely land, buildings and other immovable properties but also all kinds of rights and interests in tangible and intangible properties.[68]

'Save . . . . as Parliament by law otherwise provides'.

1. These words mean that though ordinarily the State Legislature is competent to legislate in respect of Union property situated in a State, the law made by the State shall give way in so far as the Union Parliament makes a law occupying the field.[67] This would not be a case of repugnance between the provisions of the two laws but a case of deprivation of the legislative power of the State by the Union Parliament by exercising its exclusive power under List I, e.g., under Entry 54 of List I.[69]

2. If, however, Parliament does not legislate on the subject, or the law made by Parliament does not occupy the same field as that of the State law,[11d] both will co-exist.[70]

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66. The words 'specified in Part A or Part B of the First Schedule' omitted by the Constitution (Seventh Amendment) Act, 1956.
67. *Saiyada* v. *Hindustan Steel,* A. 1989 S.C. 406 (para. 10).
68. *A. & S. Services* v. *Union of India*, (1988) 4 S.C.C. 324 (para. 2,13).
69. *Maria* v. *Dy. Collector,* A. 1987 Bom. 105 (para. 21) D.B.
70. *State of Orissa* v. *Tulloch,* A. 1964 S.C. 1284.

Entries 32 of List I and 18 of List II.– 1. Entry 18 of List II relates to the relationship of landlord and tenant and land tenures relating to vacant lands and would not cover tenancy of houses and buildings situate on property of the Union Government, which comes under Entry 32 of List I.[11a]

2. Conversely, by reason of this Entry, Parliament has power to legislate with respect to agricultural land belonging to the Union even though the State Legislature otherwise has exclusive jurisdiction over such lands, under Entry 18 of list II.[71]

3. The State Legislature shall have the power to legislate over property situate within the State, subject to legislation by Parliament.[71]

Entries 32 and 97 of List I.– 1. In case legislation for the eviction of unauthorised occupants be not covered by Entry 32, it would be supported by Entry 97 of List I.[71]

2. Property belonging to a Government Company may not be 'property of the Union' but may come under Entry 97 of List I.[67]

Entries 32 of List I and 45 of List II. Entry 45 of List II authorises the State Legislature to assess land revenue on agricultural land belonging to the Union.[69]

Existing Laws.– Government Buildings Act (IV of 1899); Government Grants Act (XV of 1895).

Legislation by Parliament.– Public Premises (Eviction of Unauthorised Occupants) Act, 1971.[11b] The National Highways Act (48 of 1956) vests all national highways in the Union.

33. *Omitted.*[72–100]

[See under Entry 42 of List II, *post*].

34. Courts of Wards for the estates of Rulers of Indian States.

'Courts of Wards for estates of Rulers'.– This Entry forms an exception to the general provision in Entry 22 of List II.

35. Public debt of the Union.

OTHER CONSTITUTIONS

(A) *Australia.*– See 51 (iv) of the Constitution Act gives the Commonwealth Parliament power to make laws with respect to–

"Borrowing money on the public credit of the Commonwealth".

(B) *Government of India Act, 1935.*– Under Entry 6 of List I,–

"Public debt of the Federation" was an exclusive federal subject."

INDIA

'Public debt'.– For the borrowing power of the Union and the States, see Arts. 292-3, *ante*.

Analogous Provision.– Entry 43 of List II makes 'Public debt of the State' a State subject.

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71. *Hari Singh* v. *M.E.O.* A. 1972 S.C. 2205.

72–100. Omitted by the Constitution (Seventh Amendment) Act, 1956.

Existing Law.—The Public Debt (Central Government) Act (XVIII of 1944); Indian Securities Act (X of 1920); Scheduled Securities (Hyderabad) Act, 1949.

[See further, under Entry 43 of List II.]

36. Currency, coinage and legal tender; foreign exchange.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. I, Sec. 8 (5) of the Constitution authorises Congress to "coin money, regulate the value thereof", while Art. I, Sec. 10 (1), forbids the States to "coin money". The right to issue *paper money* has been held to follow from the power to 'borrow'.[1–14]

Under the present power, Congress may restrain the circulation, as money, of any notes not issued by its own authority,[15] *e.g.*, by laying a prohibitive tax on notes issued by banks chartered by States.[15] It can compel citizens to hand over their gold in return for paper money,[16] abolish the 'gold clause' in private contracts;[17] pay interest on its bonds by devalued currency.[18]

As to legal tender, the Constitution makes no provision save in Art. I, Sec. 10 (1), forbidding States to

"make anything but gold and silver coin a tender in payment of debts."

(B) *Australia.*—These subjects are within the jurisdiction of the Commonwealth Parliament, under Sec. 51 (xii) of the Commonwealth of Australia Act, which relates to—

"Currency, coinage and legal tender."

while item (xiii) of the same section confers similar power as regards—

"The issue of paper money."

The power is concurrent [Sec. 115], subject to Sec. 109,

(C) *Canada.*—Under Sec. 91 (14) & (20) of the Br. North America Act, 'currency, and coinage' and 'legal tender' are within exclusive competence of the Dominion Legislature.

(D) *Government of India Act, 1935.*—Entry 5 of List I was—

"Currency, coinage and legal tender."

INDIA

'Currency'.—Currency, according to Quick & Garran, means--

"the acceptance, reception, passing or circulation from hand to hand, from person to person, of metallic money, or of Government or bank notes as substitute for metallic money."

'Coinage'.—Coinage is 'the act or process of converting metal into money for circulation'.[19]

'Legal Tender'.—As to what coins and paper currency are legal tender in India, under existing enactments,--see Secs. 11-15 of the Indian Coinage Act (III of 1906),

The currency and legal tender powers would enable Parliament to deny the quality of legal tender to foreign coins, to punish the offence of counterfeiting not only Indian coins, but also foreign coins and notes.[19]

1–14. The Legal Tender Cases, (1871) 12 Wall. 457.
15. *Veazie Bank* v. *Fanno*, (1870) 8 Wall. 533.
16. *Nortz* v. *U.S.*, (1935) 294 U.S. 317.
17. *Norman* v. *Baltimore R. R.*, (1935) 294 U.S. 350.
18. *Perry* v. *U.S.*, (1935) 294 U.S. 330.
19. Wynes, Legislative & Executive Powers, pp. 140-2.

'Foreign Exchange'.—This power includes only the power to control foreign exchange but also to acquire it for the betterment of the economic stability of the country,[20] e.g., by promoting export.[20]

Foreign exchange has been defined in the Foreign Exchange Regulation Act (VII of 1947) as follows :

"'Foreign exchange' means foreign currency and includes all deposits, credits and balances payable in any foreign currency, and any draft, travellers' cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency."

Existing Laws.—Indian Coinage Act (III of 1906); Bronze Coin (Legal Tender) Act (XXII of 1918); Metal Tokens Act (I of 1889).

Legislation by Parliament.—Foreign Exchange Regulation Act, 1973; Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.

37. Foreign loans.

'Foreign loans'.—See under Arts. 292-3, *ante*.

38. Reserve Bank of India.

INDIA

'Reserve Bank of India'.—The Reserve Bank of India, established by the Reserve Bank of India Act (II of 1934), functions as the 'Central Bank' of India and has two separate Departments,—the Issue Department and the Banking Department. In its Issue Department, it has a complete monopoly of issue of the paper currency, and is under an obligation to convert the different forms of currency into notes of smaller denominations or coins. In its Banking Department, it controls the credit system of the country, by the purchase and sale of securities and sterling to maintain the sterling exchange rate as well as to maintain the internal rate of interest, by making loans and advances to banks and local authorities, and by controlling and inspecting books of account of other Banks under the Banking Companies Act. The Bank shall also buy or sell foreign exchange of a value exceeding two lakhs of rupees. It is however prohibited from competing with other banks by engaging in trade or having a direct interest in any commercial or industrial undertaking, from allowing interest on deposits, and in some other specified ways. By the Reserve Bank (Transfer to Public Ownership) Act (LXII of 1948), the Reserve Bank has been transformed from a private shareholders' bank into a State-owned bank.

Existing Laws.—Reserve Bank of India Act (II of 1934) ; Reserve Bank (Transfer to Public Ownership) Act (LXII of 1948).

Legislation by Parliament.—Reserve Bank of India (Amendment and Miscellaneous Provisions) Act (LIV of 1963).

39. Post Office Savings Bank.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Postal savings business is carried on by the Federal Post Office Department under its Postal power (Art. I, s. 8 (7)].

20. Krishna Sugar Mills v. Union of India, A. 1959 S.C. 1124.

(B) *Government of India Act, 1935.*—The present subject was included in Item 7 of List I.

Existing Laws.—Government Savings Bank Act (V of 1873).

40. Lotteries organised by the Government of India or the Government of a State.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 48 of List I was—

"State lotteries."

INDIA

'Lottery'.—A lottery is a distribution of prizes by lot or chance.[21] It embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value.[22] In law, the word embraces all schemes for the distribution of prizes by chance,[23-24] such as policy playing, gifts exhibitions, prize concerts, raffles at fairs etc. The essential elements are—(1) consideration; (2) prize; (3) chance. All three of these elements must be present to make a lottery.[23]

If the predominating factor in determining success be chance, it is lottery, even though a scintilla of skill may be invoked.[25] It is on this ground that cross-word puzzle competition[26] and competition for forecasting the result of football matches, have been held to be 'lotteries'.

'Lotteries'. Lotteries organised by Government come under the present Entry; all other lotteries will come under the general Entry 34 (betting and gambling) in List II.[27-28]

Entries 40 of List I and 34 of List II. 1. Lotteries organised by the Government of India or of a State has been taken out from the legislative field relating to lotteries and made a subject within the exclusive competence of Parliament.[28] Hence, no State Legislature can make a law relating to a Government lottery.

2. But since Art. 298(b) empowers a State to carry on a trade or business by virtue of its executive power, subject to legislation by Parliament in the case of a trade or business with respect to which the State Legislature has no power to legislate, it follows that in the absence of a law made by Parliament relating to Government organised lottery, any State may organise and conduct a lottery by virtue of its executive power to carry on a trade or business.[28] Such power is not subject to the executive power of the Union or of any other State.[28]

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21. *Taylor* v. *Smethen*, (1833) 11 Q.B.D. 207.
22. *U.S.* v. *Wallis*, 58 Fed. 942.
23. 34 American Jurisprudence, p. 647.
24. Halsbury, Hailsham Ed., Vol. XV, p. 525.
25. *Moore* v. *Elphick*, (1945) 2 All E.R. 155.
26. *Coles* v. *Odhams Press*, (1936) 1 K.B. 416.
27. *State of Bombay* v. *Chamarbaugwalia*, A. 1956 Bom. 1 (6) ; *R.M.D.C.* v. *State of Mysore*, A. 1962 S.C. 594 (599).
28. *Anraj* v. *State Maharashtra*, A. 1984 S.C. 781 (para. 5).

3. Sale or distribution of a lottery ticket, not organised by any Government but by some other person or body, would not fall under Entry 40 of List I but would come under Entry 34 of List II.[29] Hence, a State Legislature has the exclusive competence to regulate the sale or distribution, within its State, of lottery tickets issued by private persons or institutions belonging to another State.[29] That State of origin of the lottery tickets has no competence to ban the sale of such tickets in another State.[29]

41. Trade and commerce with foreign countries ; import and export across customs frontiers; definition of customs frontiers.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Under Art. I, Sec. 8 (3) of the Constitution, the power

"to regulate commerce with foreign nations,"

is a federal subject of legislation.

The control of Congress over foreign commerce is in effect wider than that over inter-State commerce though both powers are conferred by the same clause inasmuch as it has plenary authority over foreign relations and is, accordingly, entitled to grant special commercial privileges to a country by treaty or to lay a total or partial embargo upon a foreign commerce directly, or indirectly, by tariff legislation. Again, it has been held that the power over foreign commerce includes the responsibility and duty of—

"providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce."[30]

On the other hand, as regards inter-State commerce, Congress cannot prohibit the right of passage of persons and property from one State to another. But as a Sovereign State it has the right to exclude foreigners or their manufactures.[31] The United States are considered as a unit in all regulations of foreign commerce, but Congressional regulations of commerce among the several States must be equal and general in their provisions. It cannot impose an embargo upon one or some of them.[32]

The power of Congress over foreign commerce is, however, subject to the limitation imposed by Art. I, s. 9 (5)—

"no tax shall be laid on articles exported from any State."

Hence, Congress cannot impose a stamp duty on bills of lading, charterparties or policies or marine insurance for export of goods.[15] But in order to come within the above prohibition, the tax must be levied on the article by reason of its exportation.[33]

The exclusive power of Congress over external trade and commerce is strengthened by a corresponding prohibition imposed upon the States by Art. I, s. 10 (2)—

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; but the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

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29. *Bharati* v. *State of Maharashtra*, A. 1984 S.C. 1542.
30. *Crutcher* v. *Kentucky*, (1891) 141 U.S. 47.
31. Slaughter House Cases, (1872) 16 Wall. 36.
32. *Groves* v. *Slaughter*, 15 Pet. 449.
33. Wills, p. 374.

(B) *Australia*.--Under Sec. 51 (i) of the Australian Constitution Act, 1900, "trade and commerce with other countries . . . . ." is a federal subject of legislation.

A restriction upon States similar to that in Art. I, s. 10 (2) of the American Constitution is imposed by s. 112 of the Australian Constitution Act which says –

"After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth."

(C) *Canada*.–Sec. 91 (2) of the Br. N. America Act gives the Dominion Parliament power to legislate in relation to–

"The regulation of trade and commerce."

This clause thus covers both foreign and inter-State commerce.[34]

Under this clause together with cl. (25) ['naturalisation and aliens'] the Dominion Parliament has power to require a *foreign company* to take out a licence from the Dominion Minister, even though the company desires to carry on its business only within the limits of a single Province.[35]

Regulation of export[36] or import[37] is beyond the competence of the Provincial Legislature.

Though the power conferred upon the Dominion Parliament by s. 91 (2) is very wide, it has been held to exclude the regulation of intra-Provincial trade and commerce, which belongs to the Provinces exclusively, under the power relating to 'property and civil rights within the Province' [s. 92 (13)].[38] Owing to a liberal interpretation of the latter power, it has been held that under the power relating to trade and commerce, the Dominion cannot--(i) regulate trading transactions completed within a single Province;[39] (ii) regulate the financial practices of insurance companies;[40] (iii) prohibit trade combinations or regulate the supply and price of the necessities of life;[41] (iv) provide for compulsory investigation of industrial disputes;[42] (v) prohibit citizens from manufacturing and selling certain named substances, even if he manufactures them within a Province and sells only in that Province.[43]

(D) *Government of India Act, 1935*.–Item 19 of List I was–

"import and export across customs frontiers as defined by the Union Government.

INDIA

'Customs Frontiers'.–By a Notification of 1st April, 1937, Government of India defined 'custom frontier' as–

"the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of (British) India".[44]

Under the present Entry, this power of definition belongs to Parliament.

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34. Lefroy, Canadian Constitutional Law, p. 103.
35. *A.-G. for Canada* v. *A.-G. for Alberta*, (1916) A.C. 598 (597).
36. *Re* Sheep & Swine Marketing, (1941) 3 Dom. L.R. 569 (575) (Can.).
37. *A.-G. Ontario* v. *A.-G. Canada*, (1896) A.C. 348.
38. *Bank of Toronto* v. *Lamb*, (1887) 12 A.C. 557.
39. *A.-G. of Br. Columbia* v. *A.-G. of Canada*, (1937) A.C. 377.
40. *In re* Insurance Act of *Canada*, (1932) A.C. 41.
41. *In re* Board of Commerce Act, (1922) A.C. 191.
42. *Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396.
43. *Canadian Fed. of Agriculture* v. *A.-G. Quebec*, (1950) 4 Dom. L.R. 689 (P.C.).

'Import'. This Entry does not extend to the sale or possession of the article after it has been imported across the custom frontiers.[45]

As regards foreign liquors, the power to deal with their possession[46] or sale is governed by Entry 8 of List II, and not the present Entry.[45]

Existing Laws. – The Tea Act (XXIX of 1953) provides for the control of the export of tea from India. The Imports and Exports (Control) Act (XVIII of 1947, as amended) empowers the Central Government to prohibit or restrict import and export of any goods.

Legislation by Parliament. – The Customs Act, 1962 lays down the law relating to the import and export of goods from or to territories outside India, by land and sea, respectively.

Export-Import Bank of India, 1981. Antiquities & Art Treasures Act, 1972.

42. Inter-State trade and commerce.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Art. I, Sec. 8(3) lays down –

"The Congress shall have power to regulate commerce and among the several States."

This clause is known as the 'Commerce clause'.

Since the Constitution expressly confers upon Congress the power to regulate 'commerce among the States' it has been held, that by implication Congress is denied any power to interfere with the *internal* trade and business of the separate States, except as a necessary and proper means for carrying into execution some other power expressly granted or vested.[47] As to the exclusiveness of the federal power to legislate with respect to *inter-State* trade, it has been held –

(i) The Congressional 'commerce' power is necessarily exclusive whenever the subjects of it are national in character or admit only of one *uniform* system or plan of regulation. (b) Where the power of Congress is exclusive, the failure of Congress to make express regulations is deemed an indication of its will that the subject shall be left free from any restrictions or impositions.[48] (c) State laws can only be justified if within State police powers ; or in matters of a local nature, auxiliary to commerce, rather than a part of it.[48]

Again, by the application of the doctrine of 'Implied and Ancillary powers', the Supreme Court of the United States has used the inter-State commerce power of Congress [Art. 1, Sec. 8 (3)] as a most potent means of expression of the federal power.[49]

Thus, the power to regulate inter-State commerce includes the power to control all necessary *incidents* thereto[50] such as bills of lading,[51] contracts of sale and lease of property connected with inter-State commerce.[52] Again,

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44. Cf. *Emp.* v. *Dantes*, A. 1940 Bom. 307 (*310*).
45. *State of Bombay* v. *Balsara*, (1951) S.C.R. 682 (*694*).
46. *Kishori* v. *King*, A. 1950 F.C. 69 (*71*).
47. *U.S.* v. *De Witt*, (1824) 9 Wall. 41.
48. *Robbins* v. *Shelby County Taxing District*, (1887) 120 U.S. 489.
49. *Leisy* v. *Hardin*, (1890) 135 U.S. 100.
50. *Milling Co.* v. Bondurant, (1904) 196 U.S. 1.
51. *Almy* v. *California*, (1860) 24 How. 169.
52. *Caldwell* v. *Carolina*, (1903) 187 *U.S.* 622.

"The power of Congress to regulate commerce carries with it the power over all means and instrumentalities by which commerce is carried on".[53]

So, regulation of inter-State commerce means – (i) regulation of the instrument of transport, (ii) regulation of the goods that are in transit, (iii) regulation of the persons carrying on that commerce.

Formerly, the Supreme Court took the view that the commerce power enabled the Congress to regulate only transactions of 'commerce' but not activities other than commerce even though they might have substantial effect on inter-State commerce, e.g., a monopoly.[54] But, in recent years, the liberal interpretation of 'regulate', as well as 'commerce', has led to the result than anything which has a substantial effect on inter-State commerce may be regulated, e.g., labour relations, that might affect the free flow of such commerce,[55] an electric power plant which supplied its output to customers within the State but some of such customers were themselves engaged in inter-State commerce[56] ; child labour.[57] It has also been held that even inter-State commerce may be regulated, if necessary, in order to make effective regulation of intra-State rates to ensure a fair return,[58] and for this end rates may be reduced in some States and increased in others,[59] or some companies earning extra return may be compelled to contribute for advance loans to companies running below fair return.[60]

"Such regulation is not a forbidden invasion of State power merely because either its motives or its consequence is to restrict the use of articles of commerce within the State of destination . . . . It is on objection to the assertion of the power to regulate inter-State commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the States".[57]

(B) *Australia*. – Under Sec. 51 (i) of the Australian Constitution Act, 1900, the Commonwealth Parliament is competent to make laws with respect to –

"Trade and commerce with other countries, and among the States."

The words 'among the States' have been interpreted to mean 'intermingled with . . . . .'[61]

It has been held that, subject to Sec. 92, a State has concurrent power to legislate with respect to inter-State trade and commerce,[62] by reason of Sec. 109. The American doctrine of exclusiveness of the federal power over inter-State commerce has not been imported into Australia.[63]

S. 98 expressly provides that the above power of Parliament extends to –

"Navigation and shipping ; and to railways the property of any State."

Intra-State trade and commerce, on the other hand, is reserved exclusively to the State, by S. 107. Hence, Parliament cannot affect carriers engaged in intra-State trade through its power over navigation[64] or air navigation.[65]

(C) *Canada*. – Sec. 91 (2) of the British North America Act confers upon the Dominion Parliament exclusive legislative authority over –

"The regulation of trade and commerce."

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53. *Monongahela Bridge Co.* v. *U.S.*, (1893) 148 U.S. 312.
54. *U.S.* v. *Knight Co.*, (1895) 156 U.S. 1.
55. *National Labour Relations Board* v. *Jones*, (1937) 301 U.S. 1.
56. *Consolidated Edison Co.* v. *National Labour Relations Board*, (1938) 305 U.S. 197.
57. *U.S.* v. *Darby Lumber Co.*, (1941) 312 U.S. 100.
58. *Wisconsin* v. *Chicago*, (1922) 257 U.S. 563.
59. *New York* v. *U.S.* (1947) 91 L. Ed. 1083.
60. *Dayton-Goose R.R.* v. *U. S.*, (1924) 263 U.S. 456.
61. *Huddart Parker, Ltd.* v. *Moorehead*, (1908) 8 C.L.R. 330.
62. *James* v. *Commonwealth*, (1936) A.C. 578.
63. *Kerr*, Australian Constitution, p. 112 ; *Victoria* v. *Commonwealth*, (1942) 66 C.L.R. 488.

This does not mean, however, that the Dominion Parliament has power to regulate the intra-State or internal trade of a Province which comes under the Provincial power relating to 'property and civil rights in the province' [s. 92]. Practically, therefore, the above clause is confined to 'inter-provincial' trade and commerce only. Thus—

> It includes political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and may, perhaps, include *general* regulations of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a *particular* business or trade, such as the business of insurance, *in a single Province*[66].

Nor does the importance of the particular trade or business affect the matter; when the British N. America Act has taken such forms of business out of Provincial jurisdiction [Sec. 92 (13) and (16)], as in the case of 'banking' [Sec. 91 (15)], t has done so by express words. [See further under Entry 41, *ante*.].

(D) *Government of India Act, 1935.*—There was no item in that Act corresponding to the present Entry of the Constitution, relating to inter-State trade and commerce. The result was that though foreign trade was beyond the legislative competence of a Provincial Legislature, inter-State trade and commerce was not. By inserting the present Entry, the makers of *our* Constitution have deliberately assigned inter-State trade and commerce, like foreign trade, to the exclusive care of Parliament.

INDIA

Distribution of legislative power with respect to Trade and Commerce in India. While foreign trade and commerce is dealt with in Entry 41 of List I, the legislative power as regards trade and commerce within a State or between different States of India, are dealt with in 3 other Entries of the 7th Schedule.

> Entry 42 of List I, is—"Inter-State trade and commerce".
>
> Entry 26 of List II, is—"Trade and commerce within the State, subject to the provisions of Entry 33 of List II".
>
> Entry 33 of List III, is—"Trade and commerce in, and the production, supply and distribution of, the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest . . . . "

Since the three entries are to be read together, and under Art. 246, the State and Concurrent powers are to be read subject to the exclusive power of Parliament with respect to any matter of List I, it follows that when a matter is *with respect* to 'inter-State trade and commerce', the jurisdiction of Parliament is exclusive, irrespective of any other question. When the matter is with respect to 'trade and commerce' within the State, the State Legislature has exclusive power, subject, however, to the power of Parliament with respect to inter-State trade and commerce [vide Art. 246 (3)].

But even when the matter is with respect to trade and commerce within the State, but the trade and commerce relates to the products of industries the control of which by the Union has been declared by Parliament to be expedient in the

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64. *New Castle Steamship Co.* v. *A.G. for Commonwealth*, (1921) 29 C.L.R. 357.
65. *R.* v. *Burgess*, (1936) 55 C.L.R. 609.
66. *Citizens Ins. Co.* v. *Parsons*, (1881) 7 App. Cas. 96 ; *Toronto Electric Commrs.* v. *Snider*, (1925) A.C. 396 (409) ; *A.-G. for Canada* v. *A.-G. for Alberta*, (1916) A.C. 588 ; *Canadian Fed. of Agriculture* v. *A.G., Quebec*, (1951) A.C. 179.

public interest, the legislative power shall be concurrent. The power of Parliament to declare industries to be of the above nature is conferred by Entry 52 of List I. The Constitution (Third Amendment) Act has widened the scope of Entry 33 by including imported goods of the same kind as products which are declared under Entry 52 of List I, as well as certain other specified commodities, such as food-stuffs (see, further, under Entry 33, *post*).

In short, the power of the State Legislature under Entry 26 of List II is subject to the power conferred by Entry 42 of List I and 33 List III.

Scope of Entry 42. This Entry confers general legislative power relating to "inter-State trade and commerce.[67] The power to tax inter-State sales is not included in this Entry. Prior to the insertion of Entry 92A in List I, in 1956, that power belonged to the State Legislature under Entry 54 of List II, subject to Art. 286.[67] But Entry 92A, inserted in List I, by the Constitution (Sixth Amendment) Act, 1956, gives the Union exclusive power to tax 'sale or purchase in the course of 'inter-State trade or commerce'.

When does commerce become 'Inter-State'.

(A) *U.S.A.*– In the U.S.A. it has been held that commerce which crosses the territorial limits of a State is regarded as inter-State from the point of departure from within another State.[68]

The journey begins when the goods are turned over to the inter-State carriers, such as the railway.[69] When the goods are to be carried by some natural course, for example, by floating logs down a river, the journey does not begin until the goods begin to move.[70] There is no interruption of the journey so as to lose its inter-State character, if the goods are stopped in the course of the journey only for the sake of convenience of transportation or safe delivery.[71] A carrier, though wholly operating within a State, may yet be engaged in inter-State commerce, if it accepts goods for transportation to other States.[72] Since the inter-State journey commences from the point of entrusting them to a common carrier, for transportation into another State, the journey of the goods to the depot or terminus of the carrier is no part of the inter-State journey.[70]

The journey ends when the goods are "commingled" with the goods of the State of destination. This takes place in various ways :

(a) For example, when the original packages in which the goods were packed have been broken. This doctrine is known as the Original Package Doctrine.[49] The doctrine, however, does not mean that even where small packages are resorted to for the purpose of evading State taxation, the inter-State character would not terminate until that package is broken by the ultimate consumer.[73]

The doctrine of original package was thus explained in *Brown* v. *Maryland*:[74]

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67. *Sundaramier* v. *State of A.P.*, A. 1958 S.C. 468 (*494*).
68. *Gibbons* v. *Ogden*, (1824) 9 Wh. 1.
69. *Pennsylvania R.R. Co.* v. *Knight*, (1904) 192 U.S. 21.
70. *Coe* v. *Errol*, (1896) 116 U.S. 517.
71. *Champlain* v. *Brattleboro*, (1922) 260 U.S. 366.
72. *Daniel Ball*, (1870) 10 Wall . 557.
73. *Austin* v. *Tennessee*, (1900) 179 U.S. 343.
74. *Brown* v. *Maryland*, (1827) 12 Wh. 419.

"When the importer has has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject the taxing power of the State ; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution".[74]

The doctrine means that the act of importation was not over so long as the goods were in the original package and hence a State has no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package.

(b) Similarly does the journey end when the goods come to rest in the State of destination, say, in a warehouse.[75]

The power of State taxation depends upon the termination of the inter-State journey. Thus, it has been held that :

(a) When goods have become part of the general mass of property in the State, they are liable to be taxed in the usual manner. (b) Such taxation must not be conditioned upon the fact that they have come from another State.[76] (c) No tax may be imposed by the State before the goods terminate their inter-State journey in the foregoing sense. Thus :

(i) A statute of Missouri requiring a license for sale by travelling dealers of certain articles which were not the produce of that State was held void, being a regulation of inter-State commerce and not a mere tax upon the business of selling goods.[77]

(ii) More radical was the case of *Robbins* v. *Shelby County*,[78] where a State Act requiring a licence for sale of goods by sample (without saying anything about the origin of such goods) was held to be void in so far as it purported to apply to inter-State sales. The whole transaction goes out of the State's jurisdiction and becomes inter-State commerce, subject to federal regulation, from the point of its start.[79]

On the other hand, inter-State means commerce that begins and ends within the bounds of a single State.[68] It is only that State which can deal with such commerce. But if at any point between its start and destination, the traffic passes outside the boundaries of the particular State though it is the crossing of State borders that determines whether a commerce is inter-State or not, once it is held that commerce is 'inter-State' Congressional regulation will not stop at the external boundary of the State but may enter its interior so as to be capable of authorising the disposition of the articles of inter-State trade until they become mingled with the common mass of property within that State.[49] The federal power of regulation of inter-State commerce covers the entire course of that commerce from the point of its origin to that of its destination ; and even though the destination lies within the territory of a State, the State laws must give way to federal regulation relating to such commerce.[80]

A business or transaction, though wholly operating within a State, may however affect trade or commerce outside the bounds of that State. Congress may then

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75. *Woodruff* v. *Parham*, (1868) 8 Wall. 123.
76. *Brown* v. *Houston*, (1885) 114 U.S. 622.
77. *Welton* v. *Missouri*, (1876) 91 U.S. 275.
78. *Robbins* v. *Shelby*, (1887) 120 U.S. 489.
79. *Pennsylvania R.R. Co.* v. *Knight*, (1904) 192 U.S. 21.
80. *Wickard* v. *Filburn*, (1942) 317 U.S. 111 ; *Stafford* v. *Wallace*, (1922) 258 U.S. 495.

regulate such local business or operation, if the effect upon the inter-State commerce is direct or substantial, but not if otherwise.[81]

"It is the effect upon the inter-state commerce or its regulation, regardless of the particular form which the competition may take, which is the test of the federal power".[82]

(B) *Australia*.—In Australia, the doctrine of 'original package' has not been accepted as an inflexible rule.[83]

"In some case it is either impossible of application from the nature of the commodity or is attended with added circumstances which render it of little or no value. The one relevant question always is—is the given transaction in the circumstances part of trade and commerce among the States ?"

In *McArthur* v. *Queensland*,[84] it was observed,—

"Commercial transactions are multiform and each transaction that is said to be inter-State must be judged of by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated. A given transaction which taken by itself would be domestic, as for instance, transport between two points within a State, may in a particular instance be of an inter-State nature by reason of its association as part of a large integer, having as a whole the distinctive character of commerce between States ; on the other hand, a transaction which is inherently of an inter-State character, as passage of goods between two States, is nonetheless inter-State because the contract out of which it arises is itself a domestic contract. The mode of fulfilness of the contract may be optional, one mode being inter-State and the other (the one assumedly adopted) being inter-State movement and in that case the inter-State movement remains inter-State whatever the impelling motive may be".[84]

So, it is incompetent for a State Legislature to impose a tax upon or to require a licence from the first seller, of goods after entry thereof into the State, on the ground that the first sale is a part of the inter-State trade, even though the sale by itself is a purely domestic act.[83] In some cases, the immediate impact of an intra-State sale on inter-State trade has been considered to attract s. 92.[85]

The test of the imported goods being 'commingled' with the general mass of goods of the importing State has also been adopted in some cases.[86]

(C) *India*.—Our Constitution tries to avoid the intricacies of American case-law relating to the limits of inter-State and intra-State trade, by adopting the words 'within the State' in Entry 26 of List II. In view of the residuary Entry 97 of List I, whatever is not trade within the State, must necessarily be 'inter-State trade' within the scope of List I, for there is no scope for any third category. The application of the doctrine of original package will not, therefore, be called for in India.[87]

By the Constituition (Seventh Amendment) Act, 1956, cl. (3) has been added to Art. 269, giving Parliament the power "to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce". Though this power relates to the power to

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81. *Schechter Poultry Corp.* v. *U.S.*, (1935) 295 U.S. 495 ; *Federal Baseball Club* v. *National Baseball League*, (1922) 259 U.S. 200.
82. *U.S.* v. *Wrightwood Dairy Co.*, (1941) 315 U.S. 110.
83. *Commonwealth Oil Refineries* v. *South Australia*, (1926) 38 C.L.R. 408 (*428*).
84. *McArthur* v. *Queensland*, (1928) 28 C.L.R. 530 (*549*).
85. *Fish Board* v. *Paradiso*, (1956) 95 C.L.R. 443.
86. *Fergusson* v. *Stevenson*, (1951) 84 C.L.R. 421.
87. This view, expressed by the Author at p. 816 of th First Edition of this Commentary, has been confirmed by the Supreme Court in *State of Bombay* v. *Balsara*, (1951) S.C.J. 478 (*487*), where it has been pointed that the powers of the Union as well as of the State Legislatures having been expressed in clear and precise language by *double* enumeration, under our Constitution, there is no scope for giving the widest meaning to the 'commerce' power of Parliament as in the *U.S.A*

tax inter-State sales under Entry 92A of List I and to curtail the power of the States to impose sales tax under Entry 54 of List II, the principles formulated by Parliament in s. 3 of the Central Sales Tax Act, 1956, are of interest in construing the ambit of Entry 42 of List I also, as they embody general principles. S. 3 of that Act will be dealt with under Entry 92A, *post.*

Legislation by Parliament. – Spirituous Preparations (Inter-State Trade & Commerce) Control Act, 1955.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Broadly speaking, item 33 of List I of that Act combined Entries 43 and 44 of List I of the Constituion. See under Entry 44, below.

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'Incorporation, regulation and winding up of trading corporations'. 1. An Act which regulates the affairs of a company by laying down certain special rules for its management and administration is dully covered by this item.[88] It would also include legislation providing for the amalgamation of companies,[89] but not th regulation of their functions.

2. Read with Entry 95 of List I, the present Entry empowers Parliament to define the jurisdiction of Courts (other than the Supreme Court) relating to the subject-matters coming under the present Entry, e.g. banking companies.[90]

3. The incorporation, etc. of of co-operative societies is specifically excluded from the Union power because it is an exclusive State subject under Entry 32 of List II, *post.*

Entries 43 o f List I and 23 of List II. A law providing for social insurance and relief of unemployment would fall under Entry 23 of List III, even though it may incidentally impinge upon the power to wind up companies under Entry 43 of List I.[91]

Legislation by Parliament—See under Entry 44, *below.*

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

OTHER CONSTITUTIONS

(A) *U.S.A.* – There is a no express grant in the Constitution relating to ihcorporation, but it has been held that Congress is competent to incorporate companies as a means of exception of any of its expressly granted powers.[92]

(B) *Australia.* – Under Sec. 51 (xx) of the Constitution Act, the Commonwealth Parliament has exclusive jurisdiction over –

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88. *Chiranjit Lal* v. *Union of India,* (1950) S.C.R. 869.
89. *Narayanprasad* v. *Iron & Steel Co.*, A. 1953 Cal. 695.
90. *Hanuman Bank* v. *Munia,* A. 1985 Mad. 279.
91. *Jaysynth* v. *M.T. Mills,* A. 1988 Raj. 16 (para. 10).
92. *Mc Culloch* v. *Maryland,* (1814) 4 Wh. 316.

"Foreign corporations, and trading or financial corporations formed with the limits of the Commonwealth."

This placitum does not confer on the Commonwealth Parliament the power to create corporations ; it is limited to legislation as to foreign corporations and trading and financial corporations created by State law,[93] – to regulate their transaction affecting the public.[94] The only power of incorporation possessed by the Commonwealth Parliament is as regards banking corporations [s. 51 (xiii) ; see under next Entry].

(C) *Canada.* – There is no express grant in favour of the Dominion Parliament, but section 92 (11) gives exclusive power to the Provinces over –

"the incorporation of companies with Provincial subjects."

and the residuary powers of incorporation accordingly belong to the Dominion.

On the other had, a Province has exclusive right of legislation as regards –

'property and civil rights in the Province'.

From the above provisions, it has been held, on the one hand, that –

(a) The power of Provincial Legislatures to make laws relating to incorporation of companies with Provincial objects does not extend to the passing of legislation which strikes 'at capacities which are the natural and logical consequences' of the incorporation by the Dominion Government of companies 'with other than provincial objects'.[95]

(b) A Provincial Legislature may pass laws applying to companies without distinction and thereby requiring companies not incorporated in the Province to register for limited purposes, e.g., furnishing information ; or laws of general application regulating procedure, e.g., directing security of costs, but not laws which interfere with the status of Dominion companies as such or which prevent them from exercising powers conferred upon them by Dominion statute.[96] Thus –

(i) A Provincial statute which prevented Dominion companies as such from carrying on business in the Provinces unless registered or licensed and subjected them to penalties, was declared ultra vires.[96]

(ii) A Provincial Act which prohibited Dominion Companies from selling their shares in the Province without the consent of the Provincial Commissioner was declared ultra vires on the gorund that it 'sterilized' the Dominion Company in all its functions and activities 'from the moment of its incorporation'.[97]

(iii) A Provincial legislation which was really intended at preventing the operation of Dominion Banking Copanies, and was only nominally a taxing measure was held void.[97]

On the other hand, the power to regulate 'trade and commerce' enables the Canadian Parliament to prescribe the extent of powers of companies, the objects of which extend to the whole Dominion. But such power cannot be exercised in such a way as to trench on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. Even when a company is incorporated by the Dominion Government, it is not the less subject to provincial laws of general application enacted under powers conferred under section 92.[95] Thus –

A Provincial Law which prohibited any person from trading in securities, unless registered with the approval of the Attorney-General, was held to be invalid, to affect Dominion Companies. It was observed that a Dominion company constituted with powers to carry on a particular business, is –

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93. *Huddart Parker* v. *Moorehead*, (1909) 8 C.L.R. 330.
94. *Appleton* v. *Moorehead*, (1909) 8 C.L.R. 330.
95. *John Deere Plow Co.* v. *Wharton*, (1915) A.C. 330.
96. *G. W. Saddlery Co.* v. *The King* (1921) 2 A.C. 91.
97. *A.G. v. Alberta*, A. 1939 P.C. 53.

"subject to the competent legislation of the Province as to that business and may find its special activities completely penalised as by legislation against drink, traffic or by the laws as to hold land. If it is found to trade in securities there appears no reason why it should not be subject to competent laws of the province as to the business of all persons who trade in securites . . . . . "[98]

(D) *Government of India Act, 1935.* – Item 33 of List I was –

Coporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by an Acceding State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit, but not including universities."

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Scope of Entries 43–44 of List I. The scope of these two entries is limited to the 'incorporation, regulation and winding up' of certain classes of corporations. They do not imply that any law relating to a corporation would come under either of these two Entries, even though the 'pith and substance' of such law relates to some other relevant Entry.[99] Thus,

(i) If a law regulates the 'business' of a corporation, it would not fall under the present Entries, but may fall under some other Entry, according to the nature of the business[100]. For instance, if the business be supply of electricity, it would come under Entry 38 of List III.[1]

(ii) If a corporation is established for the establishment and organisation of 'industries' in industrial areas, the law would be governed by Entry 24 of List II,[1] unless Entry 52 of List I is attracted by a Parliamentary declaration.

'Incorporation of trading and inter-State corporations'. – Entries 43-4 have to be read together. They confer exclusive jurisdiction upon Parliament not over all corporations ; the only corporations that come within the scope of these two Entries are (a) 'trading corporations', including banking, insurance and financial corporations (excluding co-operative societies), whether their business is confined within one State or not ; (b) inter-State corporations whether trading or not (excuding Universites), e.g., the Board[2] constituted under the Sikh Gurdwaras Act, 1925, read with s. 72(3) of the Punjab Reorganisation Act, 1966.

These two Entries of List I, again, are to be read with Entry 32 of List II, which gives the State Legislature exclusive jurisdiction in respect of all corporations other than those specified in Entries 43-4 of List I ; Universities other than those specified in Entry 63 of List I ; co-operative societies ; as well as other unincorporated associations.

"Incorporation". – This means the statutory recognition of the formation of a corporation. At the time of incorporation by statute, the Legislature may ratify and confirm agreements made by the promoters of a company prior to incorporation. The effect of such ratification or confirmation is that the agreement would be as obligatory and binding on the parties as if these provisions had been enacted in the form of a statute.[3]

"Regulation". – The power to regulate the affairs of a company includes the power of laying down rules for its management and administration.[4]

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98. *Lymburn* v. *Maryland*, (1932) A.C. 318.
99. *Cooper* v. *Union of India*, A. 1970 S.C. 564.
100. *Kerala S.E. Board* v. *Indian Aluminium Co.* A. 1976 S.C. 1031 (para,. 16).
1. *Ramtanu Housing Soc.* v. *State of Maharashtra*, A. 1970 S.C. 719.
2. *S. G. P. Committee* v. *Gill*, A 1970 Punj. 40 (49).
3. *International Ry.* v. *Niagara Parks*, A. 1937 P.C. 214.
4. *Chiranjit Lal* v. *Union of India*, A. 1951 S.C. 41 (59).

It has also been held that the power to provide for amalgamation or merger of existing companies is included in the power of 'regulation.[5]

"Winding up".—The specific enumeration of this power improves upon the Australian placitum, under which it has been doubted whether 'corporation' would include the power of 'winding-up'.[6]

Existing Laws.—Companies (Foreign Interests) Act (XX of 1918) ; Industrial Finance Corporation Act (XV of 1948) ; Damodar Valley Corporation Act (XIV of 1948) ; Banking Companies Act (X of 1949) ; Multi-unit Co-operative Societies Act (VI of 1942) ; Rehabilitation Finance Administration Act (XII of 1948) ; Central Silk Board Act (LXI of 1948) ; Coal Grading Board Act, 1925 ; Coffee Act, 1942 ; Indian Red Cross Society Act, 1920 ; Red Cross Society Allocation of Property) Act, 1936 ; Oriental Gas Company Act, 1857, 1867 ; Indian Cotton Cess Act, 1923 (s. 5) ; Lac Cess Act, 1930 (s. 5) ; Indian Oilseeds Committee Act, 1946 ; Rubber Act, 1947 (S. 4) ; Capital Issues (Continuance of Control) Act, 1947 ; Indian Coconut Committee Act, 1944, Pharmacy Act, 1948 (s. 4).

Legislation by Parliament.—State Financial Corporations Act (LXIII of 1951) ; Railway Companies (Emergency Provisions) Act (LI of 1951) ; Companies Donations to National Funds Act (LIV of 1951) ; Air Corporations Act (XXVII of 1953) ; Road Transport Corporation Act (LIV or 1950) ; Companies Act (I of 1956) ; Agricultural Produce (Development and Ware-housing) Corporation Act, 1956 ; Life Insurance Corporation Act, 1956, Khadi & Village Industries Commission Act, 1956 ; University Grants Commission Act, 1956 ; All-India Institute of Medical Sciences Act, 1956 ; Delhi Road Transport Authority Act, 1950 ; Rajghat Samadhi Act, 1951; Faridabad Development Corporation Act, 1956 ; Indian Medical Council Act, 1956 ; Iron & Steel Companies Amalgamation Act, 1952 ; Inter-State Corporations Act, 1957 ; State Agricultural Credit Corporations Act, 1968 ; Press Council Act, 1978 ; Auroville Foundation Act, 1988 ; Jamia Islamia Act, 1988.

Characteristics of a Corporation. A Corporation is an artificial person established for preserving in perpetual succession certain rights, which being conferred on natural persons only would fail in process of time.[7] A corporation is an artificial person, existing only in contemplation of law and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.[8] A corporation sole consists of only one member at a time. A corporation aggregate consists of a number of persons, having in the aggregate an existence, rights and duties distinct from those of the individual members who compose it at any time.[9] It has a perpetual succession, a name and a common seal.

The present Entries relate to corporations aggregate, such as an incorporated company, i.e., a corporation formed for the purpose of carrying on a business for profit and incorporated by an Act of the Legislature.

In English law, a corporation aggregate has certain general characteristics :

(i) It has power to make bye-laws for its own government and transacts its business under the authority of a common seal. Such bye-laws are binding, unless (a) contrary to law, (b) unreasonable or (c) against the common benefit.[10]

(ii) It has no soul or tangible form, but enjoys a legal entity, sues and is sued by its corporate name and holds and enjoys property by such name.

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5. *Narayanprosad* v. *Indian Iron & Steel Co.*, A. 1953 Cal. 695 (699).
6. *Wynes, Legislative & Executive Powers*, 3rd Ed., p. 214.
7. Wharton's Law Lexicon.
8. *Dartmouth College Case*, (1819) 17 U.S. 518.
9. *Salomon* v. *Salomon & Co. Ltd.*, (1897) A.C. 22.
10. *Kruse* v. *Johnson*, (1898) 2 Q.B. 91.

(iii) The several members of a corporation and their successors constitute but one person in law. The law knows only the body corporate and not the individuals constituting it.7

(iv) A corporation created by statute is limited in its capacity by the terms of the statute creating it.[11]

Special features of a statutory corporation. When a corporation is created by statute, it is impressed with the rights and obligations of a statutory body, together with the incidents attaching to it as a 'corporation'. A corporation may be created by statute for various purposes, e.g., Municipal Corporation and similar local authorities ; Universities ; National Corporations, such as the Air Corporations, Life Insurance Corporation.

I. The first characteristic of a statutory corporation is that its rights, duties and obligations are as provided in the statute by which it is created[12] and that it can have only such rights and can do only such acts as are authorised by that statute, whether expressly[13] or by necessary implication, i.e., what are necessary for carrying into effect the purposes of its incorporation,[14] and not expressly prohibited[15] ; or what follow as incidental to or consequential upon what the Legislature has authorised.[16]

In the result, whatever is not expressly or impliedly authorised by the statute of incorporation is prohibited to a statutory corporation.[17]

This is known as the doctrine of *ultra vires*.

II. It follows from the doctrine of *ultra vires* that if the subject-matter of a contract made by a statutory corporation be beyond the scope of the objects of its incorporation, it is void ab initio and cannot be made valid even by ratification,[17] or by any other means,[18] such as estoppel, acquiescence or lapse of time.[19]

III. Consequently, a statutory corporation cannot be held liable for breach of contract where the contract is *ultra vires*.[20] Even a judgment, obtained by its consent, upon an *ultra vires* contract cannot be enforced against the corporation.[19]

IV. Where formalities for making contracts by a corporation are laid down by statute, such formalities must be strictly carried out.[21]

V. Whatever is inconsistent with the objects of its incorporation as expressed in the statute is *ultra vires*.

It follows that –

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11. *Ashbury Ry Co* v. *Riche*, (1871) L.R. 7 H.L. 653.
12. *Mann* v. *Edinburgh Northern Tramways Co.*, (1893) A.C. 69 (*79-80*).
13. *Wenlock* v. *River Dee Co.*, (1881) 10 App. Cas. 354 H.L.
14. *Dundee Harbour Trustees* v. *Nicol*, (1913) A.C. 550 (H.L.).
15. *Galsworthy* v. *Selby Dam Drainage Commrs.*, (1892) 1 Q B. 348 (*354*) C.A.
16. *A.G.* v. *Great Eastern Ry. Co.*, (1880) 5 App. Cas. 473 (*478*) H.L.
17. *Ashbury Ry. Co.* v. *Riche*, (1875) 7 H.L. 653 (*672*).
18. *G.N.W. Ry.* v. *Charlesbois*, (1899) A.C. 114 (*124*) P.C.
19. *York Corpn.* v. *Leetham & Sons*, (1924) 1 Ch. 573.
20. *William Cory* v. *City of London*, (1951) 2 All. E.R. 85 (*88*).
21. *Cope* v. *Thames Haven Ry. Co.*, (1849) 3 Exch. 841.

(a) A statutory corporation cannot grant or dedicate a public right of way over a land if such user of the land by the public is incompatible with the statutory objects of the corporation.[22]

In other words, if land is vested in a corporation or other public body by statute to be used for some special purpose, which is inconsistent with its use by the public as a highway, the corporation would be incompetent to dedicate the right of way to the public over such land.[23]

On the other hand, there is nothing to debar the corporation to dedicate the right of way, expressly or impliedly, if the public use as a highway is not inconsistent with the purpose for which the land is vested, or acquired by, the public body.[22]

(b) A statutory corporation, if authorised by statute to compulsorily acquire land for a specific purpose, cannot acquire any land for a different purpose.[24]

(c) A statutory corporation which holds land for the purposes of a special Act cannot alenate land except for the purposes of that Act, even for valuable consideration.[25]

(d) While under common law, a non-statutory corporation has the power to grant or accept leases, subject to statutory restrictions, if any, a statutory corporation shall have no such power unless expressly empowered by the statute constituting it.[26]

VI. (a) Like other statutory authorities, a statutory corporation is liable to be a sued in torts for damages for –

Breach of statutory duties.[27]

(b) A statutory body cannot divest itself of its statutory powers[28] or fetter itself in the use of such powers.[28] Hence, a contract binding such a body not to exercise its statutory powers would be void.[29]

VII. The limitations which are imposed on the powers of a statutory corporation cannot be waived or modified by any agreement or consent of the members of the corporation.[13]

Thus , a corporation which is authorised to raise money for a specific purpose cannot apply that money for any other purpose, even by the consent of all its members.[30]

VIII. A statutory corporation, having been constituted by an Act of Parliament, everybody is presumed to know the nature and extent of its powers.[31]

The result of this is that no plea of *bona fides*[32] can be raised by a party who deals with the corporation where (i) the powers of the corporation have

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22. *British Transport Corpn.* v. *Westmorland C. C.*, (1957) 2 All E.R. 353 (*358, 361*) H.L.
23. *R.* v. *Inhabitants of Leake*, (1833) 5 B & Ad. 469.
24. *Galloway* v. *London Corpn.*, (1866) 1 H.L. 34 (*43*).
25. *Mulliner* v. *Midland Rail Co.*, (1879) 11 Ch. D. 611.
26. *Kent Coast Ry. Co.* v. *London Ry. Co.*, (1869) 3 Ch. App. 656.
27. *Liptrot* v. *Br. Ry. Board*, (1966) 2 All E.R. 247 (C.A.)
28. *Birkdale Dt. E.S.C.* v. *Southport Corpn.*, (1926) A.C. 355 (*372*) H.L.
29. *Ayr Harbour Trustees* v. *Oswald*, (1883) 8 App. Cas. 623 (H.L.)
30. *Bagshaw* v. *Eastern Rail Co.*, (1850) 2 Mac. & G. 389.
31. *McGregor* v. *Dover & Deal Ry. Co.*, (1852) 18 Q.B. 618 (*631*).
32. As in the case of a non-statutory corporation [*County of Gloucester Bank* v. *Rudry Colliery Co.*, (1895) 1 Ch. 629 (C.A.)].

been exceeded[33] ; (ii) the conditions for the exercise of the statutory powers by the corporation have not been fulfilled;[34] (iii) the mandatory procedural requirements, such as need for quorum, have not been complied with.[35]

IX. While every corporation has the power to make bye-laws to regulate its government for the purposes for which it was constituted, such bye-laws are not binding upon persons other than its members, unless the power to make bye-laws has been conferred by statute.[36]

In other words, bye-laws made by a statutory corporation are binding upon the world at large, provided they are *intra vires*.

When a bye-law is made under statutory power, a repeal of the Act which conferred the power aborogates the bye-law, unless it is preserved by some provision in the repealing Act.[37]

Public corporations, what are. Apart from the normal pattern of Governmental organisation, Central, State (in federal countries), and local, an intermediate type of organisation has come into being during the last century[38] because of the expansion of the administrative burden and the need for relieving the formal administrative machinery from those activities of a welfare State which partake of the character of a business enterprise. Such activities are given to statutory corporations which do not form part of the governmental machinery and yet carry on administrative functions in a business-like manner like private companies but subject to statutory limitations.

In *India*, the growth of public corporations dates from April, 1948 when the Government of India, by its resolution on Industrial Policy announced that –

"management of State enterprise will, as a rule, be through the public corporation under the statutory control of the Central Government . . . . "

Such public corporations, so far created in India, may be grouped under the following heads :

(i) Industrial or Commercial. (1) The Industrial Finance Corporation Act (XV of 1948) has set up an Industrial Finance Corporation for the purpsoe of making medium and long-term credits more readily available to industrial concerns in India.[39] (2) The State Financial Corporations Act (LXIII of 1951) empowers the State Governments to set up State Financial Corporations with similar purposes.

(ii) Economic Development. (1) The Damodar Valley Corporation Act (XIV of 1948) sets up a Corporation called the Damodar Valley Corporation which will be an autonomous body within the framework of the Act. The objects and functions of the Corporation are – (a) to control flood in the Damodar river ; (b) to utilise its water for irrigation, generation of electrical energy, navigation ; (c) to promote sanitation and economic and social welfare of the Damodar Valley, and the like. Its legal

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33. *Irvine* v. *Union Bank of Australasia*, (1877) 2 App. Cas. 366 (P.C.).
34. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1917) A.C. 607 (616).
35. *D'Arcy* v. *Tamar Ry. Co.*, (1866) L.R. 2 Exch. 158.
36. *River Tone Conservators* v. *Ash*, (1829) 10 B. & C. 349 (379).
37. *Watson* v. *Winch*, (1916) 1 K. B. 688.
38. Wade, *Administrative Law* (1978), PP. 140ff. ; Hood Phillips, *Constitutional & Administrative Law* (1978), pp. 547ff. ; de Smith, *Constitutional & Administrative Law* (1973), pp. 215ff.
39. *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1331 (paras. 59, 61, 62, 67).

personality makes itself liable to income tax as well as state taxes on its transaction, such as sales tax.[40]

(iii) The Oil and Natural Gas Commission, set up by the Oil and Natural Gas Commission Act, 1959, for the development of petroleum resources.[39]

(iv) The State Bank of India, created by the State Bank of India Act, 1955, to carry on banking business under Government control.

(v) The Central Silk Board Act (LXI of 1948), set up a Central Silk Board for the development of the raw silk industry under Central control.

(vii) A State Financial Corporation, set up under the State Financial Corporations Act, 1951, for promoting industrial development.[41]

(viii) A Warehousing Corporation, created by a State Act.[42]

(viii) Public service : (1) The Road Transport Corporation Act (LXIV of 1950) empowers State Governments for the incorporation of Road Transport Corporations in which the Central and Provincial Governments shall be properly represented, for the purpose of improving road transport facilities.[43]

(2) The Life Insurance Corporation has been established by the Life Insurance Corporation Act, 1956, to carry on the business of life insurance which has been nationalised.[39]

(3) The Air Corporations Act, 1953, similarly, set up two corporations for the carrying on of the business of air transport, after acquiring the assets of the existing air companies.[44]

(4) The Food Corporation of India, set up by the Food Corporation Act, 1964.[45]

When trading or public service functions are carried on by the Government through a corporation or Government company[46] it is sometimes called a 'public undertaking, e.g. the State Trading Corporation, State Electricity Board.

Features of a public corporation. 1. Since a public corporation is created by statute, it is a statutory corporation and has all the incidents of a statutory corporation, as stated in the preceding pages. Besides, it has certain special incidents of its own, being controlled by the Government, as will appear from below.

2. 'Public corporations' differ from ordinary trading or commercial corporations in that though they are not Departments of Government, and mostly rest on private capital and management ; they act under the control of Government, on matters of policy and the like and Government has, in general, the power to supersede their Board of Directors in case of failure to carry out the instructions issued by Government.

In short, it may be stated that a public corporation is a statutory corporation which has the features of a 'public authority'[47]. An individual may constitute a public authority when public duties are imposed upon it by statute ; when such duties are imposed upon a corporation, it is called a 'public corporation'.

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40. *Damodar Valley Corpn.* v. *State of Bihar*, A. 1961 S.C. 440.
41. *Gujarat State Financial Corpn.* v. *Lotus Hotels*, A. 1983 S.C. 848 (para. 3).
42. *U.P. Warehousing* v. *Vijoy*, A. 1980 S.C. 840 (paras. 10. 14).
43. *Cf. A.P.S.R.T.C.* v. *I.T.O.* , A. 1964 S.C. 1486.
44. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628.
45. *State of Punjab* v. *Raja Ram*. A. 1981 S.C. 1694 (paras. 4-5).
46. *Cf. State Trading Corpn.* v. *C.T.O.*, A. 1963 S.C.. 1811 (paras. 6, 8, 27).
47. *Bradford Corpn.* v. *Myers*, (1916) 1 A.C. 242 (247).

In this connection it would be profitable to understand what is known as a 'public authority'. In Halsbury's Laws of England,[48] the following statement appears :

"A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform,[49] and which performs those duties and carries out its transactions for the benefit of the public and not for private profits. Such an authority is not precluded from making a profit for the public benefit but commercial undertakings acting for profit and trading corporations making profits for their corporations are not public authorites, even if conducting undertakings of public utility."[50]

3. (i) A public authority does not cease to be so merely because, in addition to its public function, it undertakes some trading activity of a profit-making or non-public character. A Harbour Board was thus held by the Privy Council[50] to be a public authority because it levied rates for the wharfage and storage of goods in its warehouses. The public function of the Board was

"supplying facilities essential to the shipping community in one of the ways authorised by the ordinance by which they were created a harbour board and charged with the management and control of the port . . . ."[50]

It did not cease to be public authority by choosing to levy rates for the wharfage of goods in its warehouses because it was function of a 'subsidiary activity'.[50]

(ii) Similarly, the mere fact that in the discharge of its duty or the exercise of its authority, the public authority may have made a contract does not of itself deprive the duty or authority of its public quality.[50]

But a duty founded solely on contract cannot be said to be a public duty.[50]

4. On the other hand, a public corporation, even though owned or controlled by the Government, does not become a 'Department' of the Government. A Government Department, as the Supreme Court has pointed out,[51] is an organisation which is not only completely controlled and financed by the Government but has also no indentity of its own. The money earned by such a Department goes to the exchequer of the Government and losses incurred by the Department are losses of the Government. A corporation (including a public corporation), on the other hand, is an autonomous body capable of acquiring, holding and disposing of property and having the power to contract. It may also sue or be sued in its own name and the Government does not figure in any litigation to which the corporation is a party. A public corporation, controlled by the Government, may be an agency or instrumentality of the Government but yet not a 'Government Department'.[51]

5. A public corporation, thus, is a hybrid organism, combining the features of a business company and a government department. A public corporation is created by statute whenever it is intended to take over some industry or social service from private enterprise, and to run it in the public interest. Instead of giving over the function to a government department, it is assigned to a public corporation which has a separate legal entity and can carry on the function with autonomy subject to the ultimate control of Parliament and the Government,

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48. 3rd Ed., Vol. 30, p. 682 ; 4th Ed., Vol. 1, para. 6.
49. *Welch* v. *Bank of England*, (1955) 1 All E.R. 811 (827).
50. *Firestone Tyre Co.* v. *Singapore Harbour Bd.*, (1952) 2 All E.R. 219 (P.C.).
51. *State of Punjab* v. *Raja Ram*, A. 1981 S.C. 1694 (para. 5).

mainly on policy matters, so as to safeguard the interests of the public. Their powers are set out in the Acts which created them and they are empowered to make regulations (subject to the doctrine of *ultra vires*).

6. A public corporation which acts as an agency or instrumentality of the Government in exercising governmental power or function shall be subject to the same constitutional limitations as the Government itself.[44]

Juristic status of a public corporation : Is it a government agency ?

(A) *England.*—In England, some special questions have arisen with respect to public corporations in view of the nature of their functions which distinguish them from other statutory corporations.

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The foremost of these questions, for instance, are—(a) whether a public corporation would be bound by a statute, (b) whether it can claim Crown privilege in litigation.

Broadly speaking, the answers to both the questions depend upon whether a particular public corporation, in view of its functions, can properly be regarded as a servant or agent[52] of the Crown.

(i) Of course, if the statute which created the corporation expressly states that it shall act on behalf of the Crown, no difficulty arises.[53]

(ii) Where, however, the statute does not expressly say so, the question has to be answered with reference to the functions or purposes of the public corporation :

(a) If it is a merely commercial corporation, it cannot claim Crown immunity or privilege, even though it may be controlled by the Government.[54]

(b) If, however, the corporation exercises governmental functions[55] or carries out the public service of the Crown,[56] such as a Hospital Board or Committee, set up under the National Service Act, 1946,[57] or a Territorial Force Association, set up by statute,[58] it would be entitled to Crown immunity.

(B) *India.*—Though the question of the status and ability of non-governmental bodies which have an impact upon the rights of private individuals has arisen in recent times in England as in India on account of the nature of their functions in a welfare State, there is, however, a marked difference in the manner and extent in which this question has been raised in these two countries :

(i) While in England, the question has presented itself in connection with statutory corporations and not in respect of non-statutory companies, in India,

India.

cases have come up in relation to both[59] and it is, therefore, necessary to remember the essential juristic differences between these two kinds of corporate bodies.

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52. *International Ry. Co.* v. *Niagara Parks Common.* (1941) 2 All E. R. 456 (H.L.) ; *Tamlin* v. *Hannaford*, (1949) 2 All E. R. 327 (C. A.)
53. E.g., the Central Land Board, set up by the Town and Country Planning Act, 1947 [s. 3(3)] ; *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 (H.L.).
54. *Central Control Board* v. *Cannon Brewery*, (1919) A.C. 757 ; *Broadcasting Corpn.* v. *Johns*, (1965) Ch. 32.
55. *Bank Voor* v. *Hungarian Administrator*, (1954) 1 All E.R. 969 (983) H.L.
56. *Mersey Docks* v. *Cameron*, (1865) 11 H.L.C. 443 (504) H.L.
57. *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 H.L.
58. *Territorial & Auxiliary Forces Assocn.* v. *Nichols*, (1948) 2 All E.R. 432.
59. The case of non-statutory Government companies is being dealt with separately, at p. 78, below.

(ii) While in *England*, the question has arisen from the point of view of Crown privileges, – as to whether these could be claimed by statutory corporations, in India, it is in the context of the liabilities of such bodies that the question has mostly come up before the Courts, namely, whether their action should be regarded as 'State action' for the purpose of enforcement of fundamental rights ; whether their servants may be regarded as civil servants for the application of the procedural safeguards under Art. 311.

I. As has been pointed out by the Supreme Court,[60] the Legislature has already been obliged to make certain exceptions to the doctrine of separate personality[48,61] of a corporation as a result of the impact of complex economic factors, and these may grow in number in course of time. The Courts have, similarly, aided this progress of assimilation in the following respects :

(i) A statutory corporation (such as a State Electricity Board), which exercises statutory powers,[62-68] even though it may be carrying on commercial functions, should be held to be 'State' for the purpose of enforcing fundamental rights against it, under Art. 12 of the Constitution.[68-69]

(ii) When an employee of a statutory corporation is subject to the control of Government in the matter of appointment and removal, he would disqualify himself for membership of the Legislature under Art. 102 or 191 of the Constitution, upon the footing that he holds an 'office of profit under the Government' within the meaning of that expression in those Articles.[70]

II. On the other hand, Courts have refused to identify a statutory corporation with the State in all respects. The patent reason for this is the juristic principle that, by reason of its incorporation, a corporation acquires a separate legal personality, which cannot be wiped off by the fact that such corporation is controlled by the State or that it carries on public functions.[67-61] Thus, it has been held that –

(a) The fact that since the amendment of Art. 298 of the Constitution by the Seventh Amendment Act, 1956, a State may carry on a business by virtue of its 'executive power' does not convert the commercial function of the State Government into its 'governmental function' so as to immune it from Union taxation, without a declaration by Parliament, under Art. 289(3).[72]

(b) It will also be bound by a statute, such as a Sales Tax Act, like a private individual.[73]

(c) As to whether the employees of a public corporation would be treated as Government employees for the purposes of Arts. 309-311, there has been a change of opinion in the Supreme Court :

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60. *Tata Engineering Co.* v. *State of Bihar*, A. 1965 S.C. 40 (*48*).
61. *Cf. State Trading Corpn.* v. *C.T.O.*, A. 1963 S.C. 1811 (paras. 29, 113).
62-68. *Rajasthan State Electricity Board* v. *Mohan Lal*, A. 1967 S. C. 1856 (*1861-63*).
69. *Ajay* v. *Khalid*, A. 1981 S. C. 487 (*493*).
70. *Guru Govinda* v. *Sankari Prasad*, A. 1964 S.C. 254 (*258*).
71. *Valjibhai* v. *State of Bombay*, A. 1963 S.C. 1890 (*1894*).
72. *A.P. State Road Transport Corpn.* v. *I.T.O.*, A. 1964 S.C. 1486 (*1492*).
73. *Mafatlal* v. *Divisional Commr.*, A. 1966 S.C. 1364 (*1365*).

(i) The earlier view[73-74] was that an employee of a statutory corporation, even where it may carry on governmental functions, and is managed almost like a Government department, did not become an employee *under* the Government, so as to attract the protection Act. 311 of the Constitution.[73] The test for the application of Art. 311 being the existence of a relationship of master and servant between the Government and such employee.[73-74]

The result was somewhat anomalous, namely, that when the Government carried on a business departmentally, as in the case of a Railway, its employees held posts under the Government, so as to attract Art. 311,[75] because a Department of the Government is a limb of the Government and cannot be treated as a separate legal entity. If, however, the business is carried on through a statutory corporation the employees of the latter could not claim to be employees of the State but were employees of the corporation, which is a separate legal entity.[73]

(ii) Since 1980, the view taken is that whether or not the employee of a public corporation or a Government company comes under the category of persons 'holding office *under* the Government' within the meaning of Art. 311, the *principles* underlying Art. 311 should be applied in the matter of disciplinary proceedings against employees of public corporations, either as principles of natural justice[76] or under the principle of equality under Arts. 14, 16, read with Art. 12.[77] The fact that Art. 12 appears in Part III and Art. 311 appears in Part XIV of the Constitution should not make any difference in substance from the standpoint of the guarantees under Arts. 12, 14, 16.[77]

It should be noted, however, that the pre-1980 decisions[73-75] have not and could not have been overruled by the later Division Benches.[76-77]

Disabilities of a Public Corporation. In so far as a public corporation is a statutory body, it is subject to the following disabilities which flow from its statutory incorporation :

I. It is subject to the rule of *ultra vires*.[78]

But the terms of statutes creating public corporations are usually so wide that it is difficult to sustain a charge of *ultra vires*.

II. The general principle is that when a corporation is created by a statute to do things which could have been done by a private individual,[79] e.g., the maintenance of a dock[80] or a canal[81] or a lighthouse,[82] the ownership of railways, or the carriage of passengers and goods,[79] then, in the absence of anything to the contrary in the

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74. *State of Assam* v. *Kanak*, A. 1967 S.C. 884.
75. *Cf. Moti Ram* v. *N.E.F. Ry.*, A. 1964 S.C. 600.
76. *U.P. Warehousing Corpn.* v. *Vijay*, A. 1980 S.C. 840 (845-46), Sarkaria & Chinnappa Reddy, JJ.).
77. *Kalra* v. *P. & E. Corpn.*, A. 1984 S.C. 1361 (para. 20) (Desai, Chinnappa Reddy & Varadarajan, JJ.).
78. *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, (1875) L.R. 7 H.L. 653.
79. *Tamlin* v. *Hannaford*, (1949) 2 All E.R. 327 (C.A.).
80. *Mersey Docks & Harbour Bd.* v. *Gibbs*, (1866) L.R. 1 H.L. 93 (110; 122-23).
81. *Parnaby* v. *Lancaster Canal Co.*, (1839) 11 Ad. & El. 223.
82. *Romney Marsh* v. *Trinity House Corpn.*, (1872) L.R. 7 Ex. 207.

statute, it shall "be subject to the same liabilities as the general law would impose on a private person doing the same things".[80]

It follows that –

(i) It must pay damages for injury caused to any person occasioned by its failure to keep the works in proper repair,[80] or by negligence in making repairs, or by negligent use of their property.[82]

In such cases, it is immaterial whether the corporation is earning profit from the works, not for its own benefit but for the benefit of the public as trustees,[83] or even without profit.[80]

(ii) A public corporation would be liable for wrongful acts done not only by itself but also by its servants,[83] just as a master would be liable in torts for the wrongs done by its servants in private law.

But a public authority would not be liable in torts for acts done by its servants where the acts are done by the servant in the discharge of a duty imposed upon the servant himself by statute, – as distinguished from a duty imposed upon the authority itself, to be performed through servants.[84]

(iii) It must be subject to any statute applicable to a private person undertaking that work, e.g., the Rent Restriction Acts, where the corporation lets out its property.[79]

Rights and privileges of a Public Corporation. From the premise that the rights and obligations of a public corporation are created by a statute, certain special incidents follow, e.g., –

(a) When a statutory corporation is under a duty to supply to the public any commodity on payment of certain charges, e.g., electricity[85] in the case of an Electicity Supply Corporation, drugs[86] in the case of a National Health Service hospital, or water in the case of a municipal Corporation,[87] there is no 'sale' because the right of the public to get the commodity is statutory and does not depend on any consensus or agreement. The corporation is bound to supply it to any sonsumer who chooses to exercise his statutory right and demands it, on payment of the statutory charge.[86]

The consumer cannot, in such cases, obtain any remedy on a *contractual* basis against the corporation. His remedy would be confined to the statutory penalty[85] or other remedy as may be prescribed by the statute itself or in tort on the ground of negligence or breach of statutory duty.

(b) When a public corporation is created not for the purpose of undertaking commercial enterprises but for the performance of some *governmental function*, it may be entitled to certain rights or privileges which a private individual would not be entitled to.[88]

The problem of 'Government Companies'. Apart from corporations created by statute, a number of non-statutory companies have sprung up with the advent of the State into the commercial sphere. These are to all intents and purposes, limited liability companies registered under the Companies Act. But owing to the fact that the Government is the owner of the share-capital or the major portion thereof,[89]

83. *Gilbert* v. *Trinity House Corpn.*, (1886) 17 Q.B.D. 795 (*799-801*).
84. *Stanbury* v. *Exeter Corpn.*, (1905) 2 K.B. 838.
85. *Willmore* v. *S.E. Electricity* Bd., (1957) 2 Lloyd's Rep. 375.
86. *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 (*455, 461, 463, 466, 478*) H.L.
87. *Read* v. *Croydon Corpn.* (1938) 4 All E.R. 631.
88. *Nottingham Hospital Committee* v. *Owen*, (1957) 3 All E.R. 358.
89. Hindustan Shipyard Ltd. [In re Hariharan, A. 1960 A.P. 518 ; *Lakshmi* v. *Neyveli Lignite Corpn.*, A. 1966 Mad. 399].

these companies raise the question whether they should be treated as goernmental or public bodies for any purposes.

S. 617 of the Companies Act, 1956, defines a 'Government Company'as follows-

"For the purposes of this Act, 'Government company' means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company thus defined".

Being a company registered under the Companies Act, it has undoubtedly a juristic personality, apart from that of its share-holders,[90] notwithstanding that the ownership of its shares belongs exclusively to the Government or its officers or that it is controlled by the Government.[91] At the same time, it has got certain peculiar features :[92]

(i) The entirety of its capital is subscribed by the Government or its officers and the public are not allowed to acquire its shares, except with the permission of the Government.

(ii) Though it is not run as a Government Department, the management is, *in substance,* the same.

(iii) It is controlled by the Government in various respects, e.g., appointment and removal of its principal officers.

(iv) If the Company was wound up, its assets would go over to the Government.

(v) It is a Government undertaking; when the Government undertakes business from private enterprise, it may, instead of running it departmentally, hand over the management to a Company formed under s. 617 of the Companies Act. Sometimes a business, which was being run departmentally, may be transferred to such a company.[93]

(a) It has, however, been held that notwithstanding such predominant Government control, such a company does not become identified with the Government and does not forfeit its separate legal entity. It is called a 'Government company' in s. 617 of the Companies Act *only for the purposes of that Act,* namely, to confer upon it certain special rights and obligations.[93-94] Thus, it does not become 'State' for the purpose of enforcement of fundamental rights against it, under Art. 12,[93] because it does not exercise any legislative or governmental powers.

(b) A Government Company differs from a Public Corporation in that while a Public Corporation is created by a specific statute, e.g., the Food Corporation Act, 1964,[96] a Government Company is a company incorporated under the Companies Act, and has been given a specific status in the Companies Act, 1956 (ss. 617-619A). A Public Corporation is a statutory corporation and its powers are derived from and limited by the provisions of the Act which created it ; it is therefore, subject to the doctrine of *ultra vires.*[97] No such question arises in

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90. *Tata Engineering Co.* v. *C.T.O.,* A. 1965 S.C. 40.
91. *Heavy Engineering Mazdoor Union* v. *State of Bihar,* A. 1970 S.C. 12.
92. *Vide* the features of the Hindusthan Ltd. summarised in *Verghese* v. *Union of India,* A. 1963 Cal. 421; *Valjibhai* v. *State of Bombay,* A. 1963 S.C. 1890.
93. *Vide Kartick* v. *W.B.S.I. Corpn.,* A. 1967 Cal. 231 (*232*).
94. *Valjibhai* v. *State of Bombay,* A. 1963 S.C. 1890 (*1894*).
95. *A.P. State Road Transport Corpn.* v. *I.T.O.,* A. 1964 S.C. 1486 (*1493*) ; *Heavy Engineering Mazdoor Union* v. *State of Bihar,* A. 1970 S.C.12.
96. *Cf. State of Punjab* v. *Raja Ram,* A. 1981 S.C. 1694 (para. 5).
97. *Khanzode* v. *Reserve Bank of India,* A. 1982 S.C. 917 (para 21).

the case of a Government Company, because its powers are not derived from any specific statute but from its memorandum of association like other companies, so that its acts would be *ultra vires* only if they transgress the terms of its memorandum of association,[98] subject to the provisions of the Companies Act.

45. Banking.

OTHER CONSTITUTIONS

(A) *U.S.A.*—The United States Constitution is altogether silent on the subject of banking, and since the Federal Legislature has only enumerated power, it was originally supposed that it was a subject for State regulation.

But the doctrine of 'Implied powers' was strikingly applied to extend the power "to coin money and regulate the value therefor" [Art. I, sec. 8 (5)], to include the power to regulate paper money and banking in general,[99] and since then Congress has controlled the entire *national* banking system by enacting the Federal Reserve Act, 1913, and a series of other banking Acts. The federal power over banking, however, does not extend to banks incorporated under State law. States are forbidden by the Constitution "to coin money or bills of credit" but not to charter banks. Banking is thus a concurrent subject and in the United States there are banks chartered by the Federal as well as the State Governments.

(B) *Australia.*—Under Sec. 51 (xiii) of the Constitution Act, 1900, the Commonwealth Parliament has the power to legislate with respect to—

"Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money."

The power to legislate with respect to banking includes a power to legislate with respect to customs of a bank in their capacity as customers of the bank.[100] But under the present power, the Commonwealth cannot totally prohibit private banking or provide for the extinction of private banks, for that would mean a restriction of 'inter-State trade, commerce and intercourse', in contravention of Sec. 92 of the Constitution Act.[1]

The Commonwealth has no power to make laws with respect to Banks established by State Governments.[100]

(C) *Canada.*—Banking is an exclusive subject for the Dominion Parliament under Sec. 91 (15) of the British North America Act, 1867 :

"Banking, incorporation of banks, and the issue of paper money."

"Banking" is an expression "wide enough to embrace every transaction coming within the legitimate business of a banker".[2] A banker has been defined as "a dealer in credit".[3] The business of "banking" is so wide that it could not be operated without interfering with and modifying "property and civil rights" which is a topic allotted to the Provincial Legislatures under Sec. 92 (3).[4] Thus, bank deposits are in a sense "property", but the transaction of receiving and repaying deposits is a legitimate business of a banker.[4] Similarly, the Dominion Parliament can legislate in respect of warehouse receipts taken by a bank in the due course of its business,

98. *Cf. Lakshanaswami* v. *L.I.C.*, A. 1963 S.C. 1185 (paras. 12-13).
99. *McCullock* v. *Maryland*, (1819) 4 Wh. 316.
100. *Melbourne Corporations* v. *Commonwealth*, (1947) 74 C.L.R. 31 (51).
1. *Australia* v. *Bank of N.S.W.*, (1949) 2 All E.R. 755 (P.C.), affirming *Bank of N.S.W.* v. *Commonwealth*, (1948) 76 C.L.R. 1.
2. *Tennant* v. *Union Bank of Canada*, (1894) A.C. 31.
3. *Alberta Legislation Reference*, (19380 S.C.R. 100 (116), approved in *A.-G. of Alberta* v *A.-G. of Canada*, (1947) 52 C.W.N. 236 (P.C.).
4. *A.-G for Canada* v. *A.-G. for Quebec*, A. 1947 P.C. 44.

though it thereby modifies civil rights in the Province and though it may conflict with Provincial statutes relating to warehouse receipts as a negotiable document.[2]

On the other hand,—if the 'pith and substance' of a Provincial Act is 'banking',—to make loans which involve the expansion of credit, the Provincial Act is *ultra vires* by reason of Sec. 91 (15) of the Br. N. America Act, and it is immaterial that such business was not being done by the Banks in Canada in 1867.[3] Similarly, if the object of a Provincial legislation is not in a true sense "Taxation in order to the raising of a revenue for Provincial purposes" [Sec. 92 (2)], but to prevent the operation within the Province of those banking institutions which have been called into existence by the Dominion Parliament, the Provincial legislation is *ultra vires*.[5] Again, a Provincial statute which sought to confiscate all deposits in 'credit institutions' whenever they have not been the subject of any operation within 30 years, was held to be 'in pith and substance' a legislation relating to banking (being aimed at bank deposits) even though the word 'bank' was avoided in the statute and a bank deposit is in a sense a matter of 'property'. Hence, the Provincial statute was *ultra vires*.[5]

(D) *Government of India Act, 1935.*—Item 38 of List I of the Act was—

'Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State."

INDIA

'Banking'. 1. It would be too much to say that every law which in its operation might affect the property or interest of a *Bank just as it affects the property or interest of other persons* would constitute an encroachment on the present Entry. The Entry must be limited to laws which affect the conduct of the business of banks *qua banks*.[6]

2. But—

(i) A law which solely affects the amounts recoverable by Banks in execution of decrees obtained by them would encroach upon the present Entry.[7]

(ii) The power under this Entry, read with Entry 46 of List I, is wide enough to include power to prohibit a bank from accepting deposits by cheques.[8]

3. Our Constitution assigns to the Union Parliament exclusive jurisdiction in respect of banking as a whole. There is no exception in respect of State Banking as in Australia.

The Business of banks. A bank is a corporation, partnership or individual carrying on the business of banking. The business of banking, strictly speaking, is the receipt of money from or on account of a customer, to be repaid on demand or when drawn by cheque. The judicial recognition of the banker's lien implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers.[9]

Entries 45 List I and 30, List II. A law regulating the business of banking cannot be referred to Entry 30 of List II, relating to money-lending.[10]

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5. *A-G. of Alberta* v. *A.-G of Canada*, A. 1939 P.C. 53 (*58*).
6. *Bank of Commerce* v. *Nripendra*, A. 1495 P.C. 7 (*8*).
7. *Bank of Commerce* v. *Kunja Behari*, A. 1944 Cal. 196.
8. *Kurian* v. *Union of India*, A. 1962 Ker. 267 (*280*).
9. *Cf. A.-G. for Canada* v. *A.-G. for Quebec*, (1947) A.C. 33 (*44*) ; *A.-G. for Alberta* v. *A.-G. for Canada*, (1947) A.C. 503.
10 *D.C.G.M.. v. Union of India*, A. 1983 S.C. 937 (para. 33).

Existing Laws.—Bankers' Books Evidence Act, 1891 ; Banking Companies Act (X of 1949) ; Reserve Bank of India Act (II of 1934) ; Reserve Bank (Transfer to Public Ownership) Act (LXII of 1948) ; Banking Companies (Legal Practitioners' Clients' Accounts) Act (XLVI of 1949) ; Banking Regulation Act, 1949.

Legislation by Parliament.—State Bank of India Act (XXIII of 1965) ; State Bank of Hyderabad Act, 1956 ; Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 ; Regional Rural Banks Act, 1976 ; National Housing Bank Act, 1987.

46. Bills of exchange, cheques, promissory notes and other like instruments.

OTHER CONSTITUTIONS

(A) *Australia.*—Sec. 51 (xvi) of the Constitution Act, 1990, gives the Commonwealth Parliament power to legislate with respect to—

"Bills of exchange and promissory notes."

(B) *Canada.*—Sec. 91 (18) of the Br. N. America Act gives the Dominion Parliament exclusive power to legislate as regards—

"Bills of exchange and promissory notes."

(C) *Government of India Act, 1935.*—Item 28 of List I of that Act was the same as the present Entry.

INDIA

Negotiable instruments. The instruments specified in this Entry are known as 'negotiable instruments'. A negotiable instrument is an instrument which is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore*.[11]

In India, the law relating to negotiable negotiable instruments is codified in the Negotiable Instruments Act (XXVI of 1881). Sec. 13 of this Act enumerates the instruments which are 'negotiable instruments' under the Act :

"A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer."

Sec. 14 says—

"When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated."

The definitions of promissory note, bill of exchange and cheque are as follows:

"A "Promissory note" is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

"A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

"A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

'Other like instruments'. This phrase means 'instruments of the same genus as cheques, bills of exchange and promissory notes'. *Negotiability* is the common essential attribute of all instruments coming under the present Entry[6]. Accordingly, the phrase 'other like instruments' will include only such instruments as have the quality of negotiability.[12]

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11. *Crouch* v. *Credit Foncier*, (1873) 8 Q.B. 374.
12. *Waverly Jute Mills* v. *Raymond & Co.*, A. 1963 S.C. 90.

Other aspects of these instruments, e.g., interest on promissory notes, do not come under this Entry.[6]

Reason behind the Entry. The reason why these instruments are assigned to the Union Legislature is that uniformity of practice regarding these instruments for the whole of India is necessary. As they can be freely negotiated, they can circulate from Province to Province, and after successive endorsements can even be sued upon in Provinces other than those in which they were executed.[13]

Existing Law. – Negotiable Instruments Act (XXVI of 1881).

47. Insurance.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Though the Supreme Court allowed federal legislation regarding banking[14] as early as 1819, it refused to recognise insurance as 'inter-State commerce',[15] as a result of which insurance was subject to State control and the business as well as the insurants suffered owing to diverse conflicting laws. The Supreme Court has later reversed its earlier decisions and opened the way for federal legislation.[16]

(B) *Australia.* – Sec. 51 (xiv) of the Constitution Act, 1900, gives the Commonwealth Parliament exclusive power with respect to –

"Insurance, other than State Insurance ; also State insurance extending beyond the limits of the State concerned."

(C) *Government of India Act, 1935.* – Item 37 of List I of the Act was –

"The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respect business undertaken by a Federated State ; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province."

INDIA

'Insurance'. "Insurance is the act of providing against a possible loss, by entering into a contract with one who is willing to give assurance, that is, binds himself to make good such loss should it occur. In this contract, the chances of benefit are equal to the insured and the insurer. The first actually pays a certain sum and the later undertakes to pay a larger, if an accident should happen."[17]

Insurance is the act of providing against loss or damage which may be caused by a contingent event such as fire, marine, accident, death and the like. But the worker's compensation is not insurance.[18] Legislation under this head would extend to provisions relating to dividends, publication of accounts, value of policies, standard of policies, prescribing investmnt, requiring deposits in money or in bonds, preventing rate discrimination, limitation of risks and the like.[17]

The present Entry is wider than the entry is Sec. 51 (xiv) of the Australian Constitution inasmuch as State insurance is not excluded from the Union list.

Existing Law. – Insurance Act (IV of 1938).

Legislation by Parliament. – Life Insurance (Emergency Provisions) Act, 1956 ; Life Insurance Corporation Act, 1956.

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13. *Subrahmanyam* v. *Muttuswami*, (1940) 45 C.W.N. (F.R.) 1 (*11*).
14. *McCulloch* v. *Maryland*, (1819) 4 Wh. 316.
15. *Paul* v. *Virginia*, (1969) 8 Wall. 168.
16. *U.S.* v. *S.E. Underwriters' Association*, (1944) 322 U S. 533.
17. Wharton's Law Lexicon.
18. *Australian Steamships* v. *Malcolm*, (1915) 19 C.L.R. 298 (*327*).

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48. Stock exchange and futures markets.

'Future markets.' Legislation on forward contracts comes under this Entry and not under Entry 26 of List II.[19] When a contract postpones the delivery of goods or the payment of goods to a future date, it is a 'forward contract.[19]

The word 'market', in this Entry, refers to business and not the place where business is carried on.[19]

Analogous provisions.—Entry 26 of List II deals with 'trade and commerce within the State subject to the provisions of Entry 33 of List III' ; Entry 27 of List II deals with 'production, supply and distribution of goods, subject to the provisions of Entry 33 of List III' ; Entry 7 of List III deals with 'contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land'. Entry 33 of List III deals with the 'trade and commerce in, and the production, supply and distribution of certain specified goods.

Legislation by Parliament.—Forward Contracts (Regulation) Act (LXXIV of 1952);[7] Securities Contracts (Regulation) Act, 1956.

49. Patents, inventions and designs ; copyright ; trademarks and merchandise marks.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art I, Sec. 8 (8) of the Constitution gives Congress the power :

"to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The above clause gives Congress the power over patents and copyrights. Congress has no express grant as to *'trade-mark'*. But it has been held that it may grant exclusive right of trade-mark under its 'commerce' power but only as regards trade-marks used in foreign or inter-State commerce.[20] A State may nevertheless (in the exercise of its police power) place restrictions upon the use of such trade-marks, such as do not directly interfere with the privileges acquired from the Federal grant.[21] Similarly, it may regulate the use of a patented product,[22] or the conduct of copyright holders.[23]

A patent is regarded as a property right[24], but there is a current of opinion which regards it as a privilege.

(B) *Australia.*—Sec. 51 (xviii) of the Constitution Act, gives the Commonwealth Parliament power to legislate with respect to :

"Copyrights, patents of inventions and designs, and trade-marks."

(C) *Canada.*—Cl. (22) of Sec. 91 of the Br. N. America Act gives exclusive powers to the Dominion to deal with :

"Patents of invention and discovery",

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19. *Waverly Jute Mills* v. *Raymon & Co.*, A. 1963 S.C. 90 (95). [*Duni Chand* v. *Bhuwalka Bros.*, (1955) 1 S.C.R. 1071, to the contrary, related to the Government of India Act, 1935 in which there was no Entry conrresponding to Entry 48 of List III of the Constitution and, hence, that decision does not hold good under the Constitution].
20. *Trade Mark Cases*, (1879) 100 U.S. 82.
21. *Patterson* v. *Kentucky*, (1978) 97 U.S. 501 ; *Watson* v. *Buck*, (1941) 313 U.S. 387.
22. *Webber* v. *Virginia*, (1881) 103 U.S. 344.
23. *Watson* v. *Buck*, (1941) 313 U.S. 387.
24. *Hartford Empire Co.* v. *U.S.*, (1945) 323 U.S. 286 (415).

while cl. (23) relates to –

"Copyrights."

There is no specific entry relating to trade-marks. But it has been held[25] that the power to legislate with respect to trade-marks is an exclusive power of the Dominion Legislature under Cl. (2) of Sec. 91 relating to – "regulation of trade and commerce". It has been further held in that case[25] that a power to regulate trade-marks includes the power to create a 'national mark' which is now a usual feature of international commerce.

(D) *Government of India Act, 1935.* – Item 27 of List I was –

'Copyright, inventions, designs, trade-marks and merchandise marks'.

INDIA

'Patent'. – A patent is an exclusive right[26] or privilege of making using and selling an invention (which means any manner of new manufacture and includes an improvement), granted under the law of patents to the 'true and first inventor' thereof [cf. Indian Patents & Designs Act (II of 1911)]. In order to be patentable, an invention – (a) should relate to a manner of manufacture, (b) should be novel ; (c) should be the outcome of inventive ingenuity ; (d) should have utility ; (e) should not be contrary to law or morality.

'Design'. – The definition given in Sec. 2 (5) of the Patents and Designs Act, 1911, is as follows –

"'design' means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting embossing, engraving, staining or any other means whatever, manual, mechanical, or chemical, separate or combined, but does not include any trade or property mark as defined in sections 478 and 479 of the Indian Penal Code."

'Invention'. – In Sec. 2 (8) of the Patents and Designs Act, 1911, an invention is defined as –

"any manner of new manufacture, and includes an improvement and an alleged invention."

'Trade-mark'. – The definition given in Sec. 2 (V) of the Trade and Merchandise Marks Act, 1958 (43 of 1958) is –

"(i) in relation to Chapter X (other than section 81), a registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark ; and

(ii) in relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark registered as such under the provisions of Chapter VIII."

'Copyright'. – Our Copyright Act (14 of 1957) has adopted a comprehensive and exclusive [s. 16] definition of 'copyright' [s. 14] as follows :

"(1) For the purposes of this Act, "copyright" means the exclusive right, by virtue of, an subject to the provisions of, this Act, –

(a) in the case of a literary, dramatic or musical work, to do and authorise the doing of any of the following acts, namely : –

(i) to reproduce the work in any material form ;
(ii) to publish the work ;
(iii) to perform the work in public ;
(iv) to produce, reproduce, perform or publish any translation of the work ;

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25. *A.-G. of Ontario* v. *A.-G. of Canada*, A. 1937 P.C. 99 (*100*).
26. *Steers* v. *Rogers*, (1893) A.C. 232.

(v) to make any cinematograph film or a record in respect of the work ;
(vi) to communicate the work by radio-diffusion or to communicate to the public by a loud-speaker or any other similar instrument the radio-diffusion of the work ;
(vii) to make any adaptation of the work ;
(viii) to do in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (vi) ;

(b) in the case of an artistic work, to do or authorise the doing of any of the following acts, namely : –

(i) to reproduce the work in any material form ;
(ii) to publish the work ;
(iii) to include the work in any cinematograph film ;
(iv) to make any adaptation of the work ;
(v) to do in relation to an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (iii).

(c) in the case of a cinematograph film, to do or authorise the doing of any of the following acts, namely : –

(i) to make a copy of the film ;
(ii) to cause the film, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public ;
(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track ;
(iv) to communicate the film by radio-diffusion ;

(d) in the case of a record, to do or authorise the doing of any of the following acts by utilising the record, namely : –

(i) to make any other record embodying the same recording ;
(ii) to cause the recording embodied in the record to be heard in public ;
(iii) to communicate the recording embodied in the record by radio-diffusion.

(2) Any reference in sub-section (1) to the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a substantial part thereof."

Entries 49, List I and 97, List I. This Entry, read with Entry 97 of List I, authorises Parliament to legislate relating to the abuses and improper uses of trade marks, etc., or of certain emblems and names for professional or commercial purposes.[27]

Legislation by Parliament. – Khaddar (Protection of Name) Act (LXXVIII of 1950) ; Emblems and Names (Prevention of Improper Use) Act, 1950 ; Copyright Act (14 of 1957) ; Trade and Merchandise Marks Act (43 of 1958).

50. Establishment of standards of weight and measure.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Congress has, under Art. 1, Sec. 8 (5), the power –
"to fix the standard of weights and measures."

Under this power Congress has by law established certain standards of length, mass and capacity. The enforcement of these standards, however, is left to the States. There is a National Bureau of Standards which is the custodian of the national standards and which supplies to the States replicas of all sorts of standards kept by it, including even technical and scientific units and measures, meters, containers and the like. On the other hand, the States have undertaken inspection and prevention of fraud in respect of weights and measures, under their 'police-power'.[28]

27. *Sable & Co.* v. *Union of India*, A. 1975 S.C. 1172 (para. 13).
28. *Armour* v. *N. Dakota*, (1916) 240 U.S. 510.

(B) *Australia.* – Sec. 51 (xv) of the Constitution Act, 1900, makes – "Weights and measures", a subject for Commonwealth legislation. This power is wider than that of the American Congress and enables the Commonwealth Parliament to regulate the domestic affairs of States to some extent[17].

(C) *Canada.* – Sec. 91 (17) of the Br. N. America Act gives the Dominion Parliament exclusive power in relation to – 'Weights and measures'.

(D) *Government of India Act, 1935* – Item 51 of List I of the Act was –

"Establishment of standards of weight'.

INDIA

'Standard of weight and measure' – While 'weights and meansures' is a State subject under Entry 29 of List II, the laying down of standards relating to weights and measures is a Union subject under this Entry.

Legislation by Parliament. – Standards of Weights and Measures Act, 1976 ; Standards of Weights and Measures (Enforcement) Act, 1985.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

Existing Laws. – Coal Grading Board Act, 1925 ; Agricultural Produce (Grading and Marking) Act, 1937.

Legislation by Parliament. – Bureau of Indian Standards Act, 1986.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 34 of List I of the Act was –

"Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest."

INDIA

'Industry'. 1. In the present context, 'industry' means the process of manufacture or production and does not include the raw materials used in the industry, or in distribution of the products of the industry.[29] It would include the manufacture of gold ornaments.[30]

2. The word 'industry' cannot have different meanings in Entries 52 of List I and 24 of List II. But 'Industries' in Entry 24 of List II excludes 'gas and gasworks' in their entirety. It follows that 'gas and gas-works' are exclusively a State subject and the Union cannot assume jurisdiction over them even by making a declaration under Entry 52 of List I.[31] In the result, the Industries (Development and Regulation) Act, 1951, in so far as it purports to deal with the gas industry, is *ultra vires.*[31]

Production, supply and distribution. While the general power as to production, supply and distribution of goods is included in Entry 27 of List II, the production, supply and distribution of goods produced by industries declared under the present Entry comes under Entry 33(a) of List III.[29] But Entry 33(a)

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29. *Tika Ramji* v. *State of U.P.*, (1956) S.C.R. 393 (*411, 420*).
30. *Harakchand* v. *Union of India*, A. 1970 S.C. 1453 (*1460*).
31. *Calcutta Gas Co.* v. *State of W.B.*, A. 1962 S.C. 1044 (*1051-52*).

is concerned only with 'products', so that raw products used in the industrial process come under Entry 27 of List II, even though the industry is a controlled industry under Entry 52 of List I.[29]

Taxation. A tax on the entry of raw materials into a factory premises is a tax under Entry 52 of List II, and the State is not debarred from levying it by reason of the present Entry.[32]

'Declared by Parliament by law'. This expression means a declaration made by Parliament *subsequent* to the coming into force of the Constitution.[32] A pre-Constitution law relating to the subject will not satisfy the requirement of Entry 52, 53, 54 or 69 of List I, where this expression is used.[33]

Power of State Legislature. 1. So long as a declaration under the present Entry is not made by Parliament, the legislative competence of the State Legislature under Entry 23 of List II is not lost with respect to any industry.[34] But as soon as a declaration under the present Entry is made, any State legislation relating to the declared industry, in so far as it is inconsistent with the law made by Parliament, is impliedly repealed.[33, 35]

2. Once a declaration under the present Entry is made by Parliament, in respect of an industry, so much of it is completely taken away from the jurisdiction of the State and allocated to the jurisdiction of Parliament,[35-36] so that any State legislation relating to such declared industry shall be *ultra vires*.[37] Such jurisdiction of Parliament will include 'incidental" powers.[38]

3. But even after such declaration, the State Legislature does not cease to have the power conferred by an independent Entry, which has no proximate connection with the 'control' or regulation of the declared industry, e.g., the power relating to land, land reform, etc.[39], the power to impose a cess or tax on land under Entry 49 of List II or to impose a tax on the minerals won, under Entry 50 of List II,[40] to provide for the development of mining in the State under Entry 23 of List II, subject to legislation by Parliament under List I,[33] to acquire or requisition property for gas-works, under Entry 25 of List II,[31] to provide for public health and sanitation, with respect to the declared industries,[41] to provide for prevention of or relief against unemploymen, under Entry 23 of List III,[42] to acquire or requisition property for the industry, under Entry 42 of List III,[43] to impose sales tax, under Entry 54 of List II,[44] to regulate the production, supply and distribution of the notified goods, under Entry 33(a) of List III.[37]

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32. *Murli* v. *State of U.P.*, A. 1957 All. 159 (164).
33. *Hingir-Rampur Coal Co.* v. *State of Orissa*, A. 1961 S.C. 459 (472). (This view of the Author, expressed at p. 723 of C. 3, Vol. II, has thus been confirmed by the Supreme Court. The contrary *obiter* in the majority judgment in *State of W.B.* v. *Union of India*, A. 1963 S.C. 1941, that the declaration in s. 2 of the Minerals and Mining (Regulation & Development) Act, 1948 had the effect of a declaration made under Entry 52 of List I of the Constitution, it is submitted, overlooks the above expression.)
34. *Paresh* v. *State of Assam*, (1962) 1 S.C.A. 539.
35. *State of Orissa* v. *Tulloch*, A. 1964 S.C. 1284.
36. *Baijnath* v. *State of Bihar*, A. 1970 S.C. 1436.
37. *State of U.P.* v. *Synthetics*, A. 1980 S.C. 614 (paras. 26, 28).
38. *Fatehchand* v. *State of Maharashtra*, A. 1977 S.C. 1825 (para. 62)
39. *Kannan Deban Co.* v. *State of Kerala*, A. 1972 S.C. 2301 (para. 29).
40. *Murthy* v. *Collector of Chittor*, A. 1965 S.C. 177.
41. *Elavally Panchayat* v. *Rosa*, A. 1970 Ker. 88 (93).
42. *Pushraj* v. *Roy*, A. 1978 Cal. 215 (para. 22) F.B.
43. *Ishwari* v. *State of U.P.*, A. 1980 S.C. 1955 (paras. 23–24).

4. It would also include power 'incidental' to such Entry.[38]

5. In case of conflict between the present Entry and some other Entry in the State List, the Court has to find out the 'pith and substance' of the legislation in quesion.[44]

Entries 52 of List I and 24 of List II. Entries 7 and 52 of List I and 24 of List II, taken together, completely exhaust the sphere of 'industries'. The result is, whatever is not covered by the two Entries of List I belong to the State jurisdiction.[37]

Entries 52 of List I and 2 of List III. The concurrent power of the State Legislature under Entry 2 of List III is not taken away to by a law made by Parliament under Entry 52 of List I. The law made by the State Legislature relating to investigation of offences under the Act of Parliament is, of course, subject to cl. (1) of Art. 254, but will, again, prevail under cl. (2) thereof, if the President assents to the State Act.[45]

Entries 52 of List I and 33(a) of List III. 1. Entry 52 of List I is to be read not only with Entry 24 of List II but also with Entry 33(a) of List III.[37] In the result, a State Legislature has concurrent power to regulate the production, supply and distribution of the prducts of an industry notified by Parliament under Entry 52 of List I, including alcohol[37] or sugar.[29]

2. The power under Entry 33(a) of List III would include the power of the State Government to levy a vend fee for parting with its exclusive right to manufacture intoxicating liquor.

Entries 52 of List I and 42 of List III. The power to legislate for acquisition of property can be exercised only under Entry 42 of List III.[43]

It cannot, therefore, be exercised as incidental to the power under 52 of List I or any other Entry.[43]

Existing Laws. – Coffee Act, 1942; Rubber Act, 1947; Indian Power Alcohol Act, 1948.

Legislation by Parliament. – The industries specified in the following Acts have been declared by Parliament as industries the control of which by the Union is expedient in the public interest.

(i) Industries (Development and Regulation) Act (LXV of 1951); (ii) Tea Act (XXIX of 1953); (iii) Coir Industry Act (XLV of 1953); (iv) Rice-Milling Industry (Regulation) Act (21 of 1958); (v) Sugar (Regulation of Production) Act, 1961 ; (vi) Cardamon Act, 1965.

53. Regulation and development of oilfields and mineral oil resources ; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 32 of List I was –

"Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport."

INDIA

'Regulation'. – 1. This word occurs in this Entry as well as several other Entries. Ordinarily, the word 'regulate' means to adjust, govern or manage according to

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44. *Ganga Sugar Corpn.* v. *State of U. P.*, A. 1980 S.C. 286 (para.28).
45. *Gobardhan* v. *State*, (1989) Cr. L. J. 1908.
46. *Har Shankar* v. *Dy. Excise Commr.*, (1975) 3 S.C.R. 254.
47. *Aluminium Corpn.* v. *Coal Board*, A. 1957 Cal.326.

certain standards, but not[48] the power to tax which is conferred by specific Entries in the Legislative Lists, and cannot be claimed as an ancillary power. Parliament may, however, derive that power from Entry 97 of List I provided the tax in question is not specified in any of the Lists.[49] [See, further, under Entry 54, below].

Entries 53 of List I and 42 of List III. Mere regulation of the manner in which mining lease can be granted or oilfields can be developed would come under this Entry and cannot be challenged as a law of acquisition of State property, under Entry 42 of List III.[50]

'Declared by Parliament by law'.—See under Entry 52, *ante.*

Existing Laws.—Petroleum Act (XXX of 1934) ; Power Alcohol Act (XXII of 1948).
Legislation by Parliament.—Inflammable Substances Act (XX of 1952).

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 36 of List I of that Act was similar to the present Entry.

INDIA

'Regulation'. 1. This word should be liberally interpreted even though held to be qualified by the test of 'public interest'.[51]

2. So construed, it would include the following measures,[51] *inter alia*—

i. Prohibiting of mining operations by any person other than the Government.
ii. Termination of all existing leases and sub-leases.
iii. Grant of fresh leases in favour of the Government itself.

3. The 'development' need not take place all at once ; it may be achieved through a phased and graded programme of conservation.

The meaning of the word 'mineral' is not restricted by the preceding word 'mine'.[52] Hence, brick-earth,[52] or black-clay may well be covered by the word 'minerals'.[52]

Labour in mines and coalfields. The general power relating to 'welfare of labour' is concurrent, under Entry 24 of List III and the present Entry is in the nature of an exception to that general power.

'Declared by law by Parliament'.—See under Entry 52, *ante.*

Taxation. 1. The word 'regulation', as such, does not confer any pwer to impose a tax.

2. But, read with Entry 97 of List I, this would authorise Parliament to levy a royalty on minerals removed from a mine.[53]

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48. *Sundararamier* v. *State of A. P.*, A. 1958 S.C. 468 (*494*).
49. *Cf. Mithan Lal* v. *State of Delhi*, (1959) S.C.R. 445.
50. *Babubhai* v. *Union of India*, A. 1983 Guj. 1 (paras. 5, 81).
51. *Tara Prasad* v. *Union of India*, A. 1980 S.C. 1682 (paras.14, 30, 39).
52. *Laddu* v. *State of Bihar*, A. 1965 Pat. 491 (*497-98*) ; *Baijnath* v. *State of Bihar*, A. 1970 S.C. 1433 (*1444*).
53. *Central Coal Fields* v. *State*, A. 1989 Pat. 210 (para.17) D. B.

3. Such royalty is a payment made by the lessee to the lessor for the materials and minerals won from the land and as distinguished from 'rent' which is payable for use of the land surface.[54]

4. Such royalty is not rent payable to the lessor for the use of the surface of the mining land, but is in the nature of a tax imposed by the State in return of the privilege of working the mine. Nor is it a fee for any services rendered by the State.[52]

Cess. 1. A cess is a kind of tax which is generally used when the levy is for some special administratives expense, e.g., health cess, education cess, road cess.[54a]

2. When it is levied as an increment to an existing tax, the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment[54a].

3. Where a royalty is payable on a proportion of the minerals extracted, and thereafter Parliament levies a cess on such royalty, such cess is a tax not on 'land' or on 'land revenue,' or on mineral rights, so that the State Legislature cannot claim any jurisdiction over such cess under Entry 45, 49 or 50 or Sch. II. Such cess would come under Entry 97 of List I.[54b]

'Minerals'.– The meaning of this word is not restricted by the preceding word 'mine'.[52] Hence, brick-earth,[52] or brick-clay may well be covered by the word 'minerals'.[52]

Whether power of acquisition included. In *State of W.B.* v. *Union of India*,[55] there is an obiter in the majority judgement that this Entry gives to the Union the power to *acquire* mines and minerals, by necessary implication. But, it is submitted, if this reasoning were available in respect of similar Entries in lists I and II, a separate Entry for acquisition in the Concurent List would not have been required at all. That view has been expressed by the Supreme Court while interpreting the expression 'regulation of house accommodation' in Entry 3 of List I.[56]

Entries 54 of List I and 5 of List II. While the State Legislature as to regulation of mines passes over to Parliament to the extent of the declaration made by Parliament under Entry 54 of List I, the State Legislature would not thereby be denuded of its power over municipal administration or to levy taxes for the purpose of its effectively discharging that function.[57] Entry 54 of List I does not contemplate the taking over of municipal functions by the Union.[57-58]

Entries 54 of List I and 23 of List II. 1. To the extent that there is no declaration by Parliament in exercise of the power conferred by the present Entry by a post-Consltitution law,[33] the power of 'regulation of mines and mineral development' belongs to the State Legislature, under Entry 23 of List II.[59-60] But as soon as such declaration is made by Parliament, the State legislative power is *to that extent* withdrawn.[59]

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54. *Murthy* v. *Collector*, A. 1965 S.C. 177 (para.7).
54a. *Guruswamy* v. *State of Mysore*, A. 1967 S.C. 1512 (*1525*).
54b. *India Cement* v. *State of T. N.*, A. 1990 S.C. 85 (paras.28, 35) - 7 Judge Bench, overruling *Murthy v. Collector*, A 1965 S.C. 177.
55. *State of W.B.* v. *Union of India*, A. 1963 S.C. 1241 (*1266*).
56. *Indu Bhushan* v. *Rama Sundari*, (1969) 2 S.C.C.289 (296, para.12).
57. *Western Coalfields* v. *S.A.D.A.*, A. 1982 S.C. 697 (para. 25)
58. *Aluminium Corp.* v. *Coal Board*, A. 1959 Cal.222 (*225*); *Laxmi Narayan* v. *State*, A. 1983 Or. 210 (para.12) F.B.

2. In other words, though the power relating to mines and minerals is not concurrent, the State Legislature also has the jurisdiction so long as Parliament does not legislate under Entry 54 of list I, but loses that jurisdiction as soon Parliament legislates[59] (Entry 23 of List II is subject to Entry 54 of List I). How far the declaration made by Parliament and the exclusion of the State Legislature should go, is for Parliament to determine.[59, 64]

Entries 54 of List I and 45 of List II. 1. Entry 54 of List I does not take away the power of the State Legislature to impose land revenue (under Entry 45 of List II) on land used for mining purposes.[60]

2. But royalty payable for mining minerals from the land cannot be labelled as 'land revenue' under Entry 45 of List II.[61]

Entries 54 of List I and 49 of List II. 1. While Entry 54 of List I empowers Parliament to levy to levy a 'royalty' on minerals removed from a mine, Entry 49 of List II would empower the State Legislature to impose a 'cess' on the mine as an immovable property situated in a local area.[54, 62],

2. The two imposts are independent and operate in different fields. The local cess is leviable by the State Legislature for some specific purpose, e.g., provisions for the safety, health, convenience or education or other amenities of the inhabitants of the local area.[54]

3. Entry 49 of List II would also empower the State Legislature to impose a tax on the lands and buildings used for the purpose of mining operations.[63]

4. But, by reason of Entry 54 of List I, the State Legislature would not be competent to levy a cess for the purpose of 'devcelopment' of a mining area, by improving communications and the like.[64]

5. Similarly, by reason of Entry 50 of List I, the State Legislature cannot impose a cess which would amount to a tax on mineral rights or on the act of extraction of the mineral,[54] or a cess on the royalty payable for such extraction.[63]

Legislation by Parliament. – Mines and Minerals (Regulation and Development) Act (67 of 1957).

55. Regulation of labour and safety in mines and oil fields.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 35 of List I was identical.

INDIA

'Regulation'. – See under Entry 53, *ante.*

Analogous Provision. – The general power relating to 'welfare of labour' is concurrent, under Entry 24 of List III and the present Entry is in the nature of an exception to that general power.

Legislation by Parliament. – Mines Act (XXXV of 1952).

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59. *State of T.N.* v. *Hind Stone*, A. 1981 S.C. 711 (para. 1) ; *Baijnath* v. *State of Bihar*, A. 1970 S.C. 1436 (1443-45).
60. *Satna S. & L.Co.* v. *State*, A. 1988 M.P. 286 (paras.5, 20) D.B.
61. *India Cement* v. *State of T.N.*, A.1990 S.C. 85 (para.21)-7 Judges.
62. *Laxmi Narayan* v. *State*, A. 1983 Or. 210 (para.13) F.B.
63. *Western Coalfields* v. *S.A.D.A.*, A. 1982 S.C. 697.
64. *Hingir-Rampur Coal Co.* v. *State of Orissa*, A. 1961 S.C. 459; *State of Orissa* v. *Tulloch*, A. 1964 S.C. 1294.

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

Regulation and development of inter-State rivers and river valleys. Under Entry 17 of List II, the States have exclusive power over 'water supplies' but 'subject to the provisions of Entry 56 of List I'. In exercise of the present power Parliament has enacted the River Boards Act, 1956.

Legislation by Parliament. – River Boards Act (49 of 1956). This Act empowers the Central Government to set up a River Board in respect of any inter-State river it thinks fit. The Board will be constituted in consultation with the State Governments concerned and will include their representatives. The main function of the Board will be to advise the State Governments concerned in regard to the regulation or development of the inter-State river or river valley within its area of operation.

57. Fishing and fisheries beyond territorial waters.

OTHER CONSTITUTIONS

(A) *Australia.* – Sec. 51 (x) of the Constitution Act is – 'Fisheries in Australia beyond territorial waters'.

(B) *Government of India Act, 1935.* – Item 23 of List I was identical.

INDIA

Analogous Provisions. – "Fisheries" is an exclusive State subject under Entry 21 of List II, while "fisheries beyond territorial waters" is an exclusive Union subject under Entry 57 of List I. The State Legislature has thus exclusive competence over fisheries situated within the territory of its State, including the 'territorial waters' [see Vol. A, p. 160, *ante* and also under Entry 21 of List II, *post*].

By a Proclamation,[65] the President has claimed the right of establishing conservancy zones within a distance of 100 nautical miles from the outer limits of the territorial waters of India, to take conservancy measures in order to protect fisheries and to regulate all fishing activities in such zones, subject to the provisions of treaties and international agreements to which India is a party.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 47 of List I was – 'Salt'.

INDIA

'Manufacture . . . . . of salt . . . . . ' – This Entry is an improvement upon Item 47 of List I of the Government of India Act, 1935. In the Government of India Act, 1935, Salt was an exclusive Federal subject without any qualification. The present Entry gives the Union Parliament exclusive and complete jurisdiction over the manufacture and distribution of salt only by *Union agencies*. As to the manufacture and distribution of salt by *other agencies*, the Union Parliament has only the power of regulation and control.

'Regulation'. – See under Entry 53, *ante*.

Legislation by Parliament. – Salt Cess Act (XLIX of 1953).

59. Cultivation, manufacture, and sale for export, of opium.

OTHER CONSTITUTIONS

Government of India Act, 1935.– The present Entry reproduces Item 31 of List I of the Act of 1935.

INDIA

Opium. 1. This Entry is not exhaustive with respect to opium. It relates only to (a) cultivation ; (b) manufacture and (c) sales for the purposes of export. Other matters relating to opium, e.g., possession, storage and sales within the country, are governed by Entry 19 of List II, which is the residuary Entry regarding opium.[66]

2. While the present entry gives the Union exclusive control over only cultivation, manufacture and sale for export,– duties of excise on the production of opium is a State subject under Entry 51 of List II[67].

Existing Laws.–The Opium Acts (XIII of 1857 and I of 1878), as extended by the Opium and Revenue Laws (Extension of Application) Act (XXXIII of 1950).

60. Sanctioning of cinematograph films for exhibition.

OTHER CONSTITUTIONS

Government of India Act, 1935.–The present subject was concurrent–being Item 33 of List III.

INDIA

'Sanctioning of films . . . . '– Departing from the Act of 1935, the Constitution makes sanctioning of films an exclusively Union subject, while *other* matters relating to cinemas is included in Entry 33 of List II. Thus, the regulation of *storage* of films for exhibition is included in List II and not under the present Entry.[68]

2. 'Sanctioning of films for exhibition' would include:[69]

(i) the power and procedure for making application for such sanction ;
(ii) the power to deal with exhibition of films without sanction ;
(iii) matters ancillary to the foregoing powers.[69]

Entries 60 of List I and 33 of List II. 1. The power of the State Legislature relating to cinemas under Entry 33 of List II is subject to Entry 60 of List I. This means that the subjects which properly come under Entry 60 of List I shall be excluded from the purview of Entry 3 of List II.[69] Thus, while the State Legislature can legislate regarding the exhibition of a video film, the power to legislate as regards the sanctioning of such exhibition shall belong to the Union.[69]

Legislation by Parliament.–*Cinematograph Act* (XXXVII of 1952).

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65. *R.S.O.* 2876, 29-11-56.
66. *Laxminarayan* v. *State*, A. 1961 M.P. 13.
67. *Indian Chemical Works* v. *Corpn. of Calcutta.*, A. 1966 S.C. 713 (*715*).
68. *De Luxe Film* v. *Corporation of Calcutta*, (1952) 7 D.L.R. 144 (Cal.).
69. *Music Centre* v. *State*, A. 1989 M.P. 56 (para. 6) D.B.

61. Industrial disputes concerning Union employees.

'Industrial disputes concerning Union employees'.—The present Entry forms an exception to Entry 22 of List III which includes industrial disputes in general.

Existing Law.—Industrial Disputes Act (XIV of 1947) ; Industrial Employment (Standing Orders) Act, 1946.

Legislation by Parliament.—Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 11 of List I was—

"The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation."

Existing Laws.—Victoria Memorial Act (X of 1903) ; Imperial Library (Change of Name) Act LI of 1948) ; Imperial Library (Indentures Validation) Act (I of 1902) ; Indian Museum Act (X of 1910).

Analogous Provision.—See Entry 12 of List II.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University ; *the University established in pursuance of article 371-E* ;[69a] any other institution declared by Parliament by law to be an institution of national importance.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 13 of List I was—

"The Banaras Hindu University and the Aligarh Muslim University".

INDIA

Existing Law.—Aligarh Muslim University Act (XL of 1920) ; Banaras Hindu University Act (XVI of 1915) ; Delhi University Act (VIII of 1922).

Legislation by Parliament.—The Vishva Bharati Act (XXIX of 1951), ; Institutes of Technology Act, 1961.

Analogous Provisions.—Universities other than those mentioned in the present Entry and Entries 64–66 of List I are included in Entry 11 of List II.[70]

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

Legislation by Parliament.—Indian Statistical Institute Act, 1956.

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70. *Cf. Gujarat University* v. *Shri Krishna*, A. 1963 S.C. 703 (*715*).

69a. Inserted by the Constitution (32nd Amendment) Act, 1973.

65. Union agencies and institutions for –

(a) professional, vocational or technical training, including the training of police officers ; or

(b) the promotion of special studies or research ; or

(c) scientific or technical assistance in the investigation or detection of crime.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 12 of List I was –

"Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies."

INDIA

Cl. (b) : Union agencies for promoting of special studies or research. There are a number of such institutions already in existence, e.g., Indian Council of Agricultural Research ; Indian Agricultural Research Institute ; Indian Veterinary Research Institute ; Indian Dairy Research Institute ; Indian Institute of Sugarcane Research ; Indian Council of Medical Research ; Indian Institute of Sugar Technology ; Central Rice Research Institute ; Central Potato Research Institute ; Forest Research Institute ; All-India Institute of Hygiene and Public Health ; All-India Mental Health Institute ; Malaria Institute of India.

Entries 65 of List I and 25 of List III. Since 1976 Entry 25 of the Concurrent List is the general Entry relating to Education. Entry 65 of List I only places under the exclusive jurisdiction of the Union the 'agencies or institutions' created by the Union for the purpose of regulating professional, vocational or technical education. The subject of vocational or technical training, as such, is not taken out of the Concurrent jurisdiction, by Entry 65 of List I.[71]

Legislation by Parliament. – All-India Institute of Medical Sciences Act, 1956.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Entries 66 of list I and 25 of List III :Standards for higher education. 1. While 'education' is a concurrent subject under Entry 25 of List III, as substituted by the Constitution (42nd Amendment) Act, 1976, Entries 65 and 66 of List I give the Union power to ensure that the standard of research, etc., is not lowered at the hands of any particular State or States, to the detriment of national progress and that the power of the State Legislature must be so exercised as not to directly encroach upon the Union power under the present Entry.[72]

2. The power to 'co-ordinate' is not merely power to evaluate but to harmonise or secure relationship for concerted action. This power under the present Entry is not conditioned by the existence of a state of emergency or unequal situations calling for the exercise of the power.

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71. *Indira* v. *National Council*, A. 1989 A. P.1 (para. 15.)
72. *Chitralekha* v. *State of Mysore*, A. 1964 S.C. 1823 (*1840*).

3. 'Medium of instruction' is not an item in the Legislative List. Hence, this should be regarded as an incident of the power to legislate on education, both under Entry 25 of List III as well as under Entries 63–66 of List I. Consequently, though the State Legislature has power to legislate relating to medium of instruction in institutions for primary or secondary education, the State Legislature shall have no power to legislate as to the medium of instruction in institutions for higher and scientific or technical education, if such legislation is likely to result in a lowering of the standards in such institutions. [73]

4. 'Institutions of higher education' in the present Entry would include 'Universitites'[74-75] as is indicated by the terms of Entry 25 of list III.[73] In the result, while legislation relating to Universities belongs to the Concurrent List, State legislation relating to Universities would be subject to the laws made by the Union Parliament for the purpose of ensuring co-ordination and determining standards of education in the Universities.[74]

5. The present Entry would cover commercial or other Universities, which are not created by any special statute, but are incorporated by a general law of incorporation.[74]

6. While legislating under this Entry for the purpose of co-ordination of standards of higher education, Parliament may incidentally provide a definition of 'university'.[74]

Entries 66 of List I and 42 List II. A law for the taking over of private educational institutions for the purpose of ensuring a high level of educational and training facilities and the co-ordination of that training with industrial and business units, would come under Entry 42 of List III, because the pith and substance of the legislation is acquisition of property,[76] – and neither Entry 66 of List I nor 25 of List III would be relevant.[76]

Legislation by Parliament. – University Grants Commission Act (3 of 1956)[74] – provides for the co-ordination and determination of standards in Universities through the medium of a University Grants Commission. All-India Council for Technical Education Act, 1987.

67. Ancient and historical monuments and records, and archaeological sites and remains, declared by *or under law made by*[77] Parliament to be of national importance.

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73. *Gujarat University* v. *Sri Krishna,* A. 1963 S.C. 703 (*705–16*) per Shah, Imam, Wanchoo, Ayyangar, JJ. and Sinha C.J.). [It is submitted that the words 'subject to' in Entry 11 now Entry 25 of list 1 does not exclude the subject included in Entries 63 – 66 of List I altogether from the State List, but only make State legislation subject to the paramount legislation, *if any,* made by Parliament in exercise of the powers conferred by the specified Entries in List I ; otherwise there would be no meaning in including 'universities' in Entry 11 of List II. This does not mean, as held by Subba Rao, J., that the State Legislature has exclusive power to legislate as to the medium of education even in institutions for higher or scientific and technical education, but only that if Parliament chooses to legislate with respect to the medium of education as regards such institutions in order to maintain the standards of such education or for the purposes of co-ordination, the State legislation shall, *pro tanto,* be superseded].
74. *Prem Chand* v. *Chhabra,* A. 1984 S.C. 981 (para.8) (pre-1976-amendment transferring education from List II ot List III).
75. Cf. *Azeez* v. *Union of India,* A. 1968 S.C. 668 (para. 21).
76. *L. N. Mishra Inst.* v. *State of Bihar,* A. 1988 S.C. 1136 (paras. 36-37).
77. Inserted by the Constitution (Seventh Amendment Act), 1956.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 15 List I was –

"Ancient and historical monuments ; archaelogical sites and remains."

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Amendments. The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante.*

Ancient monuments and archaeological sites and remains. 1. Ancient monuments other than those which are declared to be of national importance are included in Entry 12 of List II, while archaeological sites, other than those declared by Parliament to be of national importance, are included in Entry 40 of List III. A monument or site would, however come under the Union List when Parliament declares it to be of national importance. Such declaration must be a specific declaration and, in the absence of any such specific declaration in a Union law, the State Legislature holds the field, [78] and a State Act will prevail notwithstanding any Central Act relating to monuments or archaeological sites.

2. "Monument" means, among others, "a structure surviving from a former period" ; whereas "archaeology" is the scientific study of the life and culture of ancient peoples. Archaeological site or remains, therefore, is a site or remains which could be explored in order to study the life and culture of the ancient peoples. The two expressions, therefore, bear different meanings.[78]

Existing Law. – Ancient Monuments Preservation Act (7 of 1904).

Legislation by Parliament. – Jallianwala Bagh National Memorial Act (XXV of 1951) ; Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act (LXXI of 1951).

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India ; Meteorological organisations.

OTHER CONSTITUTIONS

(A) *Australia.* – See. 51 (viii) of the Constitution Act, 1900, gives the Commonwealth Parliament the power to legislate with respect to –

"Astronomical and meteorological observations."

(B) *Government of India Act, 1935.* – Item 14 of List I was the same as the present Entry.

69. Census.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The federal power over census, is derived from Art. I, s.2 (3)[79], which says –

"The actual enumeration (of people) *shall* be made within three years after the first meeting of Congress . . . . . in such manner as they shall by law direct."

(B) *Australia.* – 'Census' is a subject for Commonwealth legislation, under Sec. 51 (xi) of the Constitution Act, 1900.

78. *Joseph v. State of Kerala,* (1965) 2 S.C.R. 868.
79. *Legal Tender Cases,* (1871) 12 Wall. 457 (536).

(C) *Canada.* – The Dominion Parliament has [Sec. 91 (6)] exclusive power in relation to – "The census and statistics".

(D) *Government of India Act, 1935.* – 'Census' formed Item 16 List, I.

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Census. A census is "the official numbering of population with various statistics" (Concise Oxford Dictionary). The power to legislate with respect to census includes the power to set up complete establishment of necessary departments, to prescribe at what times and in what manner the census shall be taken, and what persons for the purpose.[80]

Existing Law. – Census Act (XXXVII of 1948).

70. Union Public services ; all-India services ; Union Public Service Commission.

OTHER CONSTITUTIONS

(A) *Australia.* – Sec. 52 (ii) of the Constitution Act confers upon the Commonwealth Parliament 'exclusive' power to make laws with respect to –

"Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth."

Under Sec. 69 of the Constitution Act, the following Departments have so far been transferred to the Commonwealth : Posts, telegraphs, telephones ; Naval and military defence.

(B) *Canada.* – Sec. 91 (8) of the Br. N.A. Act gives the Dominion Parliament power in relation to –

"The fixing and providing for the salaries and allowance of civil and other officers of the Government of Canada.'

(C) *Government of India Act, 1935.* – Item 8 of List I exactly corresponded to the present Entry.

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Entries 70 of List I and 41 of List II. These two Entries give the legislative power to legislate with respect to conditions of service, which is referred to in Art. 309.

Existing Laws. – Public Servants (Inquiries) Act (XXXVII of 1850) ; Government Officers' Indemnity Act (XXXIV of 1860).

Legislation by Parliament. – All India Services Act (LXI of 1951).

71. Union pensions, that is no say, pensions payable by the Government of India or out of the Consolidated Fund of India.

Government of India Act, 1935. – The present Entry 'corresponds to Item 9 of List I of the Act of 1935.

Existing Law. – Pensions Act (XXIII of 1871).

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President ; the Election Commission.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Art. I, S. 4 (1) says –

80. Wynes, Legislative and Executive Powers, p. 135.

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chosing Senators."

(B) *Government of India Act,* 1935.—Item 40 List I was as follows :

"Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder."

Election to Parliament and State Legislatures. 1. Read with Entry 93 of List II, the present Entry gives power to Parliament to legislate with respect to election offences relating to elections of Parliament and the Parliament and the State Legislature, [81] even though some aspects of the offences may relate to 'publlic order'. e.g., to provide for maintenance of public order during elections. [82]

2. The power to legislate with respect to—

"Elections to the Legislature of the State subject to the provisions of any law made by Parliament"

belongs to the State Legislature under Entry 37 of List II. The result is that the State Legislature has also the power to enact laws relating to elections to the State Legislature, so long as Parliament does not legislate *to the contrary.* Or, in other words, in case of repugnancy the Union law will prevail even though it relates to election to the State Legislature.

By virtue of this Entry, an Election Tribunal set up under the Representation of the People Act, which is a Union law, has jurisdiction to try an election petition calling in question an election to the State Legislature. [85b]

Election to offices of President & Vice-President. This Entry enables Parliament to regulate by law any matter relating to or connected with the election of a President or Vice-President, including the mode of nomination. [85c]

Entry 72 of List I and Art. 58. There is no conflict between the two provisions. There is nothing in Art. 58 to hold that a candidate who is otherwise qualified under Art. 58 would be exempt from complying with the requirements laid down by the law enacted by Parliament under the present Entry. [85d]

Laws made by Parliament.—Representation of the People Act (XLIII of 1950 ; Parliament (Prevention of Disqualification) Act (X of 1959) ; Representation of the People Act (XLIII of 1951) ; Presidential and Vice-Presidential Elections Act (XXXI of 1952) [84] ; Delimitation Commission Act, 1962 ; Representation of the People (Miscellaneous Provisions) Act, 1956.

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

Legislation by Parliament.—Salaries and Allowances of Members of Parliament Act (XXX of 1954) ; Salary and Allowances of Leaders of Opposition in Parliament Act, 1977.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House ; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

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81. Special Courts, in re, A. 1979 S.C. 478 (para. 44.)
82. *Rameshwar* v. *State,* A. 1957 A. Pat. 252 (255).
85a. *Grain* v. *Daugherty,* (1927) 273 U.S. 135.
85b. *Murlidhar* v. *Kadam,* A. 1954 M.B. 111.
85c. *Charan Lal* v. *Fakruddin,* A. 1975 S.C. 1288 (1289).
85d. *Anand* v. *Union of India.* A. 1987 All. 351 (para.13).

OTHER CONSTITUTIONS

(A) U. S. A.—Each House of Congress has the power to punish for contempt and person (member or outsider) for refusing to give evidence before any of its Committees unless, of course, there is any privilege.[85a]

(B) *Government of India Act, 1935.*—Item 41 of List I was—

"The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly ; the salaries, allowances and privileges of the members of the Federal Legislature ; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature."

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Powers and Privileges of Parliament and State Legislatures. This Entry is to be read with Arts. 105 and 194.

Legislation by Parliament.—Parliamentary Proceedings (Protection of Publication) Act, 1977.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors ; salaries and allowances of the Ministers for the Union ; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor–General.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 41 of List I was—

"41. Salaries of the [Federal ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly] ; the salaries, allowances and privileges of the members of the Federal Legislature ; and, [to such extent as is expressly authorised by Part II of this Act], the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature."

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Legislation by Parliament.—President's Pension Act (XXX of 1951) to provide for payment of a pension to retiring Presidents ; Salaries and Allowances of Ministers Act (LVII of 1952), fixing the salaries and allowances of the Ministers for the Union, including Deputy Ministers ; Comptroller and Auditor-General (Conditions of Service) Act (XXI of 1953).

76. Audit of the accounts of the Union and of the States.

Analogous Provision.—See Arts. 149–151.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein ; persons entitled to practise before the Supreme Court.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 53 of List I was—

"53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any to the matters in this list and, to such extent as it expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court and the conferring theron of supplemental powers."

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'Jurisdiction and powers of the Supreme Court'. 1. The width of this Entry is not circumscribed by words such as 'with respect to any of the matters of this List', which are added at the end of Entry 95 of List I or 65 of List III.[81] This means that Parliament is competent to legislate with respect to the jurisdiction and powers of the Supreme Court without reference to any of the matters contained in List I, II or III.[81]

2. Nor is the amplitude of Parliament's powers in this behalf, under Art. 246(1)–(2), in any way limited by Chap. IV, Part V.[81] There is thus nothing to debar Parliament from enlarging the jurisdiction and powers of the Supreme Court in a manner not contemplated by or beyond what is contemplated by Chap. IV of Part V.[81] Hence, Parliament can provide for direct appeal, on fact and law, from a Special Court created by it[81] in exercise of its powers under Entry 11A of the Concurrent List.[85e]

'Entitled to practise'. This Entry authorises Parliament to lay down the qualifications which would entitle a person to practise before the Supreme Court. The Supreme Court itself has the same power[85f] by making Rules under Art. 145(1)(a) but the rule-making power is subject to the law made by Parliament, if any, under the present Entry.[85f] Hence if there is any conflict between a Rule made by the Supreme Court relating to this matter and the law made by Parliament under this Entry, the latter shall prevail.[85f]

Analogous Provisions.—(a) The jurisdiction and powers of Courts is dealt with by several Entries :

Entry 7, List 1 : Of the Supreme Court, relating to any matter.

Entry 95, List 1 : Of all Courts other than the Supreme Court, relating to any matter in List I.

Entry 65, List II : Of all Courts other than the Supreme Court, relating to any matter in List II.

Entry 46, List III : Of all Courts except the Supreme Court, relating to any matter in List III.

(b) The Constitution of Courts, again is dealt with in the following Entries—

Entry 77, List I : Of the Supreme Court.

Entry 78, List I : Of the High Courts.

Entry 31, List II : Of all Courts, except the Supreme Court and the High Courts.

Entries 77-78 of List I and 26 of List III 1. When read together, these Entries lead to the conclusion that the power to legislate is regard to persons entitled to practice before the Supreme Court and the High Courts is altogether excluded from the State List and is made the exclusive field of Parliament.[84-85]

2. The power to levy and fees which may be payable by such persons etitled to practise before the Supreme Court or a High Court also belongs to Parliament, under Entry 96 of List I.[85g]

85e. *Nagendra* v. *The State*, A. 1954 Pat. 356.

85f. Lily Isabel Thomas, in re, A. 1964 S.C. 855.

85g. *Bar Council of U.P.* v. *State of U.P.*, A. 1973 S.C. 231 (para. 11) ; *Mohindroo* v. *Bar Council*, A. 1968 S.C. 888.

85h. *Srinivasa* v. *State of Karnataka*. A. 1987 S.C. 1518 (para. 9).

Legislation by Parliament.—Supreme Court (Number of Judges) Act, 1956 ; Supreme Court Judges (Conditions of Service) Act (41 of 1958) ; Advocates Act, 1961.

78. Constitution and organisation (*including vacations*)[86] of the High Courts except provisions as to officers and servants of High Courts ; persons entitled to practise before the High Courts.

Union's Control over High Courts. By the present Entry, the Union is given exclusive power over the constitution and organisation of the High Courts. By Arts. 216-7, the power of appointment of the High Court Judges has been vested in the President. The power over constitution of the High Courts is given to Parliament for the sake of uniformity.

Again, legal profession is a concurrent subject [Entry 26, List III]. But the Union is given, by the present Entry, the exclusive power of prescribing the qualifications for practising before the High Courts.

Entries 77 and 78 of List I are in the nature of exceptions to the general power conferred by Entry 26 of List III.[87]

'Constitution and organisation of High Court'. This expression includes the setting up of a High Court and matters connected with the giving of final shape to the Court so that it may start functioning, such as the appointment of Judges, the division into departments, making provision for the housing of the Courts.[88]

But—

1. This Entry does not include the power to regulate the sittings of the High Court or things connected with its actual functioning, which would be included in 'administration of justice' [Entry 3, List II],[88] or to make an arrangement to deal with a class of cases, e.g., to provide that all appeals be heard by not less than two Judges. This is a matter which appropriately comes under 'administration of justice' in Entry 3 of List II.[89]

2. The present Entry does not include any power relating to jurisdiction of the High Court.[90] [See under Entry 95 of List I and Entry 3 of List II, *post*].

3. Nor does it include the power to prescribe for the rate of stamp duty payable on an application for enrolment as an Advocate.[91]

'Practice'. This word includes the functions of both acting and pleading on behalf of a suitor.[83]

By reason of the present Entry, a State Legislature has no power to amend the Bar Councils Act.[92]

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86. Inserted, with *retrospective* effect, by the Constitution (Fifteenth Amendment) Act, 1963.
87. *Durgeshwar* v. *Bar Council*, A. 1954 All. 728 (*733*).
88. *Pramatha* v. *Chief Justice*, A. 1961 Cal. 545.
89. *Siddamma* v *Nanje*, A. 1952 Mys. 75.
90. *Amarendra* v. *Bikash*, A. 1957 Cal. 534 (*543*).
91. *Vittal* v. *State of Mysore*, A. 1966 Mys. 138.
92. *Aswini* v. *Arabinda*, (1953) S.C.R. 55.

Entries 78 of List I and 23, 47, of List III. The second part of Entry 78 of List I does not debar the State Legislature to exercise its concurrent power under List III, Entry 23 (social insurance of lawyers); Entry 47 of List III (requiring stamps to be affixed to vakalatnamas).[93]

Existing Law. – Indian Bar Councils Act (XXXVIII of 1926).
Legislation by Parliament. – Supreme Court Advocates (Practice in High Courts) Act (XVII of 1951) ; Judicial Commissioner's Courts (Declaration as High Courts) Act, 1950.

79. Extension of the jurisdiction of a High Court having its principal seat in any State to, and exclusion of the jurisdiction of any such High Court from, any Union Territory.[94]

'Extension of jurisdiction of High Court'. – This Entry is explained by Art. 230.

Legislation by Parliament. – Mysore High Court (Extension of Jurisdiction to Coorg) Act (LXXII of 1952) ; Calcutta High Court (Extension of Jurisdiction) Act (XLI of 1953).

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated ; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

'Extension of power of State police'. – This entry is taken from Item 39 of List of I of the Government of India Act, with verbal changes.

'Belonging to'. 1. This expression has been used in the sense of 'functioning in an area'. Hence, the Police force functioning in a Union Territory can have their jurisdiction extended to another State by an Act of Parliament, e.g., the Delhi Special Police Establishment Act, 1946.[95]

2. Such law made by Parliament will override any State law to the contrary.[96]

Existing Laws. – Police Act, 1861, 1888, 1949.
Legislation by Parliament. – State Armed Police Forces (Extension of Laws) Act, 1952.

81. Inter-State migration ; inter-State quarantine.

OTHER CONSTITUTIONS

(A) *Australia.* – Sec. 51 (ix) of the Constitution Act relates to 'Quarantine'. This is a concurrent power.

(B) *Government of India Act, 1935.* – Item 50 of List I was – 'Migration within India from or into a Governor's Province or a Chief Commissioner's Province.'

93. *Pandey* v. *State*, A. 1988 M.P. 60 (paras. 9, 19-20).
94. Changes made by the Constitution (Seventh Amendment) Act, 1956.
95. *Advance Ins. Co.* v. *Gurudasmal*, A. 1970 S.C. 1126 (*1132*).
96. *Cf. Sanwaldas* v. *State of Bombay*, A. 1953 Bom. 415 (*417*).

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'Inter-State migration'. This is the legislative power referred to in Art. 19 (5). In making a law relating to the right of free movement from one State to another, Parliament must not impose any restrictions beyond those permissible under Art. 19 (5).[97]

By reason of this Entry, it is not within the competence of a State Legislature to legislate relating to refugees from one State within the territory of India to another.[98]

Legislation by Parliament.–Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979.

82. Taxes on income other than agricultural income.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The 16th Amendment gives Congress the power 'to lay and collect taxes on incomes, from whatever source derived . . . .'[4] It is now the largest source of federal revenue.

(B) *Australia.* – There being no limits to the *objects* of the Commonwealth taxing power [Sec. 51 (ii)], the Commonwealth has imposed income tax [Income-Tax Act, 1915] on all taxable income from property or personal exertion, save those income which are exempted by the Act. The States having concurrent power of taxation [Sec. 109), may tax pensions paid by the Commonwealth,[5] or wages fixed by an Arbitration award.[6] But neither the Commonwealth nor a State can tax property belonging to each other [Sec. 114].

(C) *Government of India Act, 1935.* – The present Entry reproduces item 54 of List I of the Act of 1935.

INDIA

'Taxes on Income'. (A) 1. Entry 82 of List I is a head of legislative power which should not be interpreted in any restricted sense either with reference to anything in the Indian Income Tax Act or in the English or American law relating to income-tax.[99] Since there is no definition of the word 'income' in the Constitution itself, the word is to be interpreted according to its natural and grammatical meaning which means 'a thing that comes in'[100] and is thus a word of the 'broadest connotation'.[1-2]

2. It would, thus, embrace any profit or gain which is actually received[99] Hence, it would include –

(i) A tax on 'capital gains'. e.g., the sale proceeds of certain properties which formed the capital of a business concern.[99]

(ii) Not only income which has actually accrued but also income which is supposed by the Legislature to have notionally accrued.[1-3]

(iii) Not only what is received by exploiting the use of property, but also what can be converted into income, or what one saves by using the property oneself.[1]

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97. *Gopalan* v. *State of Madras*,. A 1950 S.C. 17 (112).
98. *Cf. Sanwaldas* v. *State of Bombay*, A. 1953 Bom. 415.
99. *Navinchandra* v. *Commr. of I.T.*, A. 1955 S.C. 58 (*61*).
100. *Cf. Commr. of I.T.* v. *Shaw Wallace*, (1932) 59 Cal. 1343 (P.C.)
1. *Bhagwan* v. *Union of India*, A. 1981 S.C. 907 (para. 14).
2. *Kamakhya* v. *Commr. of I.T.*, A. 1943 P.C. 153.
3. *Commr. of I.T.* v. *Bhagilal*, A. 1954 S.C. 155.

(iv) All items which were chargeable under the Income-Tax Act, 1922, which was in force when the Constitution was adopted.[1]

(v) The gross receipts of a person and is not necessarily restricted to his profits or receipts after deducting his expenses.[4]

(vi) The Entry is wide enough to confer power to prevent evasion of income-tax.[5]

(B) On the other hand,–

1. The doctrine of liberal interpretation does not mean that Parliament can choose to tax as income an item which in no *rational sense* can be regarded as a citizen's 'income'.[6] The tests prescribed by the existing income-tax Act are not a proper guide for determining whether there is such a rational connection between an item charged and the assessee's 'income'.[6] But the resort to a 'fiction' is permissible where it is necessary to deal with a device to avoid legitimate taxation.[6]

2. Taxes on the income from trade or profession (Entry 60, List II) are excluded from the scope of the present Entry, by Art. 276 (*ante*).

Ancillary matters. It is competent, under the present power, to provide for the prevention of evasion of income tax, as an ancillary measure,[99] e.g., to tax a loan where it is taken as measures of evading the tax liability of income[6-7] or to tax the shareholders on the basis of the accumulated profits of the company when the distribution of such profits is deliberately withheld to avoid taxation as 'dividend'.[8]

Entries 82 of List I and 49 of List II. While the tax under Entry 49 of List II is a tax on property, the tax under Entry 82 of List I includes income *from property* even where such property is in the owner's[1] own occupation, as in the case of a house or that which can be converted into income. A tax on income does not lose its character merely because the income is computed in an artificial way.[1]

'Income'. 1. As stated earlier, the word has to be liberally interpreted, to comprehend every monetary gain which 'comes in',[100] including *every* kind of receipt or gain of a capital nature or of a revenue nature.[9]

2. But the doctrine of liberal interpretation does not mean that Parliament can choose to tax as income an item which in no *rational sense* can be regarded as a citizen's 'income'.[10] The tests prescribed by the existing income-tax Act are not a proper guide for determining whether there is such a rational connection between an item charged and the assessee's 'income'.[10] But the resort to a 'fiction' is permissible where it is necessary to deal with a device to avoid legitimate taxation.[10]

3. Income-tax includes 'excess profits tax' by virtue of Art. 366 (29).

4. It is the charging section which discloses the real nature of a tax. Hence, where a tax is imposed on 'income', it does not cease to be an income-tax merely because the incidence of the tax falls upon a person who did not receive the

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4. *Travancore Rubber Co.* v. *State of Kerala*, A. 1964 S.C. 672.
5. *Punjab Distilling Industries* v. *C.I.T.*, A. 1965 S. C. 1862 (*1865*).
6. *Navnit Lal* v. *I.T.A.A. Commr.*, A. 1965 S.C. 1375 (*1379; 1382*).
7. *Balaji* v. *I.T.O.*, A. 1962 S.C. 123 (*125*).
8. *Baldeb Singh* v. *Commr. of I.T.*, A. 1961 S.C. 746.
9. *Elel Hotel* v. *Union of India*, (1989) 3 S.C.C. 698 (paras, 14, 17).
10. *Navnit Lal* v. *I.T.A.A. Commr.*, A.1965 S.C. 1375 (*1379; 1382*).

income,[11] even where the person who received the income was outside the taxing jurisdiction, but the assessment was within its jurisdiction.[12] On this principle, a tax on the undistributed profits of a company was upheld under the present Entry, even though such profits did not become the income of the shareholders until they were distributed.[13]

5. The power to tax income includes the power to tax foreign income of persons resident in India.[4]

Whose income may be taxed. The present Entry gives plenary power to Parliament to tax 'income' (other than agricultural income) and contains no limitation, express or implied, as to the person whose income may be taxed.

In the U.S.A., it has been held that to tax A with reference to the income of B would be a violation of the guarantee of 'Due Process'.[15]

But there being no such guarantee in *our* Constitution, there is no fetter upon the power of Parliament to tax A with reference to the income of B (say, his wife or child), as in England.[16]

'Agricultural income'.—See Art. 366 (1).

Existing Laws.— Government Trading Taxation Act (III of 1926) ; Excess Profits Tax Act (XV of 1940) ; Business Profits Tax Act (XXI of 1947) ; Taxation of Income (Investigation Commission) Act (XXX of 1947) ; Payment of Taxes (Transfer of Property) Act, 1949.

Legislation by Parliament.—Voluntary Surrender of Salaries (Exemption from Taxation) Act (LXI of 1950) ; Madhya Bharat Taxes on Income (Validation) Act (XXXVIII of 1954) ; Income-tax Act, 1961.

Power of the State Legislature. The present Entry does not preclude the State Legislature from imposing a tax on 'circumstances and property[17] or professions,[17-18] falling under Entries 49 and 60 of List II.

Entries 82 of Llist I and 62 of LIst II.—See under Entry 62, List II, *post*.

83. Duties of customs including export duties.

OTHER CONSITITUTIONS

(A) *U.S.A.*— (1) The imposition *of import* duties is a federal power, following from the power of Congress 'to regulate commerce with foreign nations [Art. 1 (8)]. Import duty or tariff is levied in America both for purposes of revenue and of protection. There is a Tariff Commission to advise the President and the Congress on tariff, and generally, on the import trade. It classifies imported articles, and ascertains the imported cost and the production cost of these commodities in the U.S.A. and recommends that the tariff rate should be such as to place the American industry on the same footing as the foreign industry, so far as cost of production is concerned.

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11. *Amina v. I.T.O.*, A.1954 Mad. 1120.
12. *Jamelamma* v. *I.T.O.*, A. 1956 Mad. 387.
13. *Spencer* v. *I.T.O.*, A.1957 Mad.133.
14. *Wallace Bros. & Co., Ltd.* v. *Commissioners of I. T.* (1948) 51 C.W.N. 620 P.C.
15. *Hoeper* v. *Tax Commn.*, (1931) 284 U.S.206.
16. *Amina* v. *I.T.O.*, A. 1954 Mad. 1120; *Hafeezunissa* v. *I.T.O.*, A. 1964 A.P.342.
17. *Dt. Board* v. *Prag Dutt*, A. 1948 All 382 (F.B.); *Zilla Parishad* v. *Jugal*, A. 1969 All. 40(42).
18. *Ram Narain* v. *State of U.P.*, A. 1957 S.C. 18.

(2) But Congress is expressly prohibited from levying *export* duties. Art. I, Sec. 9 (5) says –

"No tax or duty shall be laid on articles exported from any State."

This clause has been interpreted to include not only exports from one State to another within the Union but also exports from a State to a foreign country.[19] In the result, the American Legislature has no power to impose export duties, or to impose any tax burden on exports. Thus, a *general* sales tax on sporting goods was held not applicable to goods sold to a commission house for export.[20]

The States cannot impose either import or export duties without the consent of Congress [Art.I, Sec. 10(2)].

(B) *Australia.* – Under Sec. 90 of the Constitution Act, the Commonwealth Parliament has *exclusive* power over-'duties of customs', the States being prohibited from imposing customs duties.

(C) *Canada.* – The imposition of customs is a matter within the exclusive competence of the Dominion Parliament as appears from Sec.122 of the British North America Act.[21]

(D) *Government of India Act, 1935.* – The present Entry reproduces item 44 of List I of the Act of 1935.

INDIA

'Customs'. Customs duties are levied upon commodities imported into this country from other countries or exported out of this country.[22]

"Customs duty is a duty on the importation or exportation whether by land or sea".[23]

The reason for making it a federal subject of legislation is that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied.[21]

A duty of customs being a tax on the *act* of importation or exportation,[24] in order to be an 'export duty, the duty must be levied (i) either as a condition for or by reason of the exportation of the goods, or (ii) a direct tax or duty on goods which are intended for exportation. So, where a *general* tax is levied on all goods alike, it cannot be construed as a duty on exports when falling on goods not then intended for exportation though they may happen to be exported afterwards.[25] On the other hand, a Provincial tax on all timber cut within the Province with a large rebate in cases where the timber was *used* in the Province was held to be an export tax.[26]

A customs duty cannot, accordingly, by regarded as a tax *on property*.[24]

Customs duty is essentially imposed upon commercial dealings and is concerned more with the business of importation or exporation than with the

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19. *American Steel Co. v. Speed*, (1904) 192 U.S. 500.
20. *Spalding v. Edwards*, (1923) 262 U.S. 66.
21. *Att.-G. v. Murphy Lumber Co.*, A. 1930 P.C. 173 (*175*).
22. Cf. Wharton's Law Lexicon.
23. *Commonwealth Oil Refineries, Ltd. v. S. Australia*, (*1926*) 38 C.L.R. 408.
24. Sea Customs Act in re, A. 1964 S.C. 1760 (*1775*).
25. *Brown v. Houston*, (1884) 114 U.S. 622.
26. *A. G. of Br. Columbia v. Macdonald*, (1930) A.C. 357.

person or the goods.[27] Hence, charges relating to *transport* of goods are not a duty of customs.[28]

Existing Laws.—Indian Tariff Act (XXXII of 1934) ; Protective Duties Act (XVII of 1946) ; Agricultural Produce Cess Act (XXVII of 1940); Indian Cotton Cess Act, 1923.

Legislation by Parliament.—Tea Act (XXIX of 1953); Hyderabad Export Duties (Validation) Act, 1955 ; Customs Act, 1962.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

OTHER CONSTITUTIONS

(A) *U.S.A.*—The power to lay and collect 'excises' is specifically given by Art. I, s. 8 (1) of the Constitution to Congress. At present, federal excise taxes are levied on liquor, tobacco, amusement admissions, radios, musical instruments, sporting goods, toilet preparations, rail tickets, telephone calls, telegraph messages, narcotics, machine guns etc.

(B) *Australia.*-Under Sec. 90 of the Australian Constitution Act, the Commonwealth Parliament has *exclusive* power as regards-'duties of excise'.

(C) *Government of India Act, 1935.*-Excise duties were divided between the Federaion and the Provinces, by the Government of India Act, 1935.

Item 45 of the Federal List was—

"Duties of excise on tobacco and other goods manufactured or produced in India except—
(a) alcoholic liquors for human consumption;
(b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;
(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry."

Item 40 of the Provincial List thus included the duties which are excluded from the Federal item—

"Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—
(a) alcoholic liquors for human consumption;
(b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;
(c) medicinal and toilet preparations containing alcohol or any other substance included in sub-paragraph (b) of this Entry."

The present Entry of the Constitution differs from item 45, quoted above, in so far as the present entry includes medicinal and toilet preparations including alcohol, etc. Entry 51 of List II also makes corresponding change.

The result of this change is that while a duty on medicinal and toilet preparations containing alcohol belonged to the Provincial Legislature under the Government of India Act, 1935, the power now belongs to Union and the State

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27. *A.-G for Br. Columbia* v. *Kingcome,* (1934) A. C. 45 (59).
28. *Gilpin* v. *Commissioner,* (1934) 52 C.L.R. 189.

Legislature has no power to impose such duty under the Constitution.[29] Under the Government of India Act, 1935, each Provincial Government fixed its own rates of duty and followed its own procedure to regulate the imports from and exports to other Provinces of such preparations, so that the industry manufacturing these preparations had to contend with several handicaps imposed by such diversities in rates and procedure. In order to secure uniformity, the power relating to excise duty on medicinal and toilet preparations containing alcohol, etc., was transferred by the Constitution from the State list to the Union list.

INDIA

'Duty of excise'. I. 1. A duty of excise is primarily levied upon a manufacturer or producer in respect of the commodity *manufactured or produced*,[30] even though it may be levied at a stage subsequent to the manufacture.[31] It is a tax upon goods, not upon sales or the proceeds of sale of goods.[32]

2. The taxable event in respect of a duty of excise is 'manufacture' or 'production'.[33] When the tax upon consumption of electrical energy is payable by a producer of electrical energy *only* when he *consumes* it, it is not a duty of excise.[33-34] Conversely, an excise duty imposed on the manufacture or production of goods does not cease to be so merely because the producer happens to be a consumer himself[35] or the tax is imposed at a stage subsequent to the manufacture or production[36] or it is levied in the form of a licence fee;[31] or that the measure of the tax is not limited to the manufacturing cost plus the manufacturing profit.[36]

3. An excise duty is a levy on home-produced goods of a specified class or description, the duty being calculated according to the quantity or the value of the goods produced and is not dependent on any commercial transaction in them.[37] Hence, this Entry would not authorise a duty on the purchase of goods which are required for the purpose of manufacturing other goods.[38]

4. Nor does it include a tax on raw materials which are *subsequently* required in the process of manufacture.[39] It is also to be distinguished from a tax on the transportation of goods.[40]

5. But if a tax is imposed on the manufacturer or producer, it does not cease to be an excise duty simply because it is collected at the stage of issue of the products out of the mills, or because the duty on coal produced in a mine is computed on the tonnage of the coal despatched from the mine,[35] or because it is imposed with retrospective effect,[37] or because it is not possible for the producer to pass it on to the consumer.[37]

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29. *Nageswara* v. *State of Madras*, A. 1954 Mad. 643 (*649*).
30. In re C.P. & Berar Motor Spirit Taxation Act, 1938, A. 1939 F.C. 1.
31. *Abdul Kadir* v. *State of Kerala*, A. 1976 S.C. 182 (para.9).
32. *Governor-General* v. *Province of madras*, (1945) 49 C.W.N. 381 (P.C.), affirming *Province of Madras* v. *Baddu Paidanna*, A. 1942 F.C. 33.
33. *Jiyajerao Cotton Mills* v. *State of M. P.*, A. 1959 S.C. 270.
34. *Jagannath* v. *State of M.P.*, A. 1963 S.C. 414.
35. *Aluminium Corpn.* v. *Coal Board*, A. 1959 Cal.222 (*227*).
36. *Union of India* v. *Bombay Tyres*, A. 1984 S.C. 420 (paras..13-14).
37. *Chhotabhai* v. *Union of India*, A. 1962 SC. 1005 (*1018*).
38. *N.R. & O. Mills* v. *State of Punjab*, A. 1963 Punj. 549 (*552*).
39. *Murli* v. *State of U.P.*, A. 1957 All. 159 (*164*).
40. *Bihar Cotton Mills* v. *Union of India*, A. 1957 Pat. 131; *H.P. Barua* v. *State of Assam*, A. 1955 Assam 249.

6. So long as the character of the impost, namely, that it is a duty on the *manufacture or production*, is not lost, the method of collection does not make it other than an excise duty.[41] Whether in a particular case the impost ceases to be an excise duty and the rational connection between the duty and the person on whom it is imposed ceases to exist, is to be decided on a fair construction of the provisions of a particular Act.[41]

7. If, however, the levy of a tax has no nexus with the production or manufacture of the article it cannot be deemed to be an excise duty,[31] e.g., where it is a luxury tax imposed on the *stocking* and *vending* of tobacco.[31]

II. On the other hand, a mere licence to sell or carry on business, unconnected with production imposed merely with respect to sale of goods as existing articles of trade and commerce independently of local production, is not a duty of excise.[41a] Nor is such a licence, though indirectly connected with production or manufacture an excise duty if it be *regulative* and not a form of taxation.[41b]

"To be an excise, the tax must be levied 'upon goods'.....The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as subjects of manufacture or production or as articles of commerce'.[41c]

'Goods'. See under Art. 366(12), *ante*.

'Manufactured or produced'. 1. The word 'produced' has been used in juxtaposition to the word 'manufactured'. While 'manufacture' refers to the turning out of a raw material into something altogether different from the mineral, the word 'produced' refers to the application of human skill or labour in some form to make a material, even though it be a natural product such as coal, so that it may be fit for human consumption.[42]

2. Manufacture takes place as soon as there is a transformation of one commodity into a distinct and separate new commodity.[42] The processes which effect such transformation, e.g., bleaching, dyeing, printing etc., in the case of textile fabrics, come within the concept of 'manufacture'.[42]

3. The word 'produced', in this context, contemplates some expenditure of human skill and labour but does not necessarily involve the transformation of raw material into an altogether different commodity.[42]

4. The constitutional status of the levy is indicated by the fact that it is imposed in respect of the manufacture of the article. But the point at which it is collected is not determined by the time when its manufacture is completed but will rest on considerations of administrative convenience, as declared by the statute. In other words, the circumstance that the article becomes the object of assessment when it is sold by the manufacturer does not detract from its true nature, namely, that it is a levy on the fact of manufacture.[36]

Acts coming under the present Entry. Medicinal and Toilet Preparations (Excise Duties) Act, 1955,[43] Central Excise and Salt Act, 1944.[44]

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41. *R.C. Jail* v. *Union of India*, A. 1962 S.C. 1281 (*1287*).
41a. *Shinde Bros.* v. *Dy. Commr.*, A. 1967 S.C. 1513.
41b. Wynes, Legislative & Executive Powers, p. 316 ; *Peterswald* v. *Bartley*, (1904) 1.C.L.R. 497.
41c. *Mathews* v. *Chicory Marketing board*, (1938) 60 C.L.R. 263 (*304*).
42. *Empire Industries* v. *Union of India*, A. 1985 S.C. 662 (paras. 32, 42-46).
43. Cf. *Sakti Ousadhalaya* v. *Union of India*, A. 1963 S.C. 622.
44. *Khandelwal Works* v. *Union of India*, A. 1985 S.C. 1211 (paras.39, 42).

Excise duty and customs. 1. Excise is analogous to customs duty, being an indirect tax as distinguished from direct or personal tax.[45]

"Customs and excise duties.....are duties which are imposed in respect of commercial dealings in commodities and are concerned more with the commodity *than with the person*".[46]

2. The Legislature is competent to impose an excise duty on the goods at any point of time from when they were manufactured till when they are consumed,[47] and there is nothing to prevent the Legislature from levying the duty on the same goods more than once, that is, at different points of time between their manufacture and consumption.[48]

3. Excise differs from customs in that excise is a tax on articles produced or manufactured in the taxing country and intended for *home consumption*,[11] while customs is a tax on consumption outside the taxing State or on home consumption of goods imported from abroad.[30]

Excise duty and sales tax. 1. While a duty of excise is levied upon a manufacturer in respect of the goods *manufactured*, a sales tax (Entry 54, List II) is levied upon a vendor in respect of his *sales*. There is no overlapping between the two imposts, and while Parliament may impose a duty of excise on excisable goods under the present Entry. The Legislature may impose a tax upon the sale of the same goods.[32]

2. A tax on the first *sale* effected by a manufacturer or producer is a sales tax and not an excise duty.[49]

3. Where a tax is imposed on the sale, it does not become an excise duty merely because the State Legislature lays down the place of manufacture to be regarded as the *situs* of the sale.[50]

Excise Duty and Agricultural Income Tax. A duty of excise is a tax on the goods, while an income tax is a tax on *income* and on nothing else.[25] A tax on the income derived from the cultivation of tobacco does not amount to a duty of excise under the present Entry.[51]

Incidental and ancillary matters, 1. Waste and scrap, which are incidental to the manufacturing process, will come under the present Entry.[44]

2. A legislation, which, in its 'pith and substance', is one for the levy of an excise duty on tobacco does not cease to be so under the present entry, merely because it provides for ancillary matters to make the legislation effective, e.g., the lecensing of the manufacture, sale or storage of the excisable goods [Entries 26-27 of List II], including the imposition of a licence fee.[52]

Entries 84 and 97 of List I. If the act of 'processing' of goods be not covered by the word 'manufacture' in Entry 84 of List I, it would be supported by Entry 97 of List I.[53]

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45. *Peterswald* v. *Bartley*, (1904) 1 C.L.R. 497.
46. *A.-G for Br. Columbia* v. *Kingscome Co.*, (1934) AC. 45 (*59*).
47. *Cf. Atlantic Smoke Shops* v. *Conlon*, (1943) A.C. 550 (*564*).
48. *S. S. Miranda* v. *State of Bombay*, (1955) 57 Bom. L.R. 29.
49. *Ram Raj Trading Co.* v. *Asstt. Commercial Tax Officer*, A. 1957 Mad. 325.
50. *Tata Iron & Steel Co.* v. *State of Bihar*, A. 1958 S.C. 453 (*459*).
51. *Ramachandra* v. *Agricultural I.T.O.*, A. 1961 Ker. 111.
52. *Mahavirparasad* v. *Yajnik*, A. 1960 Bom. 191. [The Mysore High Court differs (*Sampath* v. *State of Mysore*, A. 1962 Mys. 192 (195), without adverting to the Bombay decision].
53. *Ujagar Prints.* v. *Union of India*, A 1989 S C 516 (paras. 24, 41), *Empire Industries* v. *Union of India*, A. 1986 SC 662 (677).

Entries 84 of List I and 51 of List II. Under Entry 51 of List II, the States have the power to levy excise duty on alcoholic liquor for human consumption and on hemp and other narcotic drugs and narcotics.

But under Entry 84 of List I, the Union has the power to levy excise duty on (a) tobacco ; and (b) medicinal and toilet preparations containing alcohol, or opium, hemp of other narcotic drugs and narcotics.[43]

Existing Laws. – Excise (Spirits) Act (XVI of 1863) ; Excise (Malt Liquors) Act (XLIII of 1890) ; Tobacco Duty (Town of Bombay) Act (IV of 1857) ; Sugar (Temporary Excise Duty) Act (IX of 1947) ; Central Excises and Salt Act, 1944 ; Lac Cess Act, 1930 ; Indian Cocoanut Committee Act, 1944 ; Cotton Textiles Cess Act, 1948.

Legislation by Parliament. — Salt Cess Act (XLIX of 1953) ; Union Duties of Excise (Distribution) Act, 1957 ; Khadi and other Handlom Industries Development (Additional Excise Duty on Cloth) Act (XII of 1953) ; Dhoties (Additional Excise Duty) Act, 1957 ; Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955).

85. Corporation tax.

OTHER CONSTITUTIONS

(A) Canada. – Corporation tax is a federal tax.

(B) Government of India Act, 1935. – Item 46 of List I was the same as the present Entry.

INDIA

'Corporation Tax'. For definition of this term, *see* Art. 366 (6).

In substance, it is an additional income-tax on companies. No corporation tax has so far been specifically levied, but the 'super-tax' payable by companies under s. 104 of the Income-Tax Act, 1961, has the attributes of a corporation tax.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of indiciduals and companies ; taxes on the capital of companies.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 55 of List I was the same as the present Entry.

INDIA

'Capital value of the assets'. – This means the 'capitalised' value of assets. 'Assets', simply, means property. Assets may be taxed by the Union and State Legislatures, but in the case of the Central Legislature, assets may be taxed only when the tax is imposed on the capital value of the assets. Thus, under Entry 49 of List II, the State Legislature may impose a tax on lands and buildings. But the State Legislature may tax them without taking into consideration the 'capital value' of the lands and buildings, while Parliament can, under the present Entry, impose a tax not on the lands and buildings but upon their capitalised value.[54-55]

As to whether Parliament is obliged, under the present Entry, to impose a tax on the full value of the capital assets or is at liberty to tax individual portions

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54. *Byramjee* v. *Prov. of Bombay,* (1939) 42 Bom. L.R. 10 (46).
55. *Sudhir* v. *W.T.O.,* A. 1969 S.C. 59 (*61*).

of a person's capital, there was divergence of opinion.[54] The question appears to have been settled by the Supreme Court in *Sudhir* v. *W.T.O.*,[55] holding that a tax under the present Entry is a tax on the *total* assets of the assessee.

'Of individuals and companies'.—While Entry 82 of List I does not define the persons or assessees upon which income-tax may be imposed, Entry 86 limits the tax on capital value by providing that it can be imposed only on 'individuals and companies'. Hence, the Bombay High Court held that a tax on capital value cannot be imposed on local authorities, firms or other associations of persons, who may, however, be assessed with income-tax.[56] If this view be correct, it must be due to a lacuna in drafting, for, the word 'person', accordingly to s. 3 (42) ofthe General Caluses Act, includes an association or body of individuals and there is no apparent reason, why the makers of the Constitution should have intended to deny Parliament the power to tax firms and associations when both individuals and companies were within its jurisdiction.

The above view of the Author, expressed at p. 418 of the 5th Edition, has since been supported by the Supreme Court,[5] holding that the word 'individuals' includes an association of individuals such as a Hindu undivided family,[57] where the capital assets are owned by such association or group.

'Agricultural land'. See under Entry 18 of List II.

Entries 86 of List I and 49 of List II. 1. Under Entry 86 of List I, the basis of taxation is the capital value of the assets ; it is not imposed on the *components* of the assets of the assessee but on the totality of all the assets owned by the assessee ; its principle is *aggregation*.[58] A tax under Entry 49 of List II, on the other hand, must be a tax on the lands and buildings, separately, as units ; it is not a composite tax on the value of all lands and buildings.[58-59]

2. A building may be a component of the total assets of an individual ; but when a tax under Entry 86 of List I is imposed, it shall have no direct relation to the building.[59] A State tax on the building, on the other hand, is a direct tax on the assessee's building and is not a personal tax on his assets, without reference to any particular property.[59] The two taxes are separate, even though the same building may bear the burden of a wealth tax under Entry 86 of List I as well as a tax on buildings under Entry 49 of List II.[59]

3. A tax under Entry 86 of List I is assessed on an individual, and the capital value is found after deducting his liabilities. The tax under Entry 49 of List II is not concerned with the division of interest in the land or building ; in other words, it is not concerned wheher one person owns or occupies it or more persons own or occupy it. In short, the tax under Entry 49 of List II is not a personal tax like the tax under Entry 86 of List I.[58]

4. Of course, for the purpose of levying the tax under Entry 49 of List II, the Legislature may adopt as the basis of taxation the annual or capital value of the land or the building[58-59] ; but that will not obliterate the difference between the subject-matters of taxation under the two Entries.[58-59] In short, the mode of levy

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56. *Duggan* v. *C.I.T.*, A. 1952 Bom. 261.
57. *Banarasi* v. *W.T.O.*, A. 1965 S.C. 1387.
58. *Union of India* v. *Dhillon*, A. 1972 S.C. 1061 (paras. **63, 65**) ; *S.C. Nawn* v. *W.T.O.*, A. 1969 S.C. 59.
59. *Gouse* v. *State of Kerala*, A. 1980 S.C. 271 (paras. 7-8 ; **43**).

of the tax will not change the nature of the tax.[59] Thus, a building tax may be imposed either on the market value of the building ; or its annual value determined on the basis of its hypothetical rent ; or the cost of construction of the building[59] or the Legislature may prescribe a uniform formula for determining its capital value, linked with its annual value.[59]

'Agricultural land'. See under Entry 18 of List II.

'Individuals'. This word includes an association or group of individuals,[57] such as a Hindu undivided family,[57] where the capital assets are owned by such association or group.[57]

Act coming under the present Entry. Wealth Tax Act, 1957.[57]

A 'Wealth Tax' imposed under the present Entry is not a 'tax on lands and buildings' coming under Entry 49 of List II, but a tax on assets, under the present Entry.[55]

87. Estate duty in respect of property other than agricultural land.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The federal 'death tax', first imposed in 1916, includes both estate and succession duties. Thus, – (i) an estate tax is levied on the total estate left by the deceased ; (ii) an inheritance tax is levied upon the portions of the estate which passes to particular beneficiaries.

(B) *England.* – The English Estate Duty is an *ad valorem* graduated tax imposed on the principal value of the whole aggregated estate which passes on the death of a person, – the rate of the duty increasing with the size of the estate. It is payable in respect of all property, real or personal, subject to certain exceptions.

(C) *Government of India Act, 1935.* – There was no Entry on the present subject and it was held that an Estate Duty could not be levied under item 56 of List I relating to Succession Duty.[55]

INDIA

Estate Duty distinguished from Succession Duty. 1. There are real and substantial differences between Succession Duty [Entry 88, List I] and Estate Duty. There is one feature common to both taxes, *viz.*, that the *occasion* for the levy is the death of a person ; but while Succession Duty has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view, – the Estate Duty has reference to the value of the *property* constituting the estate of the deceased and is independent of the question as to who takes it.[60]

The Estate Tax is levied on the *inheritance as a whole*, while the Succession duty is levied on the *separate portions* going to the different beneficiaries. The Estate Duty is thus a more productive and efficient source of revenue while the Succession Duty may be said to be the more equitable.[61] Shortly speaking, while

60. In re Ref. *on Duty on Non-Agricultural Property*, A. 1944 F.C. 73.
61. Findlay Shirras, Science of Public Finance, p. 524.

a succession duty is an excise upon the privilege of inheriting property, an estate tax is an excise upon the privilege of bequeathing. *See* definition of 'Estate Duty' in Art. 366 (6), *ante*.

2. While a succession duty falls upon the *person who takes* the property of the deceased, an estate duty falls upon the *property* whoever may be the successor to the property on the death of the previous owner.[60]

3. Since the word 'succession' implies the passing of property on the '*death* of a person to another[55] a tax on a gift *inter vivos* would not come under the present Entry.[62]

'Property other than agricultural land'. – Property here means both movable and immovable property and property of any kind and rights and interests therein[63] passing on the death of a person, other than agricultural land, in respect of which the State is authorised to impose an Estate Duty, by Entry 49 of List II.

'Agricultural land'. – See under Entry 18, List II, post.

Legislation by Parliament. – The Estate Duty Act (XXXIV of 1953), passed under the present Entry, relates generally, to non-agricultural land, but in the States specified in the Schedule of the Act (which have passed resolutions under Art. 232 (1), the Act also applied to agricultural lands.

Analogous Provisions. – Estate duty in respect of agricultural land is included in Entry 48 of List II.[64]

Entries 86 to 88 of List I do not produce the State Legislature from taxing *capital value* of lands and buildings under Entry 49 of List II.[13]

88. Duties in respect of succession to property other than agricultural land.

OTHER CONSTITUTIONS

(A) *England.* – In England, there are three Duties which are payable in connection with the death of an individual : the Estate Duty, the Succession Duty and the Legacy Duty. The following points of difference between these three Duties should be noted :

(i) Succession Duty and Legacy Duty are taxes upon the interest to which a person *succeeds* by reason of the death of another. An Estate Duty, on the other hand, is expressed to be a tax upon the property which *passes* upon the death. 'Passing', no doubt, implies a change of ownership, but, for the purposes of the Estate Duty, a property may pass to another otherwise than by succession, e.g., when money payable on a life insurance policy is payable upon the death to a person who is not related to the deceased. In short, while the basis of the succession and Legacy Duty is the interest to which a person *succeeds*, the basis of the Estate Duty is the property in respect of which the interest of the deceased *ceases* by reason of the death in question.[65]

(ii) An Estate Duty is payable in respect of all kinds of property, – real and personal. Succession duty is payable in respect of interests in land, including

62. *Sesharatnam* v. *Gift Tax Officer*, A. 1960 A.P. 115 (119).
63. *A. & S. Service* v. *Union of India*, A. 1988 SC 1708 (para. 21.2).
64. *Sankaranarayanan* v. *Union of India* A. 1990 Ker. 5 (para. 12).
65. Stephen's Commentaries, Vol. I, p. 433.

leaseholds and previously settled personalty. Legacy Duty, on the other hand, is payable on all beneficial acquisitions of personal property other than leaseholds by reaons of Will, intestacy or *donatio mortis causa*. It follows that the Succession duty and Legacy duty *are mutually* exclusive, so that if one is payable in respect of a particular property, the other cannot be levied in respect of the same.

(B) *U.S.A.* – Inheritance taxes are levied by many States in the U.S.A. The tax is regarded not as a tax upon th property inherited, but upon the right to inherit.[66]

(C) *Government of India Act, 1935.* – Item 56 of List I was the same as the present Entry.

INDIA

'Succession'. Succession in this Entry includes both testamentary and intestate succession, in other words, the transmission, by law or *by the will of man*, to one or more persons, of the property of a deceased person.[67] The word 'succession' is used in this Entry in the sense as in the Indian Succession Act.[61]

Estate Duty and Succession Duty. 1. There are real and substantial differences between Succession Duty and Estate Duty. There is one feature common to both taxes viz., that the occasion for the levy is the *death* of a person ; but while Succession Duty [Entry 88 of List I] has reference to the acquisition of the property by the sucessor and gererally takes into account the extent of the benefit derived by him and other consideration relevant from that point of view, – the Estate Duty has reference to the value of the *property* constituting the estate of the deceased and is independent of the question as to who takes it.[67]

While a succession duty falls upon the *person who takes* the property of the decesed, an estate duty falls upon the *property* whoever may be the succesor to the property on the death of the provious owner.[67]

2. Since the word 'succession' implies the passing of property on the *death* of a person to another,[67] a tax on a gift *inter vivos* would not come under the present Entry.[68]

Agricultural land'. – See under Entry 18, List II, post.

Anologous Provision. – While the present Entry relates to duty on succession relating to non-agricultural property, the State Legislature has exclusive power, under Entry 47 of List II, to levy succession duty on agricultural land[12b].

Entries 86-88 of List I do not preclude the State Legislauture from taxing *capital value* of lands and buildings under Entry 49 of List II.[69]

89. Terminal taxes on goods or passengers, carried by railway, sea or air ; taxes on railway fares and freights.

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66. *Magoun* v. *Illinois T. & S. Bank*, 170 U.S. 283.
67. In re *Ref. on Duty on non-Agricultural Property*, A. 1944 F.C. 73.
68. *Sesharatnam* v. *Gift Tax Officer*, A. 1960 A.P. 115 (*119*).
69. *Asstt. Commr.* v. *B. & C. Co.*, A. 1970 S.C. 169 (*174*).

OTHER CONSTITUTIONS

Government of India Act, 1935.—The present Entry reproduces item 58 of List I with the addition of the word 'sea'. The Act of 1935 for the first time transferred the power to the Centre from the States, but at the same time authorised the continuance of the levy of the existing terminal taxes levied by the States on passengers carried by railway until provision to the contrary was made by the Central Legislature. No such Central legislation took place under the Government of India Act, 1935. The existing State taxes also continued under the Constitution by virtue of Art. 277, *ante*.

INDIA

Terminal Tax. 1. The terminal tax in the present entry is a tax on the entry of goods ; the in Entry 52 of List II is also a tax on the entry of goods.

But the terminal tax in List I must be—(a) terminal ; (b) confined to goods and passengers carried by railway, sea or air. They must be chargeable at a rail or air terminus and be *referable to services* (whether of carriage or *otherwise*) *rendered or to be rendered by some rail or air transport organisation.*[70] Another point of difference between the two Entries is that while under the present Entry, a terminal tax may be levied on goods and passengers while entering as well as leaving an area, the power of the State under Entry 52 of List II is confined to goods and only when the goods *enter* into a local area and for particular purposes, *viz.*, consumption, use or sale in that area. [See further under Entry 52, List II].

Under the present Entry, the terminal tax is leviable upon the entry of goods in a local area, irrespective of whether they would be used within that area or not.[64] But a terminal tax is not leviable by a local authority, under the present Entry if the goods are not loaded or unloaded within its local area but are simply carried across it.[65]

2. The requirements of a tax under Entry 52 of List II, on the other hand, are—(a) the entry of goods into a definite area and (b) the entry must be for the purpose of consumption, use or sale of the goods in such local area.[70] There is no limitation to be implied in this Entry, in regard to the *manner* in which goods may be transported into a local area.[70]

3. 'Terminus' means the end of the journey, by railway, sea or air.[71] It follows that a terminal tax can be imposed only on goods on their journey *ending* within the municipal limits or commencing therefrom and not where the goods were merely *in transit* through the municipal limits and had their terminus elsewhere.[71] Of course, the incidence is the same whether the tax is imposed on goods which are imported or exported.[71]

4. A terminal tax can therefore be levied only by the Corporation or the State which is the *final destination* of the goods sent from some other area.[72]

5. 'Final destination' in this context referes to the transaction which is the subject-matter of taxation.[72] Thus, where A consigns goods from Patna to Delhi in the name of X and X, after having received the goods at Delhi, rebooks the same on a transport for Chandigarh in the name of Y, terminal tax would be leviable by the Corporation at Delhi because the destination of the goods in the first instance was Delhi and that by itself would attract the imposition of terminal tax.[72] The fact that X rebooks them to Chandigarh would to make any difference because the act of rebooking by X at Delhi would constitute a *fresh transaction*

70. *Punjab Flour Mills* v. *Corp. of Lahore*, (1947) F.C.R. 17.
71. *Central India Spg. Co.* v. *Empress Mills*, A. 1958 S.C. 341.
72. *Man Mohan* v. *Delhi Municipality*, A. 1981 S.C. 991 (para. 9).

by which the goods, having been carried to Delhi, are further exported to Chandigarh.[72] In short, where the goods enter into a local area which is also the destination of the goods either *temporarily* or otherwise, the terminal tax would be leviable.[72]

6. On the other hand, where there is one continuous journey of the goods from Patna to Chandigarh without any break, the final destination would be Chandigarh, even though the goods may have to be halted in Delhi for the purpose of unloading, sorting and reloading and may have to be kept in Delhi for a *reasonable* time.[72] In this case, terminal tax would not be exigible.

But even in such a case, if the goods are kept at the halting place for an *indefinite or such unreasonable* period of time, that the purpose of reaching the final destination lying in a different area is frustrated or defeated, they may be exigible to terminal tax.[72]

Taxes on Railway fares and freights. It is not all fares and freights, but only railway fares and freights which are included with this part of the Entry.

Analogous Provisions. – While the present Entry gives to the Union the power to levy *terminal* taxes on goods or passengers carried by railways, sea or air, Entry 52 of List II gives to the State the power to levy taxes on the entry of goods into a local area for *consumption, use* or *sale therein.*

Entry 56 of List II, on the other hand, empowers the State to impose taxes on goods and passengers carried by *road* or on *inland waterways.*

Art. 269 (d) provides for the assignment by the Union to the States of all the taxes levied an collected by the Union under the present Entry. But Art. 277 provides that until Parliament legislates under the present Entry, the corresponding taxes which were being levied by any State or local authority at the commencement of the Constitution[73] will continue to be levied for the purposes of such State or locl authority notwithstanding the fact that these taxes are now included in the Union List.

Entries 89 of List I and 52 of List II. 1. The terminal tax in Entry 89 of List I must be – (a) terminal : (b) confined to goods and passengers carried by railway, sea or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation.[74] Another point of difference between the two Entries is that while under the present Entry, a terminal tax may be levied on goods and passengers while entering as well as leaving an area, the power of the State under Entry 52 of List II is confined to goods and only when the goods enter into a local area and for particular purposes, viz., consumption, use or sale in that area. [See, further, under Entry 52, List II.]

2. The requirements of a tax under Entry 52 of List II, on the other hand, are – (a) the entry of goods into a definite area, and (b) the entry must be *for the purpose of consumption, use or sale* of goods in such local area.[68] There is no limitation to be implied in this Entry, in regard to the manner in which goods may be transported into a local area.[74]

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73. The Provinces were competent to levy such taxes prior to the Government of India Act, 1935. Thus, under the Calcutta Improvement Trust Act, the State of West Bengal levies a terminal tax on railway passengers bound for Calcutta and Howrah.

74. *Punjab Flour Mills* v. *Corpn.*, (1974) F.C.R. 17.

3. It follows that so far as rail-borne goods are concerned the same goods may well be subjected to taxation under Entry 89 of List I and Entry 52 of List II. The grounds of taxation under the two Entries are radically different.[74]

4. No tax is leviable under Entry 52 of List II upon goods which are brought into a local area, but are re-exported.[75]

Entries 89 of List I and 56 of List II. 1. While the present Entry gives to the Union the power to levy *terminal* taxes on goods or passenger carried by railway, sea or air, Entry 56 of List II empowers the State to impose taxes on goods and passengers carried by *road*, on *inland waterways*, or national highways,[76] which may be in the nature of an octroi or terminal tax,[77] on export or import in relation to a local area.[78]

Legislation by Parliament.—A terminal tax on Railway passengers has been imposed by the Terminal Tax on Railway Passengers Act (69 of 1956). S. 3 (1) of this Act provides—

"Subject to the other provisions contained in this Act, there shall be levied on all passengers carried by railway from or to any notified place a terminal tax in respect of every railway ticket (whether single or return) at such rates not exceeding the maximum rates as the Central Government may, by notification in the Official Gazette, fix."

S. 7 says that the tax shall be collected by means of a surcharge on fares.

S. 8 of the Act abolishes the existing terminal taxes imposed by the States wherever a tax under this Act shall be levied.

A tax on railway fares was imposed by the Railway Passenger Fares Act (25 of 1957), but that Act has been repealed by Act 8 of 1961.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

Government of India Act, 1935.—There was no item in that Act, corresponding to the present Entry.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

OTHER CONSTITUTIONS

Government of India Act, 1935.— The present Entry reproduces Item 57 of List I of the Government of India Act, 1935, with the addition of 'transfer of shares, debentures.'

INDIA

'Rates of stamp duty'.—'Stamp duties' is a concurrent subject under Entry 44 of List III ; but 'rates' are excluded from that Entry, and included in the present Entry as regards certain specified documents, while the rest are included in Entry 63, List II. [See also Art. 268 (1)].

Entries 91 of List I and 63 of List II. By the Devolution Rules, read with the Scheduled Taxes Rules framed under the Government of India Act, 1919, the Provincial Legislature was, for the first time, authorised to impose "stamp-duty

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75. *Burmah-Shell v. Belgaum Municipality*, A. 1963 S.C. 906 (910).
76. *International Tourist Corpn. v. State of Haryana*, A. 1981 S.C. 774 (para. 8).
77. *Man Mohan v. Delhi Municipality*, A. 1981 S.C. 991
78. *Monji v. State*, A. 1988 M.P 220 (para. 3).

other than the duties of which the amount is fixed by Indian legislation". By Government of Idnia Order no. 902, dated 17-2-22, the following instruments were reserved for Central legislation –

Acknowledgment, Bills of Exchnage, Share Certificates, Cheques, Delivery Order in respect of goods, Letter of allotment of shares, Letters of Credit, Policies of Insurance, Promissory Notes, Proxies, Receipts, Shipping Orders.

Hence, except in relation to the instruments specified above, the Provincial Legislature had complete power as regards stamp duties including the power to fix *rates*.

The Government of India Act, 1935 differentiated the power to legislate relating to stamp duties from the power to prescribe the rates of such duties. The power to legislate relating to stamp duties (generally) was included in item 13 of List III, while the power to prescribe rates was divided between the Central and Provincial Legislatures. Entry 57 of List I gave to the Central Legislature the power to prescribe rates of stamp duty on the following instruments :

Bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

It may be seen that this list of instruments reserved for Central legislation with respect of rates was the same as that framed under the Devolution Rules except that acknowledgments, share certificates, delivery orders, letters of allotment of shares were omitted and 'Bills of Lading' were substituted for 'Shipping Orders'. Under s. 137 of the Act, the duties on instruments specified in Entry 57 of List I were to be levied by the Union but assigned to the States.

The power to prescibe rates relating to all instruments other than those included in item 57 of List I belonged to the Provincial Legislature under item 51 of List II.

2. The above scheme of the Government of India Act, 1935 is maintained by the Constitution, excepting that in Entry 91 of List I relating to rates, two new instruments have been added, viz., 'Transfer of Shares' and 'Debentures'. In the result, Parliament has no power to legislate as to the *rate* of stamp duty payable of an application for enrolment of an Advocate, – such instrument not being enumerated in the present Entry.[79] Art. 268 provides that duties on the instruments specified in Entry 91 shall be levied by the Union and assigned to the States.

Entries 91 of List I and 44 of List III. 1. Under Entry 44 of List III, the power to *levy* stamp duty on all documents, is concurrent.[80]

2. But the power to prescribe the rate of such levy is excluded from Entry 44 of List III and is divided between Parliament and the State Legislatures as follows : If the instrument falls under the categories mentioned in Entry 91 of List I the power to prescribe the rate will belong to Parliament ; for all other instruemnts or documents, the power to prescribe the rate belongs to the State Legislature, under Entry 63 of List II.[80]

3. The meaning of Entry 44 of List III, therefore, is that excludign the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature, in the concurrent sphere, subject to Art. 254 in case of repugnancy.[80]

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79. Rupendra Saigal, in re, A. 1958 A.P. 63 (65).
80. *Bar Council* v. *State* of U.P., A.1973 S.C. 231 (paras. 11-12).

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

OTHER CONSTITUTIONS

U.S.A. – Though newspaper owners are not exempt from the ordinary taxation of the country,[81] a heavy tax on newspaper advertisements has been invalidated on the ground that it was an excessive burden on the freedom of the press,[82] where 'the payment was singled out for special taxation and the tax was graduated in accordance with the volume of circulation'.[83]

"The tax here involved is bad not because it takes money from the pockets of appellees . . . . It is bad because . . . . . it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of informantion to which the public is entitled in virtue of the constitutional guarantees".[82]

INDIA

'Taxes on sale or purchase of newspaper . . . . . '– There was no specific item in the Act of 1935 relating to the present subject. Item 48 of List II included taxes on the sale of all goods and on advertisements.

Under the Constitution, taxes on sale of goods and on advertisements are included in Entries 54-55 of List II, but taxes on sale of newspapers and on newspaper advertisements are excluded from those entries and included in the present Entry.

'Newspaper' 1. This word, which is used in Entries 92 and 92A of List I , 54-55 of List II and 39 of List III, should receive the same meaning under all these Entries.

2. The controversy as to the meaning of the word in the High Courts has been settled by the Supreme Court in the *All India Reporter case*,[84] as follows:

3. 'News' means tidings, new information of recent events, new occurences as a subject of report or talk. Any printed periodical work which contains news may be a newspaper even though it may not conform strictly to the usual pattern of a daily or weekly or monthly newspaper or magazine.[84] Hence, the Gazette of India is a newspaper.[85]

4. A law report which contains decisions gives information about recent events in the Courts which are of interest to lawyers as well as the general public. The fact that it can be used as a reference book at a later stage is not sufficient to hold that the law report does not contain public news when it is received by the subscribers.

5. The distinction between a newspaper and a book sometimes becomes very thin or totally vanishes.[84]

6. The establishment in which the report is published is a newspaper establishment within the meaning of the Working Journalists Act, 1955.[84,86]

7. On the other hand, a publication which contains predictions or forecasts of lucky members at a race is not a newspaper as it has nothing to do with the news about any recent event.[87]

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81. Also see *Murdock* v. *Pennsylvania*, (1943) 319 U.S. 105.
82. *Grosjean* v. *American Press Co.*, (1936) 297 U.S. 233.
83. *Courtney Mabee* v. *White Plains Co.*, (1964) 327 U.S. 178.
84. *A.I.R.K.S.* v. *A.I.R.*, (1988) S.C.C. Supp. 472 (paras. 10-16) [overruling *Iyer* v. *C.S.T.* A. 1960 Or. 221].
85. *Jain* v. *General Manager*, I.L.R. (1967) P.H. 193.
86. *Ramnath* v. *Union of India*, (1975) Lab. I.C. 488 (Mad.).
87. *C.S.T.* v. *Express P.P.*, A. 1983 Bom. 199.

Legislation by Parliament. – The Tax on Newspapers (Sales and Advertisements) Repeal Act (XXVIII of 1951).

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

Amendment. This Entry was inserted by the Constitution (Sixth Amendment) Act, 1956.

Scope of Entry 92A. Prior to the insertion of this Entry in List I, the only Entry relating to taxation of sale or purchase was Entry 54 of List II. As a result, though Parliament had the exclusive power to regulate inter-State trade or commerce, under Entry 42 of List I, it had no power to tax sale or purchase taking place in course of inter-State trade and commerce, and the latter power belonged to the State Legislature, under Entry 54 of List II.[88]

This position was obviously anomalous. The Constitution (Seventh Amendment) Act, 1956, therefore, inserted the present Entry, to give the Parliament exclusive power to levy tax on a sale or purchase taking place in course of inter-State trade and commerce and the power of the State Legislature has to that extent been curtailed by making corresponding amendment in Entry 54 of List II, by the same Constitution Amendment Act (see *post*).

'Newspaper' – see under Entry 92 of List I.

When does a sale or purchase take place in course of inter-State trade or commerce. The same Constitution (Seventh Amendment) Act, 1956 inserted cl. (3) in Art. 269 conferring power upon Parliament itself to "formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce."

Parliament has enacted s. 3 of the Central Sales Tax Act, 1956, in the exercise of this power. Hence, if a transaction of sale or purchase is an inter-State transaction under s. 3 of this Act, the power to levy a sales tax on such transaction will belong to Parliament and not to a State Legislature.

S. 3 of the Central Sales Tax Act, 1956 is as follows –

"A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase –

(a) occasions the movement of goods from one State to another ; or

(b) is effected by a transfer of documents of the title to the goods during their movement from one State to another.

Explanation 1. – Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. – Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

[See, further, under Art. 269(3) : Vol. K, pp. 267 ff ; Vol. L, p. 44].

Fees. Read with Entry 96, *post*, this Entry would empower Parliament to impose a fee on inter-State sales,[89] but not a 'market fee' which would come under Entry 28 of List II.[90]

Legislation by Parliament. – The Central Sales Tax Act, 1956.

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88. *Sundararamier* v. *State of A.P.* A. 1958 S.C. 468 (494).
89. Cf. *Krishna* Coconut *Co.* v. *E.G.C. Committee,* A. 1967 S.C. 973.
90. *Marularadhya* v. *State,* A. 1970 Mys. 114 (128-29).

[91]*92B. Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.*

Scope of this Entry. This Entry gives to Parliament the legislative power to impose a tax on the inter-State consignment of goods, which was provided for by Cl. (h), inserted in Art. 269 (1) by the same 46th Constitution Amendment Act.[91] [See Vol. K, p. 266].

No such law has been passed till April, 1990.

But by virtue of the present Entry, the State Legislature has lost any power to tax an inter-State consignment in the garb of a purchase tax.[91a]

93. Offences against laws with respect to any of the matters in this List.

OTHER CONSTITUTIONS

(A) *Government of India Act, 1935.*—The present Entry is the same as Item 42 of List I of the Government of India Act, 1935.

(B) *Australia.*—The Commonwealth has the power to legislate with respect to crimes as incidental to its substantive powers, under s. 51 (xxix)[92]. The residue belongs to the States.

(C) *Canada.*—S. 91 (27) gives the Commonwealth the power with respect to 'criminal law' but under s. 92 (15) the Provinces have the power to impose 'punishment' for enforcing any law of the Province.

INDIA

'Offences.' While the general power to legislate relating to offences is a concurrent power under Entry 1 of List III, that Entry excludes 'offences against laws with respect to any of the matters specified in List I or List II.'

Hence, the Union Parliament has exclusive power to legislate for offences against laws enacted by Parliament in exercise of powers conferred by List I, with ancillary matters.[93]

[See, further, under Entry 1 of List III].

'Offences with respect to matters in List I'. The Union Legislature has exclusive power to create offences in respect of insurance, under the present Entry.[74]

Analogous Provision.—This entry is to be read with Entry 64 of List II. The Union and the State Legislatures have the power to legislate as regards offences relating to the matters included in List I and II respectively (vide excepting portion of Entry I of List III), and to direct the destination of the fines imposed.[95]

Some examples of offences relating to matters in List I, as contained in the Indian Penal Code.—(a) Offences relating to coins (Entry 36), such as counterfeiting [Secs. 230-254, I.P. Code] and currency [Secs. 489-A—489-D]. (b) Offences relating to trade and property marks (Entry 49). [Secs. 481-489.]

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91. Inserted by the Constitution (46th Amendment) Act, 1982.
91a. *Goodyear* v. *State of Haryana*, A. 1990 S. C. 781 (paras. 39, 81).
92. *Australian Communist Party* v. *Commonwealth*, (1951) 83 C.L.R. 1.
93. *Lakhinarayan* v. *State*, A. 1950 F.C. 59.
94. *Raghubar* v. *Emp.*, A. 1944 F.C. 25.
95. *United Provinces* v. *Governor-General*, A. 1939 F.C. 58 (*61*).

Power relating to these offences will, therefore, come under Entry 93 of List I, because even though these are included in the Indian Penal Code, the second part of Entry 1 of List III, excludes those offences from the ambit of that Entry inasmuch as the legislative power to such offences relate to matters enumerated in List I, which belongs exclusively to Parliament.[96]

Legislation by Parliament.—Railway Stores (Unlawful Possession) Act, 1955.

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

OTHER CONSTITUTIONS

(A) *Australia.*—'Statistics' is a Commonwealth subject under Sec. 51 (xi) of the Constitution Act, 1900. But every State is free to keep statistics for its own purposes.[96a]

(B) *Government of India Act, 1935.*—Item 43 of List I was the same.

INDIA

'Inquiry'. An inquiry necessarily involves investigation into facts and collection of material facts from the evidence brought to the notice of the person or body making the inquiry and also includes ancillary matters, e.g.,

(i) the recording of the findings of the inquiring body on the facts ;

(ii) the vires of the inquiring body on the facts found, for the consideration of the Government which set up the inquiry, with recommendations for the suppression of the mischief in future.

It, cannot, however, include any recommendation as to the award of punishment for wrongs *already done or committed,* for, that is a function which can be exercised only by a court of law properly constituted and not by an 'inquiring body'. A law made under the present Entry or under Entry 45 of List III cannot, accordingly, empower the inquiring authority to suggest the action necessary by way of securing 'redress or punishment' for wrongs already committed.[97]

'For the purpose of . . . . List'. 1. This Entry authorises Parliament to make a law for making inquiry into any matter relating to any subject which is enumerated in List I.

2. The purpose of the inquiry may be administrative or othrwise and is not confined to the undertaking of some future legislation.[97] The law made under the present Entry may cover inquiries into any aspect of the matters enumerated in the List and is not confined to those matters as mere heads of legislative topic.[97]

3. The word 'inquiry', in the present Entry or in Entry 45 of List III, not being qualified by any word of limitation, is wide enough to embrace every kind of inquiry, whether a criminal offence by any one is disclosed or not by the facts alleged.[98]

Entries 94 of List I and 45 of List III. 1. These two Entries are intended to cover the subject of 'inquiries'. If the subject of inquiry relates to a matter

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96. *Ramnaiah* v. *Supdt.*, A. 1974 S.C. 31.

96a. Wynes, Legislative Powers, 3rd Ed., p. 183.

97. *Ramkrishna Dalmia* v. *Tendolkar,* A. 1958 S.C. 538.

98. *Karnataka State* v. *Union of India,* A. 1978 S.C. 68 (para. 76).

enumerated in List I, it will fall under Entry 94 of List I ; if, however, the subject relates to List II or III, the legislative power will come under Entry 45 of List III.

2. In any possible case where the subject-matter of inquiry cannot be brought under any of the specfic Entries of List, I, II or III, it will come under the residuary power in Entry 97 of List III.[98]

3. The relation between the subject of inquiry and the specific Entry of Lists I-III, which is relied on, must, of course, be reasonable.[98]

Act coming under the present Entry. Commissions of Inquiry Act, 1952.[97]

Analogous Provision. – See Entry 45 of List III, *post.*

Legislation by Parliament. – Tariff Commission Act (L of 1951) ; Commissions of Enquiry Act (LX of 1952) ; Collection of Statistics Act (XXXII of 1953).

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List ; admiralty jurisdiction.

OTHER CONSTITUTIONS

(A) *England.* – Admiralty means a tribunal for the trial and decision of maritime questions and offences according to maritime law. By virtue of the Admiralty Courts Acts, 1840 and 1861 and the Judicature Acts, 1873 and 1925, the Admiralty Division of th High Court of Justice in England has got jurisdiction over the following matters, broadly :

Bottomry. – Bottomry is the hypothecation of the keel or bottom of a ship whereby in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest if the ship terminates her voyage successfully, while the debt is lost if the ship is lost in course of the voyage.

Respondentia. – Respondentia is the hypothecation of the cargo on board a ship on terms similar to bottomry.

Necessaries supplied to foreign ships. – This jurisdiction extends over claims for necessaries supplied to any foreign ship at a time when such ship was in certain ports or on the high seas.

Claims for seamen's wages, Master's wages and disbursements.

Claims for damage on the high seas. – The Admiralty has jurisdiction over all wrongs committed by or to British subjects on the high seas. It includes damage due to collision between ships and vessles, and other damage done by a ship.

Damage to cargo. – This jurisdiction relates to claims for damage to cargo, including short delivery, against British or foreign ships, in respect of goods carried or to be carried into a port in England or Wales.

Salvage. – Salvage means compensation allowed to persons by whose assistance a ship or cargo or the lives of persons belonging to her are saved from danger or loss at sea.

Droits of admiralty. – When a state of war exists, enemy goods seized in English ports go to the Crown as *droits of Admiralty*. The Court of Admiralty has also the jurisdiction to condemn as droits of Admiralty unclaimed wreck, floatsam, jetsam, ligan and derelicts found in the shores of the sea or on the high seas.

Forfeiture.—The Admiralty Court has jurisdiction to condemn as forfeited ships for improper use of British national flag and dangerous goods carried or attempted to be carried on board any vessel, in certain circumstances.

Booty of War and all matters relating thereto, Mortgage of British ships, disputes between co-owners of ships.—In England, the Admiralty Court had also a criminal jurisdiction, prior to 1861, of trying treason, felony, robbery, murder and like offences committed on the sea. But the Admiralty Court Act of 1861, transferred this criminal jurisdiction to the ordinary Courts and now these offences are treated as though committed in England or Ireland. Nevertheless, the jurisdiction to take cognizance of crimes committed on the high seas is still known in England as 'admiralty jurisdiction'.

Shortly speaking, admiralty jurisdiction extends over—(i) Offences committed on British ships on the high seas ; (ii) Offences committed on foreign ships in British territorial waters : (iii) Piracies committed by (a) a British subject ; (b) a person of any nationality, provided the offence was committed on a ship subject to British jurisdiction when the offence was committed.

(a) Offences committed by British ships on the high seas.—Admiralty jurisdiction extends only to acts committed on the sea. i.e., crimes which become complete at sea. Thus, the Admiralty would have no jurisdiction over murder, where the wounding took place on shore but the death happened on sea.[99] Conversely, where a wrongful act done on shore produces criminal results at sea, the offence is cognizable by the Admiralty.[100]

Admiralty jurisdiction begins where the tide touches the shore, whether at low or high-water mark, and extends all over the world,—to the coast of every country and up every bay, arm of the sea and river, so far as great ships go. It is not necessary to show that the tide reaches the spot, if it is accessible to *oceangoing vessels*.[1] "High seas' thus include rivers below the bridges, where great ships go.[2]

(b) Offences committed on foreign ships in British territorial waters.—England has admiralty jurisdiction over a foreigner only—(i) if he commits an offence on an English ship, while on the high seas and whether he was permanently or merely casually on board that ship at the time of commission of the offence ; (ii) if he commits the offence on a foreign ship, while in British territorial waters.

The principle underlying the first case is that a ship on the high seas is a floating territory of the State whose flag it flies and, therefore, that State has the duty to protect persons upon such floating territory and is accordingly entitled to enforce obedience to its laws upon such persons. The principle underlying the second case is that 'territorial waters' are a part of the territory of the State which it adjoins and not a part of the high seas.

But English Courts have no jurisdiction over a foreigner in respect of crimes committed elsewhere than in the above two cases, e.g., in respect of homicide due to a blow inflicted by the foreigner on board a foreign vessel on the high seas, even though the injured person lands in England and dies there.[3]

In times of war, cases relating to prize vessels captured at sea come within the admiralty jurisdiction.

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99. Hale, P.C. 17.
100. Combe's Case, 1 Leach C.C. 388.
1. Mayne, Criminal Law, p. 294.
2. *R* v. *Anderson*, L.R. 1 C.C. 161.
3. *R* v. *Lewis*, (1857) 26 L.J. (M.C.) 104.

(B) *U.S.A.* – Under Art. III, Sec. 2 of the United States Constitution, "admiralty and maritime jurisdiction" is included in the judicial power of the Federal Government so that admiralty proceedings cannot be entertained by any State Court.

I. The admiralty jurisdiction in the United States is, however, much wider than in England. In the United States, it applies to any waters that are *navigable,* – whether connected with the sea or not.[4] The test of navigability, again, is satisfied when the waters, whether tidal or not, or whether natural or artificial,[5] are navigable *in fact,* or are susceptible of being so used in themselves or as connecting links, as highways over which trade and travel may be conducted between the States or with foreign nations.[6]

Admiralty jurisdiction includes prize casses, maritime torts, and maritime contracts, including marine insurance, charterparties, wages of seamen, contracts for maritime service, contacts relating to averages, contributions, jettisons, bottomry bonds etc. In view of the constitutional privision referred to above, the Federal Courts have the power to determine the scope of their admiralty jurisdiction subject, of course, to Congressional jurisdiction.[7]

II. Though the grant of jurisdiction over admiralty and maritime matters is to the *judicial* power of the Federal Government, it has been construed to confer co-extensive powers to the Federal Legislature to legislate upon those matters.[8] Again, this power of Congress relating to maritime matters is *independent* of its power over 'inter-State and foreign commerce'.[9] Thus, the jurisdiction of Congress to legislate in respect of admiralty and maritime matters is plenary, – extending to all matters and places to which maritime law extends ;[6] – and even though the navigable waters be wholly within the confines of a particular State, provided they constitute connecting links in claims of commercial communication between States.[6]

But so long as the State legislation does not conflict with the policy of federal legislation, the States are not precluded from legislating on maritime matters, such as pilotage,[10] inspection or quarantine.[8]

State law, however, must give way where it is inconsistent with the policy of federal legislation[11] or constitutes an unnecessary burden on the freedom of navigation and maritime commerce.[12]

(C) *Government of India Act, 1935,* – 'Admiralty jurisdiction' was included in Item 21 of List I. As to jurisdiction and powers of Courts, *see* Item 53 of List I of that Act.

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'Jurisdiction of a Court'. Jurisdiction means the authority or power of a court to hear and determine a cause or complaint presented in a formal way for its

4. *Propeller Genesee Chief* v. *Fitzhugh,* (1851) 12 Howard, 443.
5. *Ex parte* Boyer, (1884) 109 U.S. 629.
6. Willoughby, Constitutional Law, II, p. 950 ; Willis, p. 271 ; Daniel Ball, (1870) 10 Wall. 557.
7. The Roanoke, (1903) 189 U.S. 185.
8. *Morgan's L. & T.R.* v. *Louisiana Board of Health,* (1886) 118 U.S. 455.
9. *Ex parte* Garnett, (1891) 141 U.S. 1.
10. *Cooley* v. *Board of Wardens,* (1851) 12 How. 299.
11. *Atlantic Transport Co.* v. *Inbrovek,* (1915) 234 U.S. 52 (59).
12. *Knickerbroker Ice Co.* v. *Stewart,* (1920) 253 U.S. 149 (164).

decision. The limits of this authority are imposed by the statute under which the Court is constituted. A Court' sjurisdiction may be limited – (a) as to the nature of the subject-matter ; (b) as to persons ; (c) as to the pecuniary value of the subject-matter ; (d) as to the area over which the jurisdiction shall extend.

According to the United States Supreme Court – 'Jurisdiction' of a particular Court is that portion of the judicial power which it has been authorized to exercise by the Constitution or by valid statutes.[13] 'Judicial power', on the other hand, is the power of a Court to decide and pronounce a judgment and to carry it into effect between persons and parties who bring a case before it for its decision.[14]

Ambit of jurisdiction created by the Legislature. The extent of jurisdiction conferred upon a Court is to be determined from the statute which creates the Court or gives an existing Court the jurisdiction to hear some new matter.

But where a statute refers a matter to the determination of an existing Court with no further provision, the necessary implication is that the Court will deal with the matter *as a Court*, and the ordinary incidents and procedure of that Court including a right of appeal will also attach to such new matter.[15]

'Powers'. this is a comprehensive wore, which includes all the procedural and substantive powers which may be exercised by a Court, but the full significance of the word can be grasped only by reading special and local Acts by which various powers have been conferred on Courts, e.g., s. 13, Aircraft Act, 1934 ; s. 24, Arms Act, 1878 ; s. 10, Central Excises and Salt Act, 1944. The word 'powers' was thus added to 'jurisdiction' in the present Entry and the corresponding Entries of the other Lists, in order to grant special powers on Courts while enacting special legislation.[16]

Distribution of legislative power relating to jurisdiction. 1. Legislative power regarding jurisdiction of courts is distributed amongst the three Lists. 95 of List I ; 65 of List II ; and 46 of List III.

2. The distribution follows the subjects of the substantive legislation to which the jurisdiction of the court in question relates. If that subject-matter is included in List I, it is Entry 95 of List I which will apply, and so on.[17]

3. Thus, the power to legislate relating to the jurisdiction of courts to try offences coming under Entry 93 of List I will come under Entry 95 of List I.

Entry 95 of List I and Entry 65 of List II. The effect of these entries is that while legislating with regard to matters in their respective legislative lists, the two Legislatures are competent to make provisions in the several Acts enacted by them, concerning the jurisdiction and powers of Courts in regard to the subject-matter of the Acts, because otherwise the legislation may not be complete or effective. These entries are wide enough to empower the two Legislatures to legislate negatively as well as affirmatively, with regard to the jurisdiction of the Courts in regard to the matters within their respective legislative ambits. They can bar the jurisdiction of the Courts in regard to those matters and they can also confer special jurisdiction on certain Courts.[16] (See further under Entry 3, List II).

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13. *Binderup* v. *Pathe Exch.*, (1923) 263 U.S. 291.
14. *Muskrat* v. *United States*, (1911) 219 U.S. 346.
15. *National Telephone Co.* v. *Postmaster*, (1913) A.C. 546.
16. *State of Bombay* v. *Narottamdas*, A. 1951 S.C. 69 (71, Fazl Ali J.).
17. *Jaysyuth* v. *M.T. Mills*, A. 1988 Raj. 16 (para. 10).

Entries 95 of List I and 46 of List III. See under Entry 46 of List III, *post.*

Admiralty jurisdiction. Under cl. 33 of the Letters Patent, the High Courts of Calcutta, Madras and Bombay "shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or Vice Admiralty, or otherwise in connection with maritime matters, or matters of prize".

These High Courts are also Colonial Courts of Admiralty under the Colonial Courts of Admiralty (India) Act, 1891.

Existing Laws. – Colonial Courts of Admiralty (India) Act (XVI of 1891). See also the Acts mentioned above.

Laws made by Parliament. – Special Criminal Courts (Jurisdiction) Act (XVIII of 1950).

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

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Government of India Act, 1935. – Item 59 of List I of that Act was the same as the present Entry.

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'Fees'. 1. In order to come under the present Entry or under Entry 66 of List II or Entry 47 of List III, the levy must be a 'fee' as distinguished from a tax or other impost (see under Art. 277, *ante*), for the different imposts are distributed between the Union and the States by different entries, on different principles. Thus, in the garb of imposing a licence fee a Legislature cannot impose a tax for the purpose of raising the general revenues.[18-19] Where no expenses are incurred at all for rendering an alleged service, the imposition of a fee would be *ultra vires*, where the imposition is purported to be made under an Entry relating to 'Fees'.[19]

2. This Entry authorises the imposition of a licence fee where licensing can be legitimately resorted to as ancillary to the taxing power.[20]

3. While fees may be levied as incidental to legislation on the topics set in other Entries in the List, the power to levy a tax is not to be taken as conferred by Entries conferring general legislative power.[21]

'Not including fees taken in any court'. Fees taken in all Courts other than the supreme Court is included in Entry 3 of List II. But if the tribunal or authority in relation to which the fee is taken be not a 'court' and the matter is included in any Entry of List, I, it is within the competence of Parliament to levy a fee. Thus, Parliament may impose a fee for appeal to the Appellate Tribunal under the Income-Tax Act, for the Appellate Tribunal is not a 'Court' and taxation of non-agricultural income is enumerated in Entry 82 of List I.[22]

Analogous Provisions. – Entry 66, List II ; Entry 47, List III.

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18. *Netram* v. *Raiganj Municipality,* (1954) 59 C.W.N. 872.
19. Cf. *Raj Kishore* v. *Dt. Board,* A. 1954 All 675 (679) ; *Kewal* v. *State of Punjab,* A. 1986 S.C. 1008 ; *S.G.T.* v. *State of A.P.,* A 1983 S.C. 1246. *I.T.C.* v. *State of Karnataka,* (1985) Supp. SCC 476.
20. *Guruviah* v. *State of Madras,* A. 1958 Mad. 158 (*169*).
21. *Corpn. of Calcutta* v. *Liberty Cinema,* A. 1965 S.C. 1107.
22. Cf. *Seshadri* v. *I.T. Officer,* A. 1954 Mad. 806 (*808*).

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

OTHER CONSTITUTIONS

Canada.—It has been held that the distribution of legislative powers in the Br. North America Act is *exhaustive.* Whatever belongs to self-government in Canada must belong either to the Dominion or to the Provinces within the limits of the Act.[23] Hence, whatever is not thereby given to the Provincial Legislature, rests with the Dominion Parliament.[24]

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Scope of the residuary power. 1. A law cannot be brought under the present Entry where it clearly falls under some Entry of List II or III, e.g., matters relating to 'public order'.[25] [See under Art. 248, *ante*.]

2. On the other hand, if the law does not relate to any of the matters enumerated in List Ii or III, it will come under Entry 97 of List I. [26-27] This follows from Art. 248.[29]

3. This means that when the vires of an Act of Parliament is challenged, the only question the Court has to answer is whether the subject-matter of the Act is enumerated in any Entry of List II,[26] for, Parliament shall have competence if the matters is covered by List III, or, it will come under the residuary under Entry 97 of List I.

4. Where the competition is between an Entry in List II and Entry 97 in List I, the latter cannot be so expansively interpreted as to whittle down the power of the State Legislature.[28] On the other hand, the Entry in the State List must be given a broad and plentiful interpretation.[28]

5. There is nothing to debar Parliament from combining its power derived from some other Entry in List I of III with its powers under Entry 97 of List I.[29]

'Any other matter'. The present Entry simply embodies the provisions of Art. 248, *ante*, in the form of a legislative Entry. The Entry embodies the Candian principle (*see above*) that if a subject of legislation is not enumerated, it must belong to Parliament. But, as has been pointed out [under Art. 248], this Entry can be relied upon only as a matter of last resort and also subject to the doctrine of 'ancillary powers'. Thus, in a Patna case,[30] it was contended that inasmuch as there is no Entry relating to offences in the Concurrent List, as there are in Lists I (Entry 93) and II (Entry 64), the right to create offences relating to matters in the Concurrent List should belong to Parliament under the present residuary Entry. This contention was rejected on the ground that Entries 93 and 64 of List

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23. *Re References,* (1912) A.C. 571.
24. *Bank of Toronto* v. *Lambe,* (1887) 12. App. Cas. 175.
25. *Stainislaus* v. *State of M.P.,* A. 1977 S.C. 908 (para. 24).
26. *Union of India* v. *Dhillon,* A. 1972 S..C. 1021 (1069).
27. *Karnataka State* v. *Union of India,* A. 1978 S.C. 68 (para. 96).
28. *International Tourist Corpn.* v. *State of Haryana,* A. 1981 S.C. 774 (para. 7).
29. *Khandelwal Works* v. *Union of India,* A. 1985 S.C. 1211 (paras. 41-42) ; *Gasket* v. *E.S.I.C.* A. 1985 S.C. 790 (para. 6).
30. *Ratan Roy* v. *State of Bihar,* A. 1950 Pat. 332 (339).

List I and II, respectively, were inserted *ex abundanti cautela,* and that a State Legislature, while enacting a law under the Concurrent List was entitled to create offences for violation of such law, in the exercise of an 'ancillary' power.

Articles of the Constitution, conferring legislative power upon Parliament. – Apart from the Entries in List I, various articles of the Constitution confer legislative power upon Parliament. There is no doubt that Parliament shall be competent to make laws relating to those subjects whether or not such subjects readily come within any of the Entries of List I. These articles, for example are :

2, 3, 10, 11, 15 (3),[31] 22 (7), 32 (3), 35 (2), 70, 73 (2), 81 (2) (3), 82, 83, 84 (c), 98 (2), 101 (1), 102 (1) (e), 105 (3), 106, 112 (3) (g), 119, 120 (2), 124 (1), 134 (2), 135, 137, 138 (2), 139, 140, 142 (2), 145 (1), 146 (2), 148 (3), (5); 149, 169 (1),[32] 173 (c), 230, 240 (1), 247, 253, 262, 267, (1), 271, 275 (1), 276 (2), Prov., 20 (2), 283 (1), 285 (1), 286 (2), 287, 289 (2), 293 (2), 300 (1), 302, 307, 315 (2), 321, 324 (2), 327, 341 (2), 342 (2), 343 (3), 348 (1), 367 (3), Prov., 369, 371, Para. 7 of the 5th Schedule, Para. 21 of the 6th Schedule.

Entry 97 of List I and State legislative power. 1. If there is no Entry in the State or Concurrent List relating to a subject-matter, such matter would come under the present residuary power of Parliament, and any State enactment relating to that matter e.g., the U.P. Sugarcane Cess Act, 1956, imposing a cess upon the entry of sugarcane into the premises of a factory, must be struck down as invalid.[33]

2. On the same principle, a tax on building contracts where no 'sale' is involved, would not come under Entry 54 of List II.[34] Parliament is, accordingly, competent to impose such tax, under the present power.[35]

3. A tax on loan[36] or gift[37] has also been supported under the present Entry.

Gift tax and tax on lands and buildings. – See under Entry 49 of List II, *post.*

Entry 97 and taxing power. 1. There is nothing wrong for Parliament to claim taxing power under the present Entry. But before that can be admitted, it must be shown that tax is not mentioned in List II or III.[28] The reason is that the Constitution of India being federal in nature, the residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature.[28]

2. Once it is established that the taxing power claimed is not covered by any Entry in List II or III, it is competent of Parliament to combine its power under Entry 97 with some other power which legitimately belongs to Parliament exclusively under some other Entry of List I.[28-38]

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31. Vide Public Employmnet (Requirement as to Residence) Act.
32. Vide Legislative Councils Act, 1957.
33. *Diamond Sugar Mills* v. *State of U.P.*, A. 1961 S.C. 652 (658).
34. *State of Madras* v. *Dunkerley*, (1959) S.C.R. 379.
35. *Mithan Lal* v. *State of Delhi*. (1959) S.C.R. 445.
36. *Lakshmana* v. *I.T.O.*, A. 1961 Mad. 146 (151).
37. *Azam* v. *E.T.A.*, A. 1970 A.P. 86 (92).
38. *Satpal* v. *Lt. Governor*, A. 1979 S.C. 1550.

Laws covered by the residuary Entry. The following have been held to be covered by the present Entry–

(i) A gift tax on gifts of movable and immovable property, including land ;[39] wealth tax.[26]
(ii) A tax on building contracts, even though no 'sale' is involved therein.[35]
(iii) A cess upon the entry of sugarcane into the premises of a factory.[40]
(iv) The constitution of a Legislature for a Part C State,[41] now a Union Territory, under Art. 239(I).
(v) Providing for collection of annuity deposits from tax-payers, in the nature of borrowing.[42]
(vi) A law stting up a Commission of Inquiry relating to relations between the Union and State Governments.[27]
(vii) Prevention of improper use of certain emblems for commercial purposes.[43]
(viii) Legislation to take over the management of the Auroville.[44]
(ix) To validate, with retrospective effect, an imposition which the State Legislature had no competence to make, and to convert the collections made under that invalid State law into valid collections made under the retrospective law made by Parliament.[45]
(x) Legislation for the eviction of unauthorised occupants from property belonging to the Union or a Government Company.[46]
(xi) Imposition of excise duty on the 'processing' of goods.[47]
(xii) Expenditure tax.[48]

Legislation by Parliament. Cooch-Behar (Assimilation of Laws) Act, 1950, Finance Commission (Miscellaneous Provisions) Act, 1951, Scheduled Areas (Assimilation of Laws) Act, 1951, 1953, Lushai Hills District (Change of Name) Act, 1954, Absorbed Areas (Laws) Act, 1954, Shillong (Rifle Range and Umlong Cantonments) Assimilation of Laws Act, 1954, Chandernagore (Merger) Act, 1954, Taxation Laws (Extension to Jammu and Kashmir) Act, 1954, Jammu and Kashmir (Extension of Laws) Act, 1956, Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956, High Court Judges (Conditions of Service) Act, 1954, 1988; Rajghat Samadhi Act, 1951; Supreme Court Judges (Conditions of Service) Acts, 1958, 1988.

Foreign Contribution (Regulation) Act, 1952 Gift Tax Act (18 of 1958)[39] ; Official Language Act, 1963; s. 2A of the Industrial Disputes Act, 1947, inserted in 1965[49].

Consumer Protection Act, 1986; Tamil Nadu Legislative Council (Abolition) Act, 1986; Air (Prevention and Control of Pollution) Act, 1988.

Governors (Emoluments, Allowances and Privileges) Amendment Act, 1987; Authorised Translation (Central Laws) Act, 1973, 1988; Legal Services Authorities Act, 1987.

Acts making territorial alteration etc. :

1. The Assam (Alteration of Boundaries) Act, 1951, altered the boundaries of Assam by ceding a strip of territory from India to Bhutan.

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39. *Second Gift Tax Officer* v. *Hazareth*, A. 1970 S.C. 999.
40. *Diamond Sugar Mills* v. *State of U.P.*, A. 1961 S.C. 652 (658); *Jaora Sugar Mills* v. *State of M.P.*, A. 1964 M.P. 118 (122).
41. *Jadab* v. *H.P. Administration*, A. 1960 S.C. 1008.
42. *Hari Krishna* v. *Union of India*, A. 1966 S.C. 619 (622).
43. *Sable* v. *Union of India*, A. 1975 S.C. 1172 (para 13).
44. *Mittal* v. *Union of India* A. 1983 S.C. 1 (paras. 71-72).
45. *Shetkari Karkhana* v. *Collector*, A. 1979 S.C. 1972 (para 6); *Jaora Sugar Mills* v. *State of M.P.*, A. 1966 S.C. 416.
46. *Saiyada* v. *Hindustan Steel*, A. 1989 S.C. 406 (para. 13).
47. *Ujagar Prints* v. *Union of India*, A. 1989 S.C. 516 (para. 24).
48. *Azam* v. *E.T.O.*, (1971) 3 S.C.C. 621 (629).
49. *F.L. Corpn.* v. *Union of India*, A. 1970 Delhi 60 (66).

2. The Andhra State Act, 1953, formed a new State named Andhra, by taking out some territory from the State of Madras as it existed at the commencement of the Constitution.

3. The Himachal Pradesh and Bilaspur (New State) Act, 1954, merged the two Part C States of Himachal Pradesh and Bilaspur to form one State, namely, Himachal Pradesh.

4. The Bihar and West Bengal (Transfer of Territories) Act, 1956, transferred certain territories from Bihar to West Bengal.

5. The State Reorganisation Act, 1956, reorganised the boundaries of the different States of India in order to meet local and linguistic demands. Apart from transferring certain territories as between the existing States, it formed the new State of Kerala and merged the former State of Madhya Bharat, Pepsu, Saurashtra, Travancore Cochin, Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh in other adjoining States.

6. The Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959, transferred certain territories from the State of Rajasthan to that of Madhya Pradesh.

7. The Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, made alterations in the boundaries of the State of Andhra Pradesh and Madras.

8. The Bombay Reorganisation Act, 1960, partitioned the State of Bombay to form the new State of Gujarat and to name the residue of Bombay as Maharashtra.

9. The Acquired Territories (Merger) Act, 1960, provided for the merger into the State of Assam, Punjab and West Bengal of certain territories acquired by agreements entered into between the Government of India and Pakistan, in 1958 and 1959.

A similar transfer of certain territories from West Bengal and Assam to Pakistan under the aforesaid agreement, was provided for by enacting the Constitution (Ninth Amendment) Act, 1960, because the Supreme Court opined that no territory can be ceded from India to a foreign country without Amending the Constitution.

10. The State of Nagaland Act, 1962, formed the State of Nagaland, comprising the territory of the 'Naga Hills-Tuensang Area' which was previously a Tribal Area in the Sixth Schedule of the Constitution, forming part of the State of Assam.

11. The Punjab Reorganisation Act, 1966, by which the State of Punjab was split up into the State of Punjab and Haryana and the Union Territory of Chandigarh.

12. The Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.

13. The Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968.

14. The Assam Reoranisation (Meghalaya) Act, 1969, created an autonomous sub State named Meghalaya, within the State of Assam.

15. Himachal Pradesh was upgarded from the status of a Union Territory to that of a State by the State of Himachal Pradesh Act, 1970.

16. The North Eastern Areas (Reorganisation) Act, 1971, similarly, brought up Manipur, Tripura and Meghalaya into the category of States, and added Mizoram and Arunachal Pradesh to the list of Union territories.

17. This Haryana and Uttar Pradesh (Alteration of Boundaries) Act, 1979.

18. State of Mizoram Act, 1986 ;

19. State of Arunachal Pradesh Act, 1986 ;

20. Goa, Daman and Diu Reorganisation Act, 1987.

List II – State List.

1. Public order (but not including[1] [the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 1 of List I was –

"Public order[1] (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) . . . . . "

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Amendment. The italicised words were added by the Constitution (42nd Amendment) Act, 1976. See under Entry 2A of List I, *ante.*

'Public Order'. 1. 'Public Order' is a most comprehensive term[2] and subject to the exception mentioned, viz., use of the armed forces in aid of the civil power, the State Legislature is given plenary authority to legislate on all matters which relate to or are necessary for the maintenance of public order,[3] including the prevention of insult to national honour.[4]

2. Public order implies absence of violence and an orderly state of affairs, in which citizens can peacefully pursue their normal avocation of life.[5] Anything which disturbs public tranquillity disturbs 'public order'[2]. This entry also includes 'public safety' in its relation to the maintenance of public order.[6] In short, 'public order' is synonymous with public peace, safety and tranquillity,[7] and would, therefore, cover legislation to regulate the use of sound amplifiers,[8] or to prevent forcible and fraudulent conversion[9] or to prevent anti-social activities.[10]

3. It is to be noted in this connection that while the ambit of the expression 'public order' is very wide, the qualifying expression 'reasonable restriction' in Art. 19(2) or 'for reasons connected with' in Entry 3 of List III restrict the ambit of the legislative power under those provisions and 'public order' must be "real and proximate, not far-fetched and problematic".[5] Under the latter provisions it has been held that –

(a) Blackmarketing;[7]
(b) Contempt of Court;[8]
(c) Incitement not to pay taxes or other Government dues, unless the restriction is exclusively aimed at a general compaign for non-payment;[5]
(d) Holding of meetings and processions when there is no allegation for violence;[11-14]

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1. Substituted by the Constitution (42nd Amendment) Act, 1976.
2. *Lakhinarayan* v. *Province of Bihar.* (1949) 5 D.L.R. 17 (22) F.C.
3. *Ramesh Thappar* v. *State of Madras.* (1950) S.C.J. 418 (*324*).
4. *Nek Mohammad* v. *Prov. of Bihar,* A. 1949 Pat. I (F.B.) ; *Emp.* v. *Sibnath,* A. 1943 F.C.1.
5. *Superintendent* v. *Ram Manohar,* A 1960 S.C. 633 (639).
6. *State of Rajasthan* v. *Chawla,* A 1959 S.C. 544 (547).
7. *R.* v. *Basudeva,* A 1950 F.C. 67 (69).
8. *Sodhi Shamser* v. *State of Pepsu,* A. 1954 S.C. 276.
9. *Stainislaus* v. *State of M.P.,* A 1977 S.C. 908.
10. *Ashok* v. *State,* A 1987 All. 235 (paras. 42-44) .F.B.

11-14. *Umraomal* v. *State of Rajasthan,* A. 1985 Raj. 6 (10).

cannot be penalised by the Legislature 'in the interest of' or 'for reasons connected with' public order.

4. A narrow construction of the expression 'public order' has also been given to cases or preventive detention under Art. 22.[15]

5. But the decisions under those Articles should not be imported to restrict the meaning of 'public order' under Entry I of list II where the question is one of legislative competence, which is governed by the expression 'with respect to', and which must be given as large a meaning as possible.[3,11,16] Anything which disturbs the current of the life of the community (as distinguished from an individual) would amount to a disturbance of the 'public order',[11] e.g., the activities of anti-socials.[10]

In Arts. 19 or 22, a restrictive meaning has been given by the Courts in order to ensure minimal interference with the fundamental rights of the people. That question does not arise in dealing with an Entry dealing with legislative competence, to which the widest amplitude should be given.[10]

6. Legislation to control forcible conversion would come under the present Entry.[9] [But the regulation of 'religion', in general, should come under Entry 97 of List I][17].

'Public order' and public safety. Interpreted in the wider sense, public order would include public safety or freedom from danger, such as danger to *public health.*

The power to legislate relating to offences relating to matters specified in Lists I and II. Entries 93 of List I and 64 of List II confer specific power on the respective Legislatures to legislate with respect of 'offences against laws with respect to any of the matters' specified in those Lists. The general power conferred by Entry I of List II must, therefore, be read subject to the above specific powers. For instance, Parliament shall be competent to make a law relating to 'election offences' even though certain aspects of the offences so created may relate to 'public order'.[10]

'Use of armed forces in aid of civil power'. – This power belongs exclusively to the Union under Entry 2A, List I, *ante.*

Analogous Provision. – See Entry 3, List III, *post,* for 'preventive detention' for the maintenance of public order.

Administration of justice. – See under Entry 11A of List III, *post.*

OTHER CONSTITUTIONS

(A) *Canada.* – Sec. 91 (27) of the British North America Act, allots to the Dominion Legislature –

"The Criminal Law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal matters."

Sec. 92 (4), on the order hand, gives to the Provincial Legislature –

"The administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in Civil matters is those Courts."

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15. *Kanu* v. *State of W.B.*, A. 1972 S.C. 1656; *Amiya* v. *State of W.B.*, A. 1972 S.C. 2259; *Arun* v. *State of W.B.*, 1970 S.C. 1228.
16. *Ram Manoher* v. *State of Bihar*, A. 1966 S.C. 740.
17. Cf. *Yulitha* v. *State of Orissa*, A. 1973 Or. 116.

The above Provincial power in relation to 'administration of justice' is subject to Dominion power in relation to 'criminal law [s. 91 (27)], 'bankruptcy and insolvency' [s. 91 (12)] and to the specific provision in ss. 96-101. Hence, –

(a) A Provincial Legislature cannot create a 'superior Court' [s. 96] or confer the powers of a superior Court on any body of persons;[18] but it is not debarred from conferring quasi-judicial power upon administrative tribunals which are not 'courts'.[19]

(b) Where a Provincial law required permission of a Board to institute proceedings in the courts against certain debtors who were unable to pay their debts, *held*, that though, in form, the law purported to relate to procedure in the Provincial Courts, in substance it was legislation relating to 'bankruptcy' and was, accordingly, invalid.[20]

(c) While legislating in relation to liens [s. 92 (13)], a Provincial Legislature cannot make the judgment of the Provincial Court relating to liens 'final',[21] for, that would be making a law relating to a 'Court of Appeal for Canada' [s. 101]. In short, no Provincial Legislature, in Canada, can bar an appeal to the Supreme Court of Canada or otherwise affect the jurisdiction of that Court.[21]

On the other hand, according to the doctrine of 'ancillary powers', –

A Provincial Legislature, in the exercise of its power to 'constitute, maintain and organise Provincial Courts', is competent to legislate with reference to the persons who practise before such Courts.[22]

(B) *Government of India Act, 1935.* – Item I of List II included –

"the administration of justice; constitution and organisation of all courts, except the Federal Court, and fees taken therein."

2. Police (including railway and village police) *subject to the provision of Entry 2A of List I.*[23]

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 3 of List II was the same as the present Entry of this *Constitution*.

INDIA

'Police'. – Police means the civil force charged with the duty to maintain internal peace and order.[24] The fact that a State Constabulary created for the maintenance of public order within the State is armed does not take it out of the present Entry,[25] or make it an 'armed force' within the meaning of Entry 2 of List. I.

'Subject of the provision of Entry 2A of List I'. These words make it clear that while the Police force of a State is under the exclusive jurisdiction of the State, when any Armed Force of the Union is deployed to aid the Police force of a State, such Armed Force of the Union shall remain under the exclusive jurisdiction of the Union.

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18. *Toronto Corpn.* v. *York*, (1938) A.C. 415.
19. *Labour Relations Board* v. *J.E.I. Works*, (1949) A.C. 134.
20. *A.-G. for Alberta* v. *A.-G. of Canada*, (1943) A.C. 356.
21. *Crown Grain Co.* v. *Day*, (1908) A.C. 504.
22. *A.-G. for Canada* v. *A.-G for Ontario*, (1898) A.C. 247.
23. Words in italics added by the Constitution (42nd Amendment) Act, 1976.
24. *Cf. Pooran* v. *State of U.P.*, A. 1951 All. 370 (372).
25. *Shantanand* v. *Adv. General*, A. 1955 All. 370 (372).

Analogous Provisions., – Entry 80 List I give to the Union the power to extend the jurisdiction of the Police or Railway Police belonging to a State to any area outside that State.

Existing (Central) Laws. – Police Act (V of 1861) ; Police Act (III of 1888) ; Police Act (LXIV of 1949) ; Indian Rifles Act (XXIII of 1920) ; Bengal Choukidari Act (XX of 1856) ; Police (Incitement to Disaffection) Act (XXII of 1922) ; Madras District Police Act, 1859 ; Bengal Military Police Act, 1892 ; Assam Rifles Act, 1941 ; Central Reserve Police Act, 1949.

3 . . .[26] Officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.

Amendment. The words 'Administration of justice...High Court' have been omitted and transferred to *new* Entry 11A in List III, by the Constitution (42nd Amendment) Act, 1976.

'Administration of justice.' – See under Entry 11A of List III, *post*.

Procedure in Rent and Revenue Courts. 1. This Entry, together with Entry 18 of List II gives the State Legislature the power to legislate as regards the procedure for realisation of decree for arrears of rent.[27]

2. The 'constitution and organisation of High Courts' is an exclusive Union subject under Entry 78 of List I. But the regulation of the practice and procedure in the High Court is a law relating to the 'administration of justice [now Entry 11A of List III] which assumes the existence of a duly constituted High Court.[28]

3. Read with Entry 2 of List III, it gives the State Legislature the power to legislate as to the enforcement of foreign judgments.[29]

4. The present Entry gives exclusive power to the State Legislature to regulate the procedure in rent and revenue courts.

Fees taken in Courts. 1. While fees taken before the Supreme Court come under Entry 78 of List I, fees taken before the High Court and other Courts come under Entry 3 of List II. Both are subject to the condition that they must be 'fee' as distinguished from 'tax',[30] so that a State law would be *ultra vires* if it doubles the court-fees with the object of raising general revenue or for providing money for road building or the like.[30]

2. A fee loses its character as such if it is intended to and does go to enrich the general revenues of the State, to be applied for general purposes of the Government.[31] Hence, the *object* to be served by raising the fee should not include objects which are, otherwise, within the ambit of general governmental obligations and activities.[31] But if the *object* of levying the impost is to provide for some special service and there is a *broad and general correlation* between the amount so raised and the expenses involved in providing the services, the impost would

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26. The words 'Administration of Justice... High court' have been omitted and transferred to *new* Entry 11A in List III, by the Constitution (42nd Amendment) Act 1976.
27. *Udoychand* v. *Samarendra*, (1947) 82 C.L.I.I (F.C.)
28. *Lachikka* v. *Kunjipennu*, A. 1961 Ker. 226 (F.B.)
29. *Gauri Lal* v. *Jugal*, A. 1959 Punj. 265 (269) F.B.
30. *Govt. of Madras* v. *Zenith Lamps*, A. 1973 S.C. 724 (paras. 30, 45); *Om Prakash* v. *Chief*, A. 1986 S.C. 726 (para. 12).
31. *Aswathanarayana* v. *State of Karnataka*, A. 1989 S.C. 100 (paras. 14-15) – 3 Judges.

not lose its character of a 'fee', merely because the identity of the amount so raised is not always kept distinguished but is merged in the general revenues of the State.[31] The test is the primary object of the levy.[31]

3. But in order to be a 'court-fee', there must be a broad co-relationship with the fees collected ans the cost of administration of civil justice.[30] Under this Entry, the Legislature cannot tax litigation or make the litigant pay, say, for road building or education or other beneficial schemes that a State may have[30] or to contribute, to the increase of general public revenue.[30]

4. But, in levying court-fee, the Legislature is competent to take into account – (a) the value of the subject-matter of dispute; (b) the various steps necessary in the prosecution of a suit or matter; (c) the entire cost of the upkeep of courts and officers administering civil justice; (d) the vexatious nature of a certain type of litigation and other relevant matter.[30]

5. The *quid pro quo* need not be established arithmetically; and, if, *in substance,* the levy is not to raise revenues also for the general purposes of the State, the mere *absence of uniformity* or that it has no direct relation to actual services rendered by the authority to *each individual* who obtains the benefit of the service or that *some* of the contributories do not obtain the same *degree* of service as others, will not change the essential character of the levy as a 'court fee'.[30]

6. The concept of 'fee' is not satisfied merely by showing that the class of person from whom the fee is collected also derives some benefit from the general activities of the Government. In such a case the benefit obtained by the class of persons on whom the levy is imposed is not intended as a *special service* rendered to it, but as a part of the general public.[31]

Conversely, it is *not* essential to the concept of 'fee' that *every* member of the class on whom it is levied must receive a corresponding degree of benefit commensurate with or proportionate to the payment that he individually makes. It would be sufficient if the benefit of the special services is available to the *class* as such. It is not necessary that every individual composing the class should be *shown* to have derived any *direct* benefit.[31,32]

'Courts'. The present power does not extend to any tribunal which is not a 'Court' in the proper sense of the term, though it may possess the trappings of a Court, e.g., an Income-tax Appellate Tribunal,[33] and Assistant Collector or a Revenue Commissioner under a Sales Tax Act.[34] But it enables the State Legislature to prescribe fees charged in the High Court.[35]

Existing (Central) Laws. – Provincial Small Cause Courts Act [IX of 1887] ; Presidency Small Cause Courts Act (XV of 1892) ; Bengal, Agra and Assam Civil Courts Act (VI of 1886) ; Court-fee Act (VII of 1870) ; Acting Judges Act (XVI of 1867) ; Madras Civil Courts Act (III of 1873) ; Bombay Civil Courts Act (XIV of 1869) ; Madras City Civil Courts Act (VII of 1892) ; Dekkhan Agriculturists' Relief Act (XVII of 1879).

Legislation by Parliament. – Kerala Civil Courts Act (1 of 1957).

[See also under Entry 13 of List III, *post*].

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32. *City Corpn.* v. *Sadasivan,* A. 1985 S.C. 756 (758).
33. *Seshadri* v. *Second Addl. I.T.O.,* A. 1954 Mad. 706.
34. *Chakko* v. *State of Orissa.* A. 1956 Or 7.
35. *Manyamma* v. *Municipal Commr.,* A. 1956 A.P. 271.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein ; arrangements with other States for the use of prisons and other institutions.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The correction and custody of criminals is a State function under its 'police power'. The institutions are of various types, – security prisons for the more serious offenders ; prison farms for the less dangerous ; reformatories for women, boys and girls ; hospitals for the criminal insane.

(B) *England.* – Special provisions have been made by statute for the reformation of young offenders. The Criminal Justice Act, 1967 and the Magistrates' Courts Act, 1980, provide for the passing of a sentence of 'Borstal training' where a person between the age of 16 and 21 commits an offence punishable with imprisonment, and the Court is satisfied that it would be expedient for the reformation of the offender to send him for Borstal training than to the ordinary prison. The Children and Young Persons Act, 1969, on the other hand, empowers a Court to send an offender under 17 to an 'approved school' or to custody in a remand home, for detention for not more than a specified period, for the purpose of his reformation under proper care and training.

Provisions for 'corrective training' and 'probation' i.e., supervision of an offender under specified officers have been made by the Criminal Justice Act, 1988.

(C) *Canada.* – Under Sec. 91 (28),

"The establishment, maintenance, and management of penitentiaries",

is a Dominion subject ;

while the Province has the power in respect of –

"The establishment, maintenance, and the management of public and reformatory prisons in and for the Province."

(D) *Government of India Act, 1935.* – Item 4 of List II was the same as the present Entry of *our* Constitution.

INDIA

Entries 4 of List II and 2 of List III. 1. Entry 4 of List II would include beneficial provisions relating to prisoners, to promote the habilitative potential and reduce warder-prisoner friction ; offer of remission paroles, supervised releases, opportunities for self-improvement by family contacts, time in community work or meditational centres and the like,[36] – which relate to conditions in prison or regulation of prisoner's life.[36]

2. It would not, however, include the execution of punishments provided by the Penal Code or their remission or commutation, which comes under Entry 2 of the Concurrent List.[36] To the latter power is ancillary the provision in s. 433A of the Cr.P.C., 1973, which prescribes and minimum detention of 14 years where the offender has been sentenced to death or the offence was punishable with death,[36] in two classes of cases.

3. Legislation relating to 'prisons and prisoners' cannot cut down a judicial sentence,[36] or release by way of reduction of the sentence itself.

Existing (Central) Laws. – The Prisoners Act (III of 1900) consolidates the law relating to prisoners confined by order of a Court, including persons detained in Reformatory Schools. The Prisons Act (IX of 1894) regulates prisons, provides for the discipline, health, etc, for prisoners, prison-offences, etc. The Reformatory Schools Act (VIII of 1897) makes provision for dealing with youthful offenders and maintenance of Reformatory Schools by the Provinces [the Identification of Prisoners Act (XXXIII of 1920)].

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36. *Maru* v. *Union of India*, A. 1980 S.C. 2147 (paras. 15, 16, 23).

Legislation by Parliament. – Prisoners (Attendance in Courts) Act, 1955 ; Probation of Offenders Act, 1958 : Children Act, 1960.

5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

OTHER CONSTITUTIONS

(A) *Canada.* – Sec. 92 (8) of the Br. N.A. Act gives the Provincial Legislature exclusive power in relation to –

"Municipal institutions in the Province."

This entry gives the Provincial Legislature to create a legal body for the management of municipal affairs to which it can give any powers which come within the competence of the Provincial Legislature and all incidental powers necessary to cary on and work such municipal institutions ;[37] or to amalgamate[37] or, dissolve such institution.[38] To maintain control over such institutions, the *Provincial Legislature* may make incidental provisions for ascertaining whether they are solvent or insolvent and to regulate the amount of interest at which they may incur obligations ;[38] but cannot enact a law, the 'pith and substance' of which is the regulation of 'interest'.[39]

(B) *Government of India Act, 1935.* – Item 13 of List II was the same as the present entry .

INDIA

'Local Government'. 1. This Entry is very wide and empowers the State Legislature to legislate with respect to any subject relating to local government, including the constitution of such local authorities.[40] It can also confer such powers as it itself possesses,[41] upon a local authority, including the power of taxation within the limits of List II[42-43], for the purposes of local self-government.[44]

2. In conferring power to tax upon a local authority, the Legislature does not abdicate its functions, provided it lays down a principle and fixes a standard which the local authority has to follow in imposing the tax.[45]

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37. *A.G. of Ontario* v. *A-G. of Dominion,* (1896) A.C. 348.
38. *Ladore* v. *Bennett,* (1939) 3 All E.R. 98 (P.C.).
39. *Lethbridge Trustees* v. *I.O.F.,* (1940) A.C. 513.
40. *Moqbool* v. *State of Maharashtra,* A. 1982 Bom. 312.
41. *Ram Krishna* v. *Janpad Sabha,* A. 1962 S.C. 1073.
42. *Kisan* v. *Bhusawal Municipality,* A. 1966 Bom. 15 (18); *B.C. Press Co.* v. *Municipal Council,* A. 1990 Bom. 38 (para. 5).
43. *Municipal Council* v. *Mansoor,* A. 1966 Mad. 20.
44. *Western India Theatres* v. *Municipal Corpn.,* A. 1959 S.C. 586.
45. The above view of the Author, expressed at p. 713 of the 5th Edition, now finds support from the Supreme Court decision upholding the validity of the Bombay District Municipal Act, which had empowered the Municipalities to impose 'any other tax for the purposes of the Act' without indicating the rate or any ceiling in that behalf. Nevertheless, the Court observed that since the purposes of the tax had been indicated by the Legislature, there was no unconstitutional delegation of its functions [*Western India Theatres* v. *Municipal Corpn.,* A. 1959 S.C. 586). See also *Corporation of Calcutta* v. *Liberty Cinema,* (1965) 2 S.C.R. 477 *(492-93)].*

3. Where a taxing power is thus conferred by a State Legislature upon a local or municipal authority it does not mean that the State Legislature loses its power to impose a tax on the same subject-matter as long as the authorisation in favour of the local authority subsists or that the same subject-matter cannot be taxed both by the State Legislature and the local or municipal authority. There is no such bar in the Constitution. [46] Thus, a tax on entertainments or on property may be constitutionally levied both by a State Legislature as well as by a local body authorised by it for purposes of local self-government.[46]

4. When the State Legislature has lawfully delegated its taxing power under List II, the Local Government cannot be denied that power on the ground that it was the statutory duty of the local authority to render the relevant services.[47]

5. Read with Entries 64 and 65 of List II, the State Legislature is competent not only to constitute local bodies but also to define and punish offences and to define and regulate the jurisdiction of all Courts (except the Supreme Court) with respect to the same.[47]

Ancillary powers. This Entry includes, *inter alia*, the ancillary power of providing for –

The election or nomination of local authorities and for the settlement of disputes arising thereof.[48]

Existing (Central Laws). – Local Authorities Loans Act (IX of 1914) ; Local Authorities (Pensions and Gratuities) Act (I of 1919) ; Bengal Districts Act (XXI of 1836) ; Punjab District Boards Act (XX of 1883) ; Calcutta Improvement (Appeals) Act (XVIII of 1911) ; U.P. Town Improvement (Appeals) Act (III of 1920).

6. Public health and sanitation ; hospitals and dispensaries.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Public health is regulated by the State under its 'police power'. It has always been regarded as a power reserved to the States. A State health *department* has the following functions, *inter alia*, – infant, maternity hygiene, control of communicable diseases, sanitary engineering, control over public and private sewage systems, control of nurses, hospitals, dispensaries, sanitary condition of tenements ; milk, food and drug regulation.

But the Federal Government has maintained of a Public Health service in connection with its control over inter-State and foreign commerce which prevents the introduction of diseases from abroad and helps local health services with research, expert personnel and the like.

(B) *Canada.* – Under Sec. 92 (7) the Province has the power in relation to –

"The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals."

(C) *Government of India Act, 1935.* – Item 14 of List II of that Act included the subjects of the present Entry.

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46. *Cantonment Board* v. *W.I. Theatres*, A. 1954 Bom. 261 (265).
47. *B.C. Press Co.* v. *Municipal Council*, A. 1990 Bom. 38 (para. 12) F. B.
48. *State of Mysore* v. *Gurupadappa*, A. 1962 Mys. 257 (259) ; *Nagendra* v. *State*, A. 1982 All. 225 (para. 33).

INDIA

'Public health'. 1. Under this Entry (read with Entry 1 of List II), the State Legislature is competent to prohibit or control the *use* of amplifiers to the detriment of public health and tranquillity even though the amplifiers themselves are instruments of broadcasting and the manufacture or control of ownership of such instruments would fall under Entry 31 of List I.[49]

2. Protection against fire will come either under Entry 5 or under the present Entry.[50]

3. It may include the power to regulate the use of medicinal and toilet preparations containing alcohol,[38] or prohibiting consumption of intoxicants.[39]

Existing (Central) Law. – Vaccination Act (XIII of 1880).

7. Pilgrimages, other than pilgrimages to places outside India.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 15 of List II of the Government of India Act, 1935, was the same as the present entry.

INDIA

'Pilgrimages within India'. – This Entry is to be read with item 20 of List. I.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase, and sale of intoxicating liquors.

OTHER CONSTITUTIONS

(A) U.S.A. – The 16th Amendment of the Constitution, adopted in 1913, prohibits the manufacture, sale or transportation of intoxicating liquor throughout the United States and gives Congress and the States concurrent power to enforce this provision.

(B) Government of India Act, 1935. – Item 31 of List II of that Act was-

"Intoxicating liquor and narcotic drugs,[7] that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs,[51] but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs,[1] to the provisions of List III."

INDIA

'Intoxicating Liquors'. Duties of excise on alcoholic liquors is also a State subject [Entry 51, List II, *post*], but not medicinal and toilet preparations containing alcohol [Entry 84, List I].

The Supreme Court has held[8] that the expression 'intoxicating liquor' covers not only those alcoholic liquors which are generally used as beverages and produce intoxication, but also all liquids containing *alcohol*,[52] including e.g., methylated

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49. *State of Rajasthan* v. *Chawla*, A. 1959 S.C. 544.
50. *Caltex Ltd.* v. *Director*, A. 1960 Cal. 219 (222).
51. Under the Constitution, all drugs,-narcotic or otherwise, are included in Entry 19, List III.
52. *State of U.P.* v. *Synthetics*, A. 1980 S.C. 614 (paras. 11, 18).

spirit, which *may be used* as substitutes for intoxicating drinks, to the detriment of health.[53]

2. It would thus include denatured spirit[52] or industrial alcohol,[52] all preparations which contain ethyl alcohol, even though poisonous substances are added so as to make it dangerous to human life, e.g., French polish.[54] At any rate, the State Legislature may prohibit the possession, etc. of such preparations as an ancillary power under the present Entry, in order to effectuate its policy of prohibition of intoxicating liquors.

'That is to say'. These words show that the words 'production etc.' which follow are merely illustrative and not words of limitation. By reason of these words, the entire field of legislation on the subject or intoxicating liquors, including prohibition, belongs exclusively to the State Legislature.[55]

'Possession and sale.' The words 'possession and sale' occurring in Item 8 of List II of the Government of India Act, 1935, must be read without any qualification (having no reference to import or export) and the word 'import' in item 41 of List I standing by itself will not include either sale or possession of the article imported into the country. There is thus no conflict between the two items (i.e., between Entries 8 of List II and 41 of List I) of the Government.[53]

'Prohibition'. 1. The power to legislate with respect to intoxicating liquors and narcotics includes the power to introduce partial or total prohibition.[53] The words "that is to say, the production, manufacture . . ." are explanatory or illustrative words, and not words either of amplification or limitation.[53] The right to legislate as to *possession* of intoxicating liquors necessarily involves a right to prohibit possession.[53]

2. A statute relating to prohibition of intoxicating liquor can widely regulate the manufacture, sale and consumption of allied products like medicinal preparations, not for the purpose of interfering with the rights of citizens to acquire, hold or dispose of them, but for preventing them from being diverted from their purpose and utilised for defeating the provisions of the law relating to prohibition.[56]

No conflict with Entry 41 of List I. There is no conflict between the present Entry and Entry 41 of List I and that the right of the State Legislature to prohibit the possession, purchase and sale of intoxicating liquor includes *foreign* or *imported* liquor as well. The words 'possession and sale' in the present Entry are to be read without any qualification whatsoever.[53]

Entries 8 and 51 of List II. 1. Since taxing power is separate from legislative power, the power to tax alcoholic liquor cannot be derived from Entry 8; it is to be found in Entry 51(a) of List II,[57] in the form of excise duty.[57]

2. But the power to levy a *fee* on the right to vend liquor may be derived from Entry 66 of List II, read with Entry 8.[58]

3. Wherther an Act falls under the present Entry or some other is to be determined with reference to the nature of the law. What the present Entry authorises is regulation of the production, etc., of intoxicating liquors. A law cannot be said to have imposed an excise duty, if it is merely of a regulatory character meant to guard against the perpetration of fraud or deception.[59]

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53. *State of Bombay* v. *Balsara*, (1951) S.C.R. 682 (685).
54. *Chandulal* v. *State of Gujarat*, A. 1964 Guj. 59 (67–68).
55. *Bhola Prasad* v. *Emp.*, A. 1942 F.C. 17.
56. *Nageswara* v. *State of Madras*, A. 1954 Mad. 643.
57. *State of Mysore* v. *Cowasji*, A. 1971 S.C. 152.
58. *State* v. *A.S.S. Co.*, A. 1978 All. 529.
59. *Mohan Breweries* v. *Excise Commr.*, A. 1976 S.C. 2020 (para. 6).

9. Relief of the disabled and unemployable.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 32 of List II was-'Relief of the poor; unemployment'.

INDIA

'Relief of the disabled and unemployable'.—This Entry differs markedly from item 32 of List II of the Act of 1935. It does not provide for the relief of the 'poor' in general, but only for the 'disabled and unemployable'. Again, unemployment, as such, is included in item 23 of List III.

In the Constitution, there is no specific Entry relating to relief of the 'poor' as such.

10. Burials and burial grounds; cremations and cremation grounds.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 16 of List II was the same as the Burma item, quoted above.

[60]11. Omitted by the Constitution (42nd Amendment) Act, 1976.

Education. Prior to the 42nd Amendment Act, subject to Entries 63–66 of List I and Entry 25 of List III, the subject of 'Education, including universities' was a State subject under the present Entry. This led to much controversy as to the scope of the State jurisdiction vis-a-vis the Union power under Entries 63–66 of List I.[61]

This controversy has been obviated by transferring Education entirely to List III, Entry 25'—excluding subjects included in Entries 63-66 in List I [see under List III, Entry 25, *post*].

12. Libraries, museums and other similar institutions controlled or financed by the State ; ancient and historical monuments and records other than those declared by *or under law made by* [62] Parliament to be of national importance.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 10 List II Was—

"Libraries, museums and other similar institutions controlled or financed by the Province."

INDIA

Amendment. The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante*.

60. Omitted by the 42nd Amendment Act, 1976, w.e.f. 3-1-77.

61. *Gujarat University* v. *Sri Krishna*, A. 1963 S.C. 703 (*716-17*); *Chitaralekha* v. *State of Mysore*, A. 1964 S.C. 1823 (1830); *State of A.P.* v. *Labu*, A. 1971 S.C. 2560; *Ambesh* v. *Principal*, A. 1987 S.C. 400.

62. The words in italics were inserted by the Constitution (Seventh Amendment) Act, 1956.

'Libraries, museums, etc.' The present Entry has to be read with Entries 62 and 67 of List I, and 40 of List III.

'Ancient and historical monuments'. The legislative power relating to this subject is distributed under the three Lists –

Entry 67, Union List – Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance ;

Entry 12, State List – Ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance; and

Entry 40 Concurrent List – Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

Existing (Central) Laws. – Ancient Monuments Preservation Act (VII of 1904) ; Museums Act (X of 1910).

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I ; municipal tramways ; ropeways ; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways ; vehicles other than mechanically propelled vehicles.

OTHER CONSTITUTIONS

(A) *U. S. A.* – Highways within each State are owned and constructed by the States and, by virtue of this ownership, a large degree of freedom is conceded to the States as regards regulation of the intra-State highways,[63] as distinguished from railways where national uniformity of regulation is essential.

It has already been pointed out that Congress has claimed the power to authorise the construction and control of inter–State or national highways under its 'commerce power'.[64]

(B) *Canada.* – Sec. 91 (13) of the British North America Act gives the Dominion Parliament excluding power in relation to –

"Ferries between a Province . . . . . and any foreign country, or between two Provinces."

S. 92 (10) of the Act, on the other hand, gives the Provincial Legislature exclusive power with respect to

"Local works and undertakings *other than*–(a) Lines of steam or other ships, railways,[65] canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.. . . . . ."

It has been held that the above clause comprises not only 'works' in the sense of a physical thing such as a railway line, but also 'undertakings' themselves.[66] Hence, legislation relating to the business of running buses connecting Provinces or operating beyond the limits of a Province, is beyond the competence of the Provincial Legislature.[66] Conversely, an inter-Provincial Telephone Co. cannot be subjected to Provincial regulation.[67]

Local works and undertakings other than those coming within the scope of sub–cls. *(a)*, *(b)* and *(c)* of s. 92 (10)are within the exclusive jurisdiction of the Province,[68] and when a railway company carries on other undertakings not

63. *Maurer* v. *Hamilton*, (1940) 309 U.S. 598 (*604*).
64. *Luxton* v. *North River Bridge Co.*, (1894) U.S. 525 (*530*).
65. *C. P. R* v. *Notre Dame*, (1899) A.C. 367 ; *A. G., British Columbia* v. *C P. R*, (1906) A.C. 204 (*210*).
66. *A.–G. for Ontario* v. *Winner*, (1954) 3 All E.R. 177 P.C.
67. *Tooto* v. *Bell Tel. Co.*, (1905) A.C. 52.
68. *Montreal City* v. *Montreal Rly.*, (1912) A.C. 342.

connected with railway, e.g., running a hotel,[69] such undertaking and property appertaining to it will be subject to Provincial legislation, unless such hotel or undertaking is meant exclusively for Railway travellers, as a part of the railway undertaking.[69]

(C) *Government of India Act, 1935.*—Item 18 of List II of the Act included the subjects of the present Entry.

INDIA

'Communications'. Means of communication excepted from the present Entry are those included in Entries 22-25, 30-31 of List I ; 32, 35 of List III.

Reading all these entries together, the division of the power over 'communications' may be explained thus :

Union.	*State.*	*Concurrent.*
Railways (Entry 22, List (I) ; 'National highways' (Entry 23, List I) ; Shipping and navigation by mechanically propelled vehicles on inalnd waterways declared to be 'national waterways' (Entry 24, List I) ; Maritime shipping and navigation, including shipping and navigation on tidal waters (Entry 25, List I); carriage of passengers and goods by railway, sea or air or by national waterways in mechanically propelled vehicles (Entry 30, List I) ; Posts and telegraphs, telephones, wireless, broadcasting and other 'like' forms of communication (Entry 31, List I).	Roads, bridges, ferries, municipal tramways, ropeways, inland waterways other than 'national waterways' and traffic thereon by vehicles other than mechanically propelled vehicles; other means of communication not specified in List II (Entry 13, List II).	Shipping and navigation on inland waterways (other than 'national waterways'), by mechanically propelled vehicles and carriage of passengers and goods on such waterways (Entry 32, List III) ; mechanically propelled vehicles (Entry 35, List III).

Bridges, dams and ferries. These have been made State subjects by specific enumeration, instead of leaving that to judicial determination as in the *United States,* where also, they have been held to be the proper subject to local authority which can regulate them better than a government at a distance,[70]

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69. *C. P. R.* v. *A.G., British Columbia,* (1950) A.C. 122.
70. *Pound* v. *Turck,* 95 U.S. 459.

'Municipal tramways'. The Entry is wide enough to authorise a Municipal tramway to fix and charge fares.

Existing (Central) Laws :—Indian Tramways Act (XI of 1886) ; Stage–Carriages Act (XVI of 1861) ; Hackney–Carriage Act (XVI of 1879) ; Northern India Ferries Act (XVII of 1878).

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Agriculture is a State subject in the United States. But though the Federal Government has no direct power over it, it has, of late, come to exercise profound influence and control over agriculture for securing uniformity and progress. Thus, through its 'spending power', it has extended grants-in-aid to promote research, experimentation and investigation by the States and has itself set up the Office of Experiment Stations in the Federal Department of Agriculture to co-oridinate the activities of the State agencies. It also makes financial grants for agricultural education and demonstration.

Through its 'commerce power' Congress has passed laws for securing the purity of food products and this clause gives it the power of regulation and control over agricultural production and trades. Thus, it has legislated to control monopolistic practices and speculation relating to agricultural products;[71] to control the marketing and grading of agricultural products ;[72] regulate the wages paid to packers at the stockyards.[73]

Under its power over 'credit', Congress has enacted legislation providing for moratoria on the foreclosure of farm mortgages[74] to relieve agricultural debotrs. It has also provided for agricultural credit by authorizing the establishment of Federal land banks, and the Farm Credit Administration.

(B) *Canada.*—Under s. 95 of the B. N. A. Act, 'agriculture' is a concurrent subject, subject to predominance of Dominion legislation in case of repugnancy.

But this power does not extend to the regulation of trade in agricultural products,[75] which are brought within the exclusive jurisdiction of the Dominion by a declaration under s. 92 (10) (c) of the B. N. A. Act ;[75] or to regulation of 'trade and commerce' [s. 91 (2)] in milk or manufactured products which have no connection with agricultural operations of farmers ;[76] or to regulate 'interest' [s. 91 (19)] relating to a contract between an agriculturist and a non-agriculturist.[77]

(C) *Government of India Act, 1935.*—Item 20 of List II of that Act included the present Entry.

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'Agriculture.'—See under Entry 18, List II.

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71. *Chicago Board of Trade* v. *Olsen.*, (1922) 262 U.S. 1.
72. *Mulford* v. *Smith*, (1939) 307 U.S. 38.
73. *Stafford* v. *Wallace.*, (1922) 258 U.S. 495.
74. *Wright* v. *Vinton Trust Bank*, (1937) 300 U.S. 440.
75. *King* v. *Eastern Terminal Co.*, (1925) S.C.R. 434 (*Can.*)
76. *Lower Mainland Dairy Committee* v. *Crystal Dairy*, (1933) A.C. 168.
77. *A.G. for Saskatchewan* v. *A.-G for Canada*, (1949) A.C. 110.

15. Preservation, protection and improvement of stock and prevention of animal diseases ; veterinary training and practice.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 20 of List II included –
"improvement of stock and prevention of animal diseases ; veterinary training and practice ....."

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'Preservation and Protection of stock.' These words were added to the original draft entry in response to an amendment proposed by Pandit Bhargava, to incorporate a direct ban on cow slaughter. Though this entry falls short of a direct ban, it empowers a State to ban cow slaughter by legislation in the interest of preservation of cattle.

This power, thus, enables the State Legislature to make a law to implement the directive contained in Art. 48 to prohibit the slaughter of milch and draught cattle.[77]

Analogous Provision. – See Entry 17 of List III which makes 'prevention of cruelty to animals' a concurrent subject, and Entry 29 of List III which similarly makes 'prevention of the extension from one State to another of infectious or contagious diseases or pests affecting . . . . . animals' a concurrent subject.

Existing (Central) Laws. – Dourine Act (V of 1910) ; Glanders and Farcey Act (XII of 1899).

16. Pounds and the pevention of cattle trespass.

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Existing (Central) Laws. – Cattle Trespass Act (I of 1871).

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

OTHERS CONSTITUTIONS

Government of India Act, 1935. – Item 19 of List II of the Act was –
"Water, that is to say, water supplies, irrigation and canals, drinage and embankments, water storage and water power."

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'Water'. – This entry corresponds to Entry 19 of List II of the Government of India Act, 1935, with this difference that while under that Act the subject of water was exclusively a Provincial subject, under the present Constitution, the State power has been subjected to Union control for the purpose of development of inter–State waterways, under Entry 56 of List I.

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78. *Hanif Quareshi* v. *State of Bihar*, A. 1958 S.C. 731.

'That is to say', – See under Entry 8, List II, *ante*.

Existing (Central) Laws. – Northern India Canal and Drainage Act (VIII of 1873) ; Bengal Embankments Act (XXXII of 1855).

Legislation by Parliament. – By virtue of resolutions passed under Art. 252 (i) of the Constitution, Parliament has enacted the Water (Prevention and Control of Pollution) Act, 1974.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and the collection of rents ; transfer and alienation of agricultural land ; land improvement and agricultural loans ; colonization.

OTHER CONSTITUTIONS

Government of India Act, 1935. – The present entry is taken from item 21 of List II of Sch. VII of the Government of India Act, 1935, with the only difference that Courts of Wards, etc., and Treasure Trove have been included in two separate Entries 22 and 44, *below*.

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'Land'. 1. The earlier portion of the entry is not restricted to agricultural[78] land, but includes all species of land[79] including non-agricultural land.[80]

2. 'Pasture' is land within the meaning of the present entry. It is sufficiently allied to agriculture generally, to be treated as a species of 'agricultural land.'[11]

'Rights in or over land.' 1. The words 'rights in or over land' confer very wide powers,[81] which are not limited by rights as between landlord and tenant or collection of rents.[81]

2. 'Rights in land' include general rights like full ownership or leasehold or all such rights. 'Rights over land' include easements or other collateral rights whatever form they might take.[79–82]

3. The expression, therefore, covers very wide powers,[54] including –

(i) Land reform and alteration of land tenures,[12] but not 'acquisition' of land which is included in Entry 42 of List III,[83] or transfer of property other than agricultural land, which is included in List III, Entry 6.[84] It is permissible, under this Entry, to expand the rights of tenants or the lands available for cultivation by tenants, by limiting the extent of lands in the possession of landowners ;[85] or to do away with intermediaries or to provide for the cancellation of leases made not in the normal course of management but in anticipation of legislation for the abolition of intermediaries;[86] transfer to tenants in possession by way of compulsory purchase, of all lands not required by the landholders for their personal cultivation ;[87] distribution of the ownership and control of agricultural lands as best to subserve the common good.[85]

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79. *Megh Raj* v. *Alla Rakhia*, A. 1947 P.C. 72.
80. *Union of India* v. *Basavaiah*, A. 1979 S.C. 1415 (para. 28).
81. *Jagannath* v. *State of U.P.*, A. 1962 S.C. 1563.
82. *Atma Ram* v. *State of Punjab*, A. 1959 S.C. 519 (522)
83. *State of Bihar* v. *Kameshwar*, A. 1952 S.C. 252 (283), affirming *Kameshwar* v. *State of Bihar* A. 1951 Pat. 91 (96).
84. *Mangulal* v. *Radhashyam*, A. 1959 Pat. 14 (22).
85 *Sri Ram* v. *State of Bombay*, A. 1959 S.C. 459 (463).
86. *Raghubir* v. *State of Ajmer*, A. 1959 S.C. 475 (477).
87. *Kunhikoman* v. *State of Kerala*, A. 1962 S.C. 723 (727).

(ii) Settlement of disputes relating to land as well as determination of jurisdiction of Courts in respect of land (as ancillary matters),[88] including stay of suits or other proceedings relating to such disputes.[89]

(iii) Prevention of encroachments on public lands, and removal of such encroachments ;[88] or unauthorised occupation of vacant land.[90]

(iv) Restriction or extinction of existing interests in lands, including provision for the statutory purchase[82] by tenants of lands belonging to the landlord.[85]

(v) Consolidation proceedings relating of several parcels of land.[82]

(vi) Fixing a ceiling[81] for the holding of land to give the exceses land to the landless or to those who hold land below that ceiling.[87]

(vii) Resumption of *jagirs* with ancillary provisions,[91] or cancellation of leases granted by ex–Rulers.[86]

(viii) Improvement and colonisation of land.[81]

(ix) Reduction of liability of tenant for payment of rent.[92]

(x) Measures ancillary to those enumerated above.[93]

Whether 'land' includes 'buildings'. There was a confict of opinion amongst the High Courts on this point :

(A) The Nagpur, Bombay and Allahabad High Courts were of the opinion that[94] 'land' includes houses and buildings. According to this view, control of letting and accommodation of premises would be covered by the present Entry.

(B) The Patna and Rajasthan High Courts,[95] on the other hand, held that 'land' cannot be so widely interpreted.

The Supreme Court has approved of the latter view, to hold that the power of the State Legislature to legislate in respect of landlord and tenant of buildings is to be found in Entries 6, 7 and 13 of List III and not in Entry 18 of List II, because the expression 'land tenures' in Entry 18 of List II would not cover tenancy of *buildings* or of house accommodation.[96]

'Relation of landlord and tenant'. This expression and the next expression "collection of rents" relate to lands which are not agricultural equally with agricultural lands.[97]

This expression covers legislating not only relating to persons whose tenancy right subsists but also persons who continue in possession after the termination of their tenancy.[98] In other words, it includes an ex-landlord and an ex-tenant.[99]

Leases of non-agricultural property and all matters relating thereto are dealt with by Entries 6 and 7 and List III.[96]

'Collection of rents'. These words confer power upon the State Legislature to legislate with respect to *remission* or *reduction* of rents as well as their *assessment*,

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88. *Brij Bhukan* v. *S.D.O.*, A. 1955 Pat. 1 (*15*).
89. *Laxminarayan* v. *Chhotu*, A. 1957 M.B. 62.
90. *State of Maharashtra* v. *Kamal*, A. 1985 S.C. 119 (para. 33).
91. *State of V.P.* v. *Moradhwaj*, A. 1960 S.C. 796 (*799–800*); *Amarsarjit* v. *State of Punjab*, A. 1962 S.C. 1305.
92. *Khajamian Wakf* v. *State of Madras*, (1970) 2 S.C.W.R. 916.
93. *Venkatarao* v. *State*, A. 1975 A.P. 315 (para. 113).
94. *Mangilal* v. *State of M.P.*, A. 1955 Nag. 153(*156*).; *Patel* v. *Viswanath*, A. 1964 Bom. 204; *Raman* v. *State of U.P.*, A. 1952 All. 703.
95. *Mangtulal* v. *Radhashyam*, A. 1953 Pat. 14 ; *Milap* v. *Dwarka*, A. 1954 Raj. 252 (*255*).
96. *Indu Bhushan* v. *Rama Sundari*. (1969) 2 S.C.C. 289 (*299*),.
97. *Megh Raj.* v. *Alla Rakhia*.' (1947) F.C.R. 77 (86) P.C.
98. *Santhanakrishna* v. *Vaithilingam*, A. 1954 Mad. 51 (*62*).
99. *Bhutya* v. *Radhakdisanlal*, A. 1956 Nag. 50 (*52*) ; *Subrahmania* v. *Dharmalinga*, A. 1958 Mad. 608 (*615*).

collection or *recovery*, e.g., to provide that decrees for rent shall be executed only in some particular manner.[100]

Existing (Central) Laws. – Bengal Alluvion and Diluvion Act (IX of 1847) ; Agriculturists' Loans Act (XII of 1884) ; Bengal Ghatwali Lands Act (V of 1859).

Entry 18 of List II and Entry 41 of List III. A law of land reform would fall under Entry 18 of List II and not under Entry 41 of List III merely because the land has vested in the Central Government or the Custodian under the Administration of Evacuee Property Act, 1950.[1]

Transfer and alienation of agricultural land. 1. While the preceding matters of the entry relate to both agricultural or non-agricultural land, the exclusive power of the State Legislature to deal with transfer of land is confined to agricultural land, for transfer of property other than agricultural land is a concurrent subject under List III (Entry 6).[2] A State law relating to transfer of agricultural land may override the provisions of the Transfer of Property Act,[3] say, as to mortgages of agricultural land.[4]

2. It includes the power to restore alienated agricultural land, to members of Scheduled Tribes.[5]

3. But the expression 'agricultural land' comprises not only land which is actually used for raising any valuable trees or plants or for any other purposes of husbandry, but also land which is lying waste but is capable of being cultivated.[5a]

'Mortgages of agricultural land. There is no express provision in the Constitution referring by name to mortgages. But so important a subject as mortgages could not have been left out of the Constitution and left as a residual subject. Mortgages of land porperty fall under entry 18 of the State List, in so far as they are mortgages of *land*, though in certain respects they include elements of transfer of property and of contract. Mortgages are properly to be classed not under the head of contracts but as special transactions *ancillary* to the entry 'land'.[4] Legislation expressly limited to mortgage of agricultural land is thus wholly within the competence of the State Legislature, being covered by Item 18 of List II. Entries 6 and 7 of the Concurrent List do not affect the position, since agricultural land is excluded from these entries. Under the present Entry, thus, it is competent for the State Legislature to provide that a mortgage with possession would be deemed to have been extinguished on the expiry of a specified period.[5b]

'Agricultural Land'. 1. This expression is used in a general sense, to include not merely the raising of grain or food crops but also gardening, horticultural or pasture.[4]

2. A question arises whether it is the original character of the land or its present use which should be the determining test for the application of this Entry or that of the Legislative Lists.

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100. *United Provinces* v. *Atiga*, A. 1941 F.C. 16 (25) ; *Uday Chand* v. *Samarendra*, (1947) 82 C.L.J. 1 (F.C.).

1. *Gram Panchayat* v. *Malwinder*, A.1985 S.C. 1394 (paras. 9, 14) C.B.
2. *State of Madras* v. *Kannepalli*, A. 1962 S.C. 1687 (*1690*).
3. *Paramananda* v. *Sankar*, (1950) D.L.R. 31 (*33*) Cuttack.
4. Cf. *Megh Raj* v. *Alla Rakhia*, (1947) 51 C.W.N. 523 (528) P.C. : A. 1947 P.C. 72.
5. *Lingappa* v. *State of Maharashtra*, A. 1985 S.C. 389 (para. 26).

5a. *Gayatri Salt Works* v. *Govt. of A.P.*, A. 1975 A.P. 262 (para. 8); *Sarojini* v. *Sri Krishna*, A. 1944 Mad. 401; *Nil Gobinda* v. *Rukmini*, A. 1944 Cal. 421.

5b. *Sripati* v. *Pasupati*, A. 1947 F.C. 17.

5c. *Krishna Rao* v. *W.T.O.*, A. 1963 Mys. 111.

In *Krishna Rao* v. *W.T.O.*,[5c] the Mysore High Court has held that it is the *present use* which should be the governing factor and that, according, the Wealth Tax Act, made by Parliament under Entry 86 of List I, applied to land which had been originally granted for agricultural purposes but was requisitioned and converted into an airfield. This view, however, runs counter to the observation of the Federal Court in *Megh Raj* v. *Alla Rakha,*[4] though, of course, the question was not concluded therein :

"It is difficult impute to Parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to laws framed under List 2, but that when the same parcel of land is used to produce something else (as often happens in this country) it should be governed by and descend according to laws framed under List 3".[4]

There is a number of Entries in Lists I and II which divide the taxing power between the Union and the State according as the land is agricultural or not. Great anomalies would result if the taxing jurisdiction of the Union or the State can be evaded by the owner by simply altering the purpose for which the land is used. In the case before the Mysore High Court, for instance, can the owner, after the land is derequisitioned, avoid the Wealth Tax by reconverting his land for agricultural purposes ?

It is submitted that the view taken by the Mysore High Court is not sound.

Lands used for the following purposes may now be said to be agricultural for the purposes of Lists II and III. (*i*) *Coffee or tea garden;*[5d] (*ii*) coconut garden;[5e] (*iii*) lease of land for growing casuarina trees to be used for fuel;[5f] (*iv*) land lying unused, but *capable of being used* for raising crops, vegetables, or other purposes of husbandry,[5g] or for farmer's residence;[5h] (*v*) mango grove.[5g]

But not land covered by a natural forest.[5b]

Like the word 'land' in the same entry, the words 'agricultural land' also include 'rights in or over' agricultural land.[5i] Hence, the State Legislature is exclusively competent to legislate as regards usufructuary mortgages of agricultural lands.[5i]

Entries 18 and 45 List II. 1. These two entries, taken together, would comprehend the power to legislate regarding resumption of *jagirs*.[5i]

2. The words of Entry 18 are comprehensive enough to include the remedial as well as the *procedural* provisions concerning the reliefs in respect of the several rights and liabilities enumerated in this Entry. Of course, there is a separate Entry for 'Civil Procedure' (4 of List III), but there civil procedure is used in a general sense as the procedúre applicable to litigation *generally* ; it does not include a special law of procedure which is applicable only to a litigation regarding a special matter.[5j] Entry 65 is wide enough to create and determine the powers and jurisdiction of Courts in respect of *land,* as a matter *ancillary* to the subject of Entry 18.[4]

5d. *Kaju Mal* v. *Saligram,* (1923) 29 C.W.N. 395 P.C.

5e. *United Provinces* v. *Atiqa*, A. 1941 F.C. 16 (*25*).

5f. *Prov. of Bihar* v. *U.N.S. Deo,* (1941) 22 P.L.T. 484 (P.C.).

5g. *Sarojini* v. *Sri Krishna,* A. 1944 Mad. 401.

5h. *Nil Govinda* v. *Rukmini,* A. 1944 Cal. 421; *Paramananda* v. *Sankar,* (1950) D.L.R. 31 (34) Cuttack.

5i. *Amarsarjit* v. *State of Punjab.*, A. 1962 S.C. 1305 (*1313*).

5j. Cf. *Bir Bikram* v. *Tafazzal,* (1942) 46 C.W.N. 999 (*1002, 1006*); *Uday Chand* v. *Samarendra,* (1947) 82, C.L.J. 1 (F.C.).

Entries 18 and 65 of List II. The words of Entry 18 are comprehensive enough to include the remedial as well as the *procedural* provisions concerning the reliefs in respect of the several rights and liabilities enumerated in this Entry. Of course, there is a separate Entry for 'Civil Procedure' (4 of List III), but there civil procedure is used in a general sense as the procedure applicable to litigation *generally;* it does not include a special law of procedure which is applicable only to a litigation regarding a special matter.[5j] Entry 65 is wide enough to create and determine the powers and jurisdiction of Courts in respect of *land,* as a matter *ancillary* to the subject of Entry 18.[4]

Entries 18 of List II and 5, 6, 7, 42 of List III. 1. In a case of competition between Entry 18 of List II and the Entries in List III referred to, the principle to be adopted by the[6] Court is that of harmonious construction.

(a) The devolution, on testamentary or intestate succession, of any property, or (b) the transfer or alienation of any property, other than agricultural lands or (c) contract other than one in relation to agricultural land, or (d) acquisition of land'[6a] will fall in the Concurrent List, and not in the State List even though it may relate to 'land' or buildings.[6b]

2. On the other hand, read with Entry 42 of List III, the State Legislature has power to acquire lands, – including land containing mineral deposits.[6b]

19. [*Omitted by the Constitution (42nd Amendment) Act, 1976 and transferred to List III, as Entry 17A*].

20. [*Omitted by the Constitution (42nd Amendment) Act, 1976 and transferred to List III, as Entry 17B.*].

Forests and Protection of Wild Animals. These two subjects have been made concurrent, by the Constitution (42nd Amendment) Act, 1976, by transferring them to *new* Entries 17A and 17B in List III (see *post*).

21. Fisheries.

OTHER CONSTITUTIONS

(A) *Australia.* – The power of the States to legislate as regards fishing within territorial limits has been inferred from Sec. 51 (*x*) of the Constitution Act,[6c] which gives the Commonwealth Parliament legislative power with respect to –

'Fisheries in Australian waters beyond territorial waters.'

(B) *Canada.* – Contrary to the Australian Constitution, the power over – 'inland fisheries' is given to the Dominion Parliament exclusively, by Sec. 91 (2) of the British North America Act.

It has, however, been held that the exercise of this power by the Dominion Parliament is limited by the power of the Provinces to legislate as regards 'property and civil rights within the Provinces' [Sec. 92 (13)]. Hence, –

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6. *A.S.S.* v. *Union of India,* A. 1988 S.C. 1708 (*1724-25*).
6a. *R.E.S. Corpn.* v. *State of Andhra,* A. 1954 S.C. 251.
6b. *State of Haryana* v. *Channan,* A. 1976 S.C. 1654 (para. 33) - 4 Judges.
6c. Wynes, Legislative & Executive Powers, 3rd Ed., p. 189.

(*a*) The authority of the Dominion to legislate in respect of inland fisheries is confined to the enactment of fishery regulations and restrictions, *e.g.*, as to the manner, time and place of fishing, measures for protection and preservation of fish, but does not extend to the direct interference with proprietary rights, such as, the authorisation of the right of fishing in non–navigable waters, the beds of which are the property of private owners.[6d]

(*b*) Dominion legislation setting up a licensing system in respect of fish canneries and curing establishments is *ultra vires*.[6e]

"Trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words – 'sea coast and inland fisheries."[6e]

The Dominion has no power of buying or selling fish.[6e]

(*c*) A Province is competent to prescribe the modes of transfer and succession in respect of rights in fishery and the terms and conditions thereof.[6e]

Fishing outside the Provincial waters is, of course, subject to Dominion power.[7]

(C) *Government of India Act, 1935.* – Item 24 of List II assigned 'Fisheries' to the Province, but item 23 of List I assigned to the Federal Legislature the power to legislate with respect to –

'Fishing and fisheries beyond territorial waters'.

Under these items, it was held that –

(*i*) The power to legislate relating to fishing rights and fisheries within the 'territorial waters' belonged to the Provincial Legislature,[22] and that the right related to all fish within the area of the territorial waters, whether the fish be migratory, free–swimming, free moving or attached to or embedded in the soil[8] (such as pearl or *chankh*).

It was also held, that the existence of an island or islands within the three–miles limit, extended the area of the 'territorial waters', for this purpose –

"Where an island is situate within the three–mile limit, the belt of waters round it will constitute territorial waters. This belt will be three miles wide and will be measured from low water mark following the sinuosities of the island. If the island is more than three, but not more than six miles from the coast (of the mainland), then the whole extent of waters would be territorial, since it would be inadvisable to allow any small strip of high seas between the coast and the island. Where the island is more than six miles from the shore, but only slightly so, then it would appear reasonable to permit to State to claim a small extension of its marginal belt in order to establish a uniform regime of its territorial waters."[9]

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Fisheries. 1. The present Entry would give the legislative power over fisheries in inland and territorial waters to the State, while the legislative power over right of fishing beyond territorial waters belongs to the Union under Entry 57 of List I.[8]

But the extent of 'territorial waters' may sometimes widen, by prescription. Thus, a littoral State may acquire rights of fishing over an area beyond the three–miles limit by prescription and as part of its dominion over the territorial waters. In the case of bays and gulfs, it is generally conceded that –

6d. *A.–G for Canada* v. *A.–G for the Provinces,* (1898) A.C. 700.
6e. *A.–G. for Canada* v. *A.–G for Br. Columbia,* (1930) A.C. 111 (*121*).
7. *Gavin* v. *R.,* (1956) 3 D.L.R. (2d) 457 (*Can.*).
8. *A. M. S. S. V. M.* v. *State of Madras,* I.L.R. (1953) Mad. 1175 (*1187*).
9. Higgins & Columbus, International Law of the Seas.

"On historical or prescriptive grounds, or for reasons based on the special characteristics of a bay, the territorial State is entitled to claim a wider belt of marginal waters, provided that it can show affirmatively that such a claim has been accepted expressly or tacitly by a great majority of other nations."9

Thus exclusive occupation for a long period attended with acquiescence by other nations in such occupation, may give the littoral State dominion over fishing rights beyond the ordinary limits of the 'territorial waters'.[10]

It is, on this theory, that it has been held that the Palk Bay and the Gulf of Mannar and the pearl and chank fisheries therein, being to the littoral State of Madras as a part of her territory and not to the Union,[8] and that State has the legislative power regarding such fisheries.

2. Though the Entry does not refer to 'fishing', it would be interpreted to include not only the regulation of fishing itself but also the prohibition of fishing altogether in particular places or at particular time.[11]

Analogous Provision.—See Entry 57, List I.

Existing (Central) Laws.—Indian Fisheries Act (IV of 1897).

22. Courts of wards subject to the provisions of entry 34 of List, I; encumbered and attached estates.

OTHER CONSTITUTIONS

Government of India Act, 1935.—The latter part of Item 21 of List II included the subject of the present Entry.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

OTHER CONSTITUTIONS

Government of India Act, 1935.—The present Entry corresponds to item 23 of List II of the Act of 1935.

INDIA

Regulation of Mines. This Entry gives the State Legislature the power to legislate as regards regulation of mines and mineral development, subject to laws made by the Union under Entry 54 of List I.[12] Thus, there is nothing to prevent a State from legislating on matters on which the Indian Mines Act, 1923 is silent.[12]

The legislation under Entry 54 of List I must, however, be a *post*–Constitution enactment. Nothing in a pre–Constitution Central Act, say, the Mines and Mineral (Regulation and Development) Act, 1948, can operate as a declaration under Entry 54 of List I so as to limit the powers of the State Legislature.[13] The State Legislature is even competent to repeal such pre–Constitution Central Act.[13]

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10. *Direct United States Cable Co.* v. *Anglo–American Telegraph Co.*, (1877) 2 A.C. 394.
11. *United Provinces* v. *Atiqa Begum*, A. 1941 F.C. 16 (25).
12. *Periyanayakam* v. *Govt. of Mysore*, A. 1952 Mys 84.
13. *Hingir–Rampur Coal Co.* v. *State of Orissa*, A. 1961 S.C. 459 (472).

Entries 23 List II and 54 of List I. 1. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said entry which refers to Entry 54 of List I. If a Central Act has been passed which contains a declaration by Parliament as required by Entry 54 and if the said declaration covers the field occupied by a State enactment[14] relating to mines and mineral development, the State Act would be *ultra vires* not because of any *repugnance* between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a *limitation of the legislative competence* of the State Legislature itself.[13]

2. Even where the declaration made by the Central Act under Entry 54 of List I is *subsequent* to the State Act, the State Act ceases to have operation from the date of enacment of the Act made by Parliament.[14]

3. But the denudation of the legislative power relating to this subject–matter will be only *to the extent* to which regulation and development under the control of the Union has been declared by Parliament to be expedient. The legislative power of the State Legislature subsists outside that area.[14]

4. If, however, the entire field of mineral development has been taken over by the Central Act, including the provision for amenities to workmen employed in the mines, the State Legislature would lose the power to levy any fee for the provision of such amenities and any fee imposed by a State Act prior to the Central Act would become invalid, even though no such levy has actually been made under the Act or the Rules framed under the Act have not yet been enforced,[15] because all that is required is a 'declaration by Parliament'.[15] Sums due under the levy prior to the disappearance of the State Act by virtue of the superior legislation may, however, be recovered.[15]

For the same reason, where the Union Act showed an intention to withdraw from the State Legislature the power in relation to the entire subject of 'minor minerals', the State Legislature had no power left to modify the terms of the existing leases relating to minor minerals.[16]

5. If, the State Act does not relate to the 'regulation and development of mines and minerals' but deals with a different matter, such as the imposition of a cess which can be supported as a 'land tax' under Entry 49 of List II, the State law will not be affected by the Central Act under Entry 54 of List I.[17]

24. Industries subject to the provisions of *entries 7 and*[18] 52 of List I.

OTHER CONSTITUTIONS

Government of India Act, 1935.–The latter part of Item 29 of List II was–

"development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control."

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14. *State of Orissa* v. *Tulloch*, A. 1964 S.C. 1284.
15. *Misralal* v. *State of Orissa*, A. 1962 Orissa 24.
16. *Baijnath* v. *State of Bihar*, A. 1970 S.C. 1436 (*1445–46*).
17. *Murthy* v. *Collector*, A. 1965 S.C. 177..

INDIA

Amendment. The words 'entries 7 and' have been substituted for the word 'entry', by the Constitution (Seventh Amendment) Act, 1956, in order to remove an obvious lacuna, for, the Union power relating to industries is contained not only in Entry 52 but also in Entry 7 of List I.

'Industry'.– Industry is distinguished from commerce in that industry produces while commerce distributes. The two are independent in so far as industry on a large scale cannot exist without commerce to market its products, while there would be no commerce unless there are products to trade with.

Analogous provisions. 1. Raw materials, which are an integral part of the industrial process, would be comprised in Entry 27 of List II.[19]

2. The products of the industry and their distribution would also be comprised in Entry 27 of List II, except where they are the products of a controlled industry, in which case they would fall under Entry 33 of List III.[19]

3. The process of manufacture or production of an industry would be comprised in the present Entry except in the case of a controlled industry when it would fall under Entry 2 of List I.[19]

Entries 7, 52 of List I and 24 of List II. [See under Entries 7 and 52 of List I, *ante*].

1. The subjection to Entry 52 of List I does *not* mean that once a declaration is made by Parliament in respect of an industry, that industry as a whole would be taken out of Entry 24 of List II.[86] Before the State Legislature is denuded of the power to legislate in respect of the declared industry, the scope of the declaration and consequent control assumed by the Union must be demarcated with precision and then ascertain whether the impugned State legislation trenches upon the excepted field.[20] (See p. 89, *ante*.).

2. In other words, the legislative power of the State under Entry 24 of List II is eroded only to the extent to which control was assumed by the Union pursuant to a declaration made by Parliament under Entry 52 of List I. The field occupied by the law enacted by Parliament is the measure of erosion of the legislative competence of the State Legislature.[20]

Hence, the declaration by Parliament that the control of an industry by the Union is expedient in the public industry cannot debar the State Legislature from acquiring an undertaking pertaining to that industry.[20]

25. Gas and gas-works.

'Gas and Gas–works'.– This Entry is the same as Item 26 of List II of the Government of India Act, 1935.

Entries 52 of List I and 25 of List II. While Entry 24 of List II is subject to Entry 52 of List I, Entry 25 of List II makes 'Gas and Gas–works' *independent* of Entry 52 of List I. In the result, even though Parliament declares the production of 'gas' as an industry, the control of which by the Union is expedient in the public interest, it is competent for the State Legislature to acquire or require or requisition the property of a particular 'gas–work.'[21]

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19. *Tika Ramji* v. *State of U.P.*, A. 1956 S.C. 676.
20. *Ishwari Mills* v. *State of U.P.*, A. 1980 S.C. 1955 (para. 7); *Southern P.C.* v. *State of Kerala*, A. 1981 S.C. 1863.
21. *In re Oriental Gas Co.*, A. 1961 Cal. 207, affirmed by *Calcutta Gas Co.* v. *State of W. B.*, A. 1962 S.C. 1044 (*1051*).

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The scope of State regulation of intra-State commerce is rather small since railways and ships running within the State mostly carry goods for transportation to other States, which makes the commerce inter-State.[22]

Even an indirect interference by Congress with intra-State commerce would be invalid. It is on this ground that the Supreme Court invalidated the Employers' Liability law.[23]

But 'intra–State' does not mean that the State has the right to regulate all commerce within is territorial limits. If the commerce falls within the category of 'foreign' or 'inter-State' Commerce, Congress has the power to maintain its free flow within the boundaries of the individual States.[24]

(B) *Australia.* – There is no express provision assigning intra- State trade to the States, but it has been held that the limitation of Commonwealth power to 'trade and commerce with other countries' [Sec. 51 (i)] by implication prohibits the Commonwealth to interfere with internal trade except as a necessary and proper means for carrying into execution some other federal power vested in the Commonwealth by the Constitution.[25]

(C) *Canada.* – Though s. 91 (2) of the B.N.A. Act confers unrestricted power upon the Dominion Parliament for 'the regulation of trade and commerce', it has been held that the above power does not include the regulation of the internal trade and commerce within a single State which comes under 'property and civil rights in the Province' [s. 92 (13)].[26] (See, further, under Entries 41, 42 of List I, *ante*). The Dominion power is to make *general* regulations, as distinguished from the regulation of particular trades or business operating within a Province.[27]

(D) *Government of India Act, 1935.* – Item 27 of List II of the Government of India Act, 1935, included –

'Trade and commerce within the Province ; . . . . . '

INDIA

'Trade and commerce within the State'. Under the present Entry, the State Legislature can –

(a) Provide for the fixation of a minimum price payable to cultivators of jute, authorise the Government to control stocking of raw jute and make it compulsory to enter into contracts for the sale of raw jute only through a Jute Board constituted under the Act. Such legislation is not *ultra vires* even though it may have some indirect effect upon export of raw jute in certain cases [Entry 41 of List I].[28]

22. *Daniel Ball,* (1870) 10 Wall. 537.
23. Employer's Liability Cases, 207 U. S. 463.
24. *Gibbons* v. *Ogden,* (1824) 9 Wh. 1 ; *Leisy* v. *Hardin,* (1890) 135 U. S. 100.
25. *A.–G. for N. S. W.* v. *Brewery Employees,* (1908) 6 C. L. R. 469, citing *U. S.* v. *De Witt,* (1824) 9 Wall. 41.
26. *A.–G. for Canada* v. *A.–G. for Alberta,* (1916) 1 A. C. 588 (596).
27. *Toronto Electric Commrs.* v. *Snider,* (1925) A. C, 396 (409) ; *Shannon* v. *Lower Midland Dairy Products Board,* (1938 A. C. 708 (719).
28. *Albion Jute Mills* v. *Jute Brokers,* (1953) 57 C. W. N. 541.

(b) Regulate the hours, place, date and manner of sale of any particular commodity or commodities.[29] It could, for example, state that the sale of explosives or other dangerous substances should only be in selected areas, at specified times or on specified days when extra precautions for the general safety of the public and those directly concerned could be arranged for. In the same way, it could say that there shall be no sales on a particular day or on days of religious festivals and so forth.

On the other hand–

(i) Though 'forward contracts' would be included in 'trade and commerce' in the ordinary sense,[30] legislation on forward contracts would come not under the present Entry but under Entry 48 of List I so that the latter Entry, introduced by the Constitution, may not be rendered futile.[31]

(ii) The present Entry would not confer any power to tax.[32]

Analogous Provisions.–See comments under Entry 42 of List I. The present power is subject to Art. 303 (1). See also Entry 33 (a), List III, which empowers Parliament to enter into the field of intra–State commerce, by declaring some industry as one which requires control by the Union.

The present Entry does not derogate from the concurrent power of the Union and States Legislatures to grant or create commercial monopolies, under Entry 21 of List III.[33]

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

OTHER CONSTITUTIONS

(A) *Canada.*–The Provincial Legislature has the power to regulate the marketing of goods provided the regulated transactions are confined wholly within the Province.[34] But if it relates to or affects inter–Provincial or export trade, the power belongs to the Dominion Parliament,[35] under s. 91 (2), under 'regulation of trade or commerce',[35] together with ancillary powers.[36]

(B) *Government of India Act, 1935.*–Item 29 List II included– 'Production, supply and distribution of goods'.

INDIA

'Production, supply and distribution of goods'. 1. Under the present Entry, the State Legislature has the power to restrict the *export* of essential commodities where such restriction is necessary for securing the maintenance or increase of the supply of such commodities, according to the doctrine of 'pith and substance'.[37]

2. Fixation of price is included within the present power.[38]

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29. *Monohar Lal* v. *The State*, (1951) S. C. R. 671.
30. *Duni Chand* v. *Bhuwalka Bros.*, (1955) 1 S. C. R. 1071 [a case under the Govt. of India Act, 1935].
31. *Waverly Mills* v. *Raymon & Co.*, A. 1963 S. C. 90 (*95*).
32. *Abdul Quder* v. *S. T. O.*, A. 1954 S. C. 922 (*925*).
33. *Narayanappa* v. *State of Mysore*, A. 1960 S. C. 1073.
34. *Shannon* v. *Lower Mainland Dairy Products*, (1938) A. C. 708.
35. *A.–G. for Br. Columbia* v. *A.–G. for Canada*, (1937) A. C. 377.
36. Ref. re Natural Products Marketing Act, (1936) 3 D. L. R. 622 (Can.).
37. *Darshan Singh* v. *State of Punjab*, (1953) S. C. R. 319 (*329*).
38. *Venkatasubba* v. *Emp.*, A. 1954 Mad. 104.

The power to regulate 'production', supply and distribution of goods' includes the power not only to make general regulations or orders, but also *ad hoc* or special orders relating to particular producers or things.[39]

'Goods'. By reason of the definition in Art. 366(2), 'goods' includes both raw materials and finished products. But the raw materials and finished products specified in Entry 33 of List III are excluded from the scope of the present Entry.

Ancillary powers. The Supreme Court has held[37] that though 'import and export across customs frontiers' is a Union subject (Entry 41, List I), while legislating on the subject of 'production, distribution and supply of goods', the State Legislature is competent to provide for restriction of export as ancillary to the supply and distribution of essential commodities, because for the maintenance or increase of supply of essential commodities within a State and to secure their equitable distribution and availability and fair prices, it might be necessary to restrict the export of the goods outside the State or outside India where the State in question is a bordering State. Such a legislation would, in its pith and substance, come exclusively under the present State Entry[32].

Existing (Central) Laws.—Coffee Market Expansion Act (VII of 1942), Agricultural Produce (Grading and Marking) Act (I of 1937) ; Rubber (Production and Marketing) Act (XXIV of 1947).

28. Markets and fairs.

OTHER CONSTITUTIONS

(A) *England.*—The right to hold a market or fair can be granted only by the Crown as a franchise or by statute, or from immemorial user from which a Crown grant may be inferred.

Certain statutes, e.g., the Diseases of Animals Act, 1950 and the Food and Drugs Act, 1955, authorise certain local authorities to establish markets. Apart from the above–mentioned Acts, other statutes regulating the creation or holding or markets include the Markets and Fairs Clauses Act, 1847 ; the Children and Young Persons Act, 1933 ; the Shops Act, 1950 ; Markets and Fairs (Weighing of Cattle) Acts, 1887–1926.

(B) *Government of India Act, 1935.*— The present Entry of the Constitution is taken verbatim from the latter part of Item 30 of List II of the Act of 1935.

INDIA

Markets and fairs. Both terms refer to a 'concourse of buyers and sellers'[40] as well as the right to hold such a concourse,[41] the difference between the two lying in the size or frequency of the gathering.[41a] A fair is larger than a market but is held less frequently. But it may be held for the sale and purchase of any merchandise, including cattle.[40]

Entries 28, 59 and 66 of List II. While the present Entry gives the State Legislature power to legislate on markets, Entries 59 and 66 (*post*) give the power with respect to tolls and fees respectively.[42]

These Entries, in List II, empower the State Legislature to impose a market fee on sales in markets within the State even though the goods may enter into inter–State trade.[43]

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39. *Jain* v. *State,* (1951) I. L. R. 30 Pat. 681.
40. *Amritsar Municipality* v. *State of Punjab,* A. 1969 S. C. 1100 (*1104*).
41. Halsbury, 3rd Ed., paras. 737–8.
42. *Haralal* v. *Dibrugarh Municipality,* A. 1958 Assam 156.
43. *Marularadhya* v. *State,* A. 1970 Mys. 144 (*129*).

Entries 29 of list II and 44 of List I. The present Entry empoweers the State Legislature not only to legislate relating to markets but also establish a body corporate for regulating the marketing of agricultural produce and livestock, notwithstanding Entry 44 of LIst I.[44]

29. [*Omitted by the Constitution (42nd Amendment) Act, 1976*].[45]

Weights and measures. Transferred to List II, as Entry 33A.

30. Money-lending and money-lenders; relief of agricultural indebtedness.

OTHER CONSTITUTIONS

(A) *Canada*—sec. 91 (19) of the Br. N. America Act empowers the Dominion Parliament to legislate exclusively in relation to —'Interest'. The Provinces have no power to legislate on this subject,[46] except where it is *incidental* to the exercise of a Provincial power, such as, with respect to Municipal Corporations.[47] But, purporting to deal with the principal of a debt, a Provincial Legislature cannot affect the contractual obligation to pay interest.[48]

Again, though the Provinces have the power to legislate regarding debts, in so doing, it cannot encroach upon the Dominion power relating to 'bankruptcy and insolvency' [s.91 (21)][49].

(B) *Government of India Act, 1935.*—'Money lending and money-lenders' formed the lattter part of item 21 of List II of the Government of India Act, 1935.

INDIA

'Money-lending'. 1. The power to legislate in respect to a matter must necessarily include the power to legislate over subsidiary and ancillary matters. The power to make laws in respect to money-lending necessarily imparts the power to affect the lender's rights in respect of *promissory* notes given as security in money-lending transactions, even though promissory notes form a Union subject (*vide* Entry 91 of List I, *ante*).

"To take a promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in a real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature".[51]

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44. *L.S.Rice Mill* v. *Agricultural Market Committee*, A. 1975 A.P. 58 (para. 11).
45. Transferred to List II, as Entry 33A.
46. *Lethbridge Trustees* v. *I.O.F.*, (1940) A.C. 513.
47. *Ladore* v. *Bennett*, (1939) A. C. 468.
48. *A- G. Saskatchewan* v. *A.-G., Canada*, (1949) A. C. 110.
49. Ref. re Validity of the Orderly Payment of Debts Act, (1960) 23 D.L.R. (2d).
50. *Prafulla* v. *Bank of Commerce*, (1947) 51 C.W.N. 599 (608) P.C.
51. *Subramanyam* v. *Muttuswami* A. 1941 P.C. 47 (upholding validity of the Madras Agriculturists Relief Act, 1938).

In short, a State Law which, in its pith and substance, deals with money lending, is not *ultra vires* if it incidentally affects promissory notes as security for loan.[51]

2. Similarly, a law providing for relief against agricultural indebtedness and dealing with the relation between agricultural bebtors and creditors is, similarly not *ultra vires* the Provincial Legislature on the ground that it incidentally affects negotiable instruments.[52]

3. Other ancillary powers would include[53]

(i) Relief against loans by scaling down, discharging, reducing interest and principal;

(ii) Staying the realisation of debts and the whole gamut of debt liquidation.[52]

'Relief of agricultural indebtedness'. This item was not expressly mentioned in any of the Lists in the Government of India Act, 1935, but it was held by the Federal Court,[53] that it would fall within the Provincial subject with respect to 'money-lending and money-lenders' in List II. The doubt is removed by specific enumeration of the subject in the present entry.

Agricultural indebtedness. 1. A law providing for relief against agricultural indebtedness[52] and dealing with the relation between agricultural debtors and creditors is, not *ultra vires* the State Legislature on the ground that it incidentally affects negotiable instruments.[50]

2. The whole gamut of debt-liquidation relating to agriculture is within the State Legislature's competence under this Entry, including the scaling own of loans, discharging or reducing principal or interest, staying the realisation of debts.[52]

3. There is nothing in this Entry to say that the relief must relate to subsisting indebtedness; it may include relief to those who have lost their properties in the process of liquidation of their debts by court sales because of the delay in providing them legislative relief.[54]

4. 'Agricultural indebtedness' means the indebtedness of those who are engaged in agriculture, whether such debt is incurred in connection with agricultural operations or otherwise.[55]

Existing (Central) Laws.—Interest Act (XXXII of 1839); Usurious Loans Act (X of 1918); Agriculturists' Loans Act (XII of 1884).

31. Inns and inn-keepers.

Government of India Act, 1935. —This Entry is the same as Item 28 of List II the Act 1935.

Existing (Central) Laws.—Sarais Act (XXII of 1867).

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52. *Veerappa* v. *Chinnasami*, (1950) M.L.J. 328.
53. *Fatehchand* v. *State of Maharashtra*, A. 1977 S.C. 1825 (para 54).
54. *Pathumma* v. *State of Kerala*, A. 1978 S.C. 771 (paras. 57-59).
55. *Vora* v. *Saiyed*, A. 1981 Guj. 154 (Para. 10).

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

Government of India Act, 1935. – This Entry corresponds to item 33 of List II of the Government of India Act, 1935.

INDIA

'Incorporation, etc., of Corporations. This Entry includes the incorporation etc., of corporations, which are not included in Entries 43–4, List I, and of Universities. It also includes unincorporated societies etc.

Municipal and Local corporations. In *India*, the Municipalities in the three Presidency towns are statutory corporations, governed by special statutes. The Municipalities outside these towns are also governed by Provincial or State Acts which constitute them bodies corporate.

Universities. The Universities constituted by the various University Acts afford another instance of statutory corporations in India.

Unincorporated society. The incorporation of the Board of an incorporated society such as the Tibbia College and its dissolution come under the present Entry;[56] societies registered under the Societies Registration Act, 1860.[57]

Co-operative Societies. 1. This Entry would comprise provisions for the amalgamation, division and reorganisation of co-operative societies.[58]

2. A co-operative society is a 'corporation' within the meaning of Art. 31A(1)(c)[59].

'Other societies'. Societies may be found for various purposes, e. g., 'friendly', 'benevolent', 'building', 'housing', 'industrial', 'provident', 'loan', 'partnership', insurance, 'mutual' and the like.

Existing Laws. – Societies Registration Act (XXI of 1860) ; Religious Societies Act (I of 1880) ; Co-operative Societies Act (II of 1912) ; Multi-unit Co-operative Societies Act (VI of 1942).

33. Theatres and dramatic performances ; cinemas subject to the provision of entry 60 of List I ; sports, entertainments and amusements.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 35 of List II was –

"Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition."

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56. *Board of Trustees* v. *State of Delhi*, A 1962 S.C. 458 (471); *Katra Educational Soc.* v. *State of U.P.*, A. 1966 S.C. 1307.
57. *Lalit* v. *State*, A 1987 Pat. 53 (para.71) F.B.
58. *Puappa* v. *State*, A. 1978 Kant. 148 (para. 37) ; *Harakh* v. *Asstt. Registrar*, A. 1968 Pat. 211.
59. *Daman* v. *State of Punjab*, A. 1985 S.C. 973 (Paras. 6-7) C.B.

INDIA

'Cinemas subject to the provisions of Entry 60 of List I. 1. It is clear from the above words that the general power to legislate with regard to cinemas is in the State Legislature and only a particular power is reserved for the Union Legislature in Entry 60 of List I, *viz.*, the sanctioning of films for exhibits.[60–67]

2. Hence, the regulation and licensing of the *storage* of films would also come within the State power under the present power unless and until Parliament declares cinematograph films as a 'dangerously inflammable substance' by a law made under Entry 53 of List I, and the West Bengal Fire Service Act, 1950 is, accordingly, *intra vires the Constitution*.[60–67]

3. The exhibition of pre-recorded cassettes of movies in a restaurant would come within this Entry.[60–67]

'Entertainments, amusements'. These words in the present Entry as well as in Entry 62 of List II refer to *objective sources* of amusement or entertainment[68] offered by one person to another, and does not include the subjective satisfaction or pleasure which a person may derive from his own acts., e.g., from reading an amusing literature or by solving crossword puzzles. Of course, where an objective amusement is offered by one person to another, the Legislature may tax either the person who offers or the person who enjoys it, under Entry 62 (see *post*).

'Cinemas'.—This means the representation of moving pictures or series of pictures.[69] Sanctioning of cinematograph films is excluded from the present Entry and included in Entry 60, List I, *ante*.

The present Entry is wide enough to include regulation of storage of films or licensing for storage and levy of any fee for such license.[67]

Existing (Central) Laws.—Cinematograph Act (II of 1918) ; Dramatic Performances Act (XIX of 1876).

34. Betting and gambling.

Government of India Act,, 1935.—Item 36 of List II was—'Betting and gambling'.

INDIA

'Betting, Gambling, Gaming, Wagering'.—A wager is a contract by which two or more persons agree that a certain sum of money or other thing of value shall be paid or delivered to one of them by the other or others upon the happening of an *uncertain* event.

Betting is a form of wagering contract, while gaming is a species of betting. In betting, money or money's worth is made payable on the result of an uncertain event, which may or may not be a game. Thus, there may be a wagering or betting contract on the result of a pending election.

60–67. *De Luxe Film Exhibitors* v. *Corporation of Calcutta*, (1952) 77 D.L.R. 144 (Cal.).
68. *State of Bombay* v. *Chamarbaugwalla*, A. 1956 Bom.1.
69. Cinematograph Act, 1952

Gaming is a contract between two or more persons by which they agree to play by certain rules at cards, dice or other contrivance that one shall be the loser and the other winner.

Gaming and gambling are usually used as synonymous ; but gambling is a wider term. While gaming refers to playing with stakes at cards, dices and similar contrivances, gambling includes any act or game whereby a man intentionally exposes to his money or thing of value to the risk of loses by *chance*.

'Gambling' 1. It includes any activity or undertaking whose determination is controlled or influenced by chance or accident and which activity or undertaking is entered into or undertaken with the consciousness of that risk[68], e.g., 'prize competitions',[70] a wagering contract, such as a contract for the sale or purchase of goods at a given price at a future time, not intending an actual transfer of goods, but only to pay or receive the difference according as the market price varied from the contract price.[71]

2. This Entry is wide enough to include all lotteries other than those organised by Government which come under Entry 40 of List I.[68]

3. It follows that no Legislature of a State can make a law touching lotteries organised by the Government of India or the Government of a State.[70]

Entries 34 and 62 of List II. While 'betting and gambling' is included in the present Entry, the power to impose taxes on betting and gambling is included in Entry 62. The two are separate powers, so that by surrendering its power to regulate prize competitions, under Art. 252 (1), a State Legislature does not lose its power to impose a tax on such competitions.[72–73]

Entries 34 of List I and 7 of List III. See under Entry 7 of List III.

Existing (Central) Laws. – Public Gambling Act (II of 1867).

Legislation by Parliament. – Prize Competitions Act (42 of 1955)[74] [see under Art. 252, *ante*]. S. 2 (d) of the Prize Competitions Act (42 of 1955) defines a 'prize competition' as follows –

"prize competition means any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name) in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words or figures."

35. Works, lands and buildings vested in or in the possession of the State.

OTHER CONSTITUTIONS

(A) *Canada.* – Sec. 92 (5) of the B. N. A. Act gives the Province exclusive jurisdiction over –

"The management and sale of the public lands belonging to the Province, and of the timber and wood thereon"

But the Dominion Parliament has the power to bring any of them within its jurisdiction by making a declaration under s. 92 (10)(c).

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70. *State of Bombay* v. *Chamarbaugwala*, A. 1957 S.C. 699 (*710*).
71. *Bullion & Grain Exchange* v. *State of Punjab*, A. 1961 S.C. 268.
72–73. *R. M. D. C.* v. *State of Mysore*, A. 1962 S.C. 594 (599).
74. *Chamarbaugwala* v. *Union of India*, A. 1957 S.C. 628.

(B) *Government of India Act, 1935.* – **Item 8 of List II was to the same effect.**

INDIA

'Works'. – Works are physical things, not services,[75] **e.g., a mill, a bridge;**[76] a warehouse or elevator.[77]

'Buildings'. – A building need not necessarily be a completed structure ; it is sufficient that it should be a connected and entire structure.[78] Nor need a building necessarily have a roof.[79] At first there are only foundadations and disconnected walls ; when the construction can be regarded as a whole and not a series of disconnected structures, such structure can well be regarded as a building.[80]

Analogous Provision. – While this Entry deals with the legislative power as regards property vested in a State, Entry 32 of List I deals with the legislative power as regards property vested in the Union.

Existing (Central) Laws. – Waste Lands Claims Act, 1833 ; Government Buildings Act, 1899 ; Muncipal Taxation Act, 1881.

36. *Omitted.*[81]

Amendment. Entry 36, which has been omitted by the Constitution (Seventh Amendment) Act, 1956, was as folows –

"Acquisition or requisition of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III."

The words 'subject to . . . .List III' meant that any law made by the State Legislature under Entry 36 of List II could be overridden by the Union Legislature making a law under Entry 42 of List III.[81]

See, further, under Entry 42 of List III, *post*.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

Government of India Act, 1935. – Item 11 of List II of the Act was –

"Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder."

INDIA

'Subject to . . . . . law made by Parliament'. – See Arts. 327-8, ***ante***. This Entry has to be read with Entry 72 of LIst 1. The result is, that though the Legislature of a State has the power to make laws relating to its own election, such laws must give way to a Union law relating to the same subject, in case of repugnancy.

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75. *Montreal* v. *Montreal Street Ry.*, (1912) A.C. 333.
76. *Van Buren* v. *Madawaska*, (1958) 15 D.L.R. 2d 763 (Can.).
77. *Luscar Collieries* v. *Mc Donald*, (1927) A.C. 925.
78. *Queen* v. *Manning*, (Crown Cases reserved,1).
79. *Waite's Executives* v. *Commissioners of Inland Rev.*, (1914) 3 K.B. 196.
80. *Mahomed* v. *Sailendra*, (1950) 54 C.W.N. 642 (647).
81. Omitted by the Constitution (Seventh Amendment) Act, 1956.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, and of that Council and of the members and the committees thereof ; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

Government of India Act, 1935. – Item 12 of List II of the Act included – "the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature."

Analogous Provision. – See Art.194 (3) Vol. H, pp. 174 ff.

40. Salaries and allowances of Ministers for the State.

41. State public services ; State Public Service Commission.

OTHER CONSTITUTIONS

(A) *Canada.* – Sec. 92 (4) of the British North America Act relates to – 'Provincial Offices and Officers'

(B) *Government of India Act, 1935.* – Item 6 of LIst II was the same.

INDIA

State public services. 1. This Entry is of wide amplitude and includes the power of creation and abolition of posts,[83] integration or reorganisation[84] of the services,[85] laying down the conditions of services.[83]

2. But the power of the State regarding integration of services under the present Entry must be exercised subject to the power of Parliament derived from Art. 4 of the Constitution.[86]

3. The scope of Entry 41 is wider than that of Art. 309, *ante*. Under the present Entry, the State Legislature may not only change the conditions of service of State civil servants with retrospective effect but also to validate with retrospective effect invalid executive orders retiring Government servants, because validating legislation must be regarded as ancillary to the power of legislation on the subject covered by Entry 41.[87]

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82. *Shankara Rao* v. *State of Mysore*, A. 1969 S.C. 453 (*450*).
83. *Honnalige* v. *State of Mysore*, A 1964 Mys. 84 (*93*).
84. *K.C.Gupta* v. *Union of India*, A. 1969 Punj. 34.
85. *Jaleel* v. *State of Mysore*, A. 1961 Mys. 210.
86. *Pillai* v. *Govt. of India*, A. 1970 Ker. 110 (*115*) F.B.,
87. *Saksena* v. *State of M.P.*, A. 1976 S.C. 2250 (paras. 30, 32).

Analogous Provision. Power relating to Union Public Services and Union Public Service Commission belongs to Parliament under Entry 70 of List I, p. *ante.*

Existing (Central) Laws. – Public Servants (Inquiries) Act (XXXVII of 1850).

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 7 of List II was identical.
Existing (Central) Laws. – Pensions Act (XXIII of 1871).

43. Public debt of the State.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 5 List II was the same.

INDIA

Public debt of the State. 1. It connotes borrowing by the Government from the public and does not take in any amount payable by the public to the Government.[88]

2. The word 'State' would exclude statutory corporations.

Analogous Provision. Entry 35 of List I deals with 'Public debt of the Union'.
Existing law. – The Public Debt Act, 1944, as amended in 1946, 1956.

44. Treasure trove.

OTHER CONSTITUTIONS

Government of India Act, 1935. – This subject was included in item 21 of List II.

INDIA

Existing (Central) Law. – Indian Trasure-trove Act (VI of 1878).

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 39 of List II was the same as the present Entry.

INDIA

'Land Revenue'. 1. Land revenue includes "every sum, annually payable to Government by the proprietor of an estate or tenure, held *directly* under Government in respect thereof . . . . ."[89]

88. *Venkataswamy* v. *T.N.S.I.D.C.*, A. 1981 Mad. 318 (paras. 16,19) D.B.
89. *Bageswari* v. *Gawhar*, 31 Cal. 256 (P.C.).

2. Though it originated in the prerogative of the Sovereign, it has been sanctioned by legislation in the pre-Constitution Provinces.[90]

3. Under the *ryotwari* system, it meant a share (in computed money value) of the produce of the land, payable to the Government.[91]

4. It would not include any money payable to any party other than the Government, e.g., a statutory corporation[92].

A Division Bench of the Kerala High Court[93] has held that s. 71 of the Kerala Revenue Recovery Act, 1968, which empowered the Government to recover money due to a statutory corporation as if it was an arrear of revenue, though not covered by the present Entry, would come under Entry 30 of List II – 'Moneylending' (p. 162, *ante*). It is difficult to agree with this conclusion, because the 'pith and substance' of that Act was not money-lending, but the 'recovery of arrears of public revenue', as the long title and Preamble of that Act stated.

5. Read with Entry 18 of List II, this Entry gives the State Legislature power to resume *jagirs*.[94]

'Assessment of land revenue'. 1. The State Legislature is competent, under this Entry, to assess land revenue in derogation of revenue-free grants previously made by the State.[95]

2. A law which prescribes the mode or manner of assessment of land revenue on any land according to its use would be covered by this expression.[96]

'Maintenence of land records'. 1. This expression would include not only the act of maintaining but all things incidental to the maintence of land records[97].

2.. The expression 'land records' is wide enough to include title deeds and other documents relating to lands resumed by the State, kept both before and after resumption.[97]

46. Taxes on agricultural income.

OTHER CONSTITUTIONS

Government of India Act, 1935.—This Entry is taken from item 41 of List II of Sch. VII of the Government of India Act, 1935.

INDIA

Taxes on agricultural income. 1. Even though Entry 19 of List II distinguishes 'forests' from 'agriculture' in Entry 14 of the same List, Entry 46 stands independent of either and would include a tax on income from forestry operations provided it falls within the definition of agricultural income in Art. 366 (1).[98]

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90. *Gopalan* v. *State of Madras*, A. 1958 Mad. 539.
91. *Nalla Raja* v. *State of A.P.*, (1967) 1 A.W.R. 399.
92. *Venkataswamy* v. *T.N.S.I.D.C.*, A 1981 Mad. 318 (para. 46) D.B.
93. *David* v. *Kerala State F.C.*, A. 1988 Ker. 319 (para. 7) D.B.
94. *Amarsarjit* v. *State of Punjab*, A. 1962 S.C. 1305 *(1313)*.
95. *Girijananda* v. *State of Assam*, A. 1956 Assam. 33 (38,46).
96. *Satna S.&L. Co.*v. *State*, A. 1988 M. P. 286 (para.5).
97. *Rinarbai* v. *State of Bombay*, A. 1962 Guj. 18.
98. *I. T. Commrs.* v. *Benoy*, A. 1957 S.C. 769 (777) : (1958) S.C.R. 101.

2. The jurisdiction of the State Legislature to legislate under the present Entry is limited by the definition of 'agricultural income' in Art. 366 (1) [p. 131, Vol. 0] and the State Legislature cannot extend its own jurisdiction by adopting a wider definition of 'agricultural income'.[99]

Analogous Provision. – This Entry is to be read with Entry 82 of List I which makes taxes in income *other than* agricultural income, an exclusively Union subject. These two Entries are complementary to each other.

47. Duties in respect of succession to agricultural land.

'Succession duty on agricultural land'. – The present Entry is the same as item 43 of List II of the Government of India Act, 1935. See, further, under Entry 88, List I, *ante*.

'Succession' implies the passing of property to another on the *death* of a person.[100]

48. Estate duty in respect of agricultural land.

'Estate duty on agricultural land'. – There was no such item in the Government of India Act, 1935. See further, under entry 87, List I.

Legislation by Parliament. – In the States of Bombay, Madhya Pradesh, Orissa, Punjab, Uttar Pradesh, Hyderabad, Madhya Bharat, Rajasthan, Saurashtra, the Estate Duty Act (XXXIV of 1923), enacted by Parliament, relates to agricultural lands also (under the present Entry), by virtue of resolutions passed by those States under Art. 252 (1) of the Constitution.

49. Taxes on lands and buildings.

OTHER CONSTITUTIONS

(A) *England.* – The land tax is assessed on the annual value or gross income, i.e., the rent at which the property is let or is worth to be let by the year, after making certain statutory allowances and deductions. The expression 'land' includes buildings and farmhouses occupied by the tenant farmers and certain miscellaneous hereditaments.

(B) *Australia.* – A land tax was imposed by the Commonwealth, by the Land Tax Assessment Act, 1910.[1] The tax is payable by the *owner* of land upon the taxable value of all the land owned by him, unless exempted by the Act. Every part of a holding which is separately held by any occupier, tenant, lessee or owner, is deemed to be a separate parcel.

(C) *Government of India Act, 1935.* – The present Entry is taken from item 42 of list II of the Government of India Act, 1935, but the words 'hearths and windows' at the end of the item have been *excluded*.

INDIA

'Tax on Land and Buildings'. I. Under the Government of India Acts, 1915 and 1919, Provincial Legislatures had authority to levy a tax on lands and buildings, but for municipal purposes only. The Government of India Act, 1935, removed that limitation and authorised the Provincial Legislature to levy this tax for the purposes of Provincial revenue. The Constitution has retained that power, and the meaning of the Entry should be determined with reference to the meaning which the tax has gathered previously.[2-3]

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99. *Prativa v. Agricultural I.T.O.*, A. 1958 Cal. 585 (586); Cf. *Karimthanvi Tea Estate* v. *State of Kerala*, A, 1963 S.C. 760.
100. *Joseph* v. *Gift Tax Officer*, A. 1952 Ker. 97.
1. Quick, Legislative Powers, 1919, p. 322.

II. An inanimate object cannot pay a tax. Therefore, a tax on property must be paid by the owner or occupier. But from the fact that the owner is liable it does not follow that the tax is an 'income-tax'. If lands and buildings are treated as investments and the *return*, as income, is taxed, it is income-tax.[3] On the other hand, if the tax is on the lands and buildings *themselves* and the assessment is on a *standard* named by the Legislature which may fluctuate or vary on the produce or income from it, it would be a tax on the property.[2]

"If a tax is levied on property, it will not be irrational to correlate it to the *value* of the property and to make some kind of annual value the basis of the tax without intending to tax income."

III. In order to determine whether a tax falls under one or other of the taxing powers confered by the various Entries in the Lists, it is necessary to examine the charging section [3] of the taxing statute as distinguished from the *means* or *machinery*[4] or *basis*[5] of taxation. In other words, the *mode* of assessment does not determine the character of a tax.[2] Thus,

"Annual value may be the basis for assessment of income-tax. It may also be the basis of assessment of a tax on capital, e.g., in the case of succession to land under the Succession Duties Act in England ; or again it may be the basis of assessment of rates such as the ordinary municipal rates in England, which are neither taxes on income nor taxes on property, but a personal charge on the occupier. Clearly it is impossible to say that the employment of annual value as the measure of the impugned tax is any indication that it is a tax on the income".[3]

IV. The present Entry confers power upon the State Legislature to levy taxes on lands and buildings' without any terms of limitation as to the *manner* in which the tax is to be levied.[4] It is, therefore, open to a Municipality under the present Entry, to correlate its tax to the real value of the open lands for the purpose of determining the rate or amount of the tax that should be levied upon them. Hence, a municipal legislation which provides that the basis of valuation for the purpose of levying a tax on lands may be either capital or annual letting value[5] is not *ultra vires*.[4]

V. A tax on building does not become a tax on income because it is levied on the basis of its annual value.[3] Similarly, a tax on holding is a tax under this Entry even though it is based on the annual value of the holding.[5]

VI. A tax on land does not cease to be so because it is imposed upon property within a defined area or upon specified classes of property,[6] or because forests stand on it[7] or because it is described as a 'Bridge tax'[6] or a 'water tax',[8] or a 'land cess'[9], or because it is levied on a building occupied by a factory.[10]

VII. In other words, the power to tax a land or building under this Entry can be exercised without reference to the *use* to which the building is put .[10] Thus, a tax on a building occupied by a factory is not a tax on a factory.[10]

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2. *Byramjee* v. *Prov. of Bombay*, A. 1940 Bom. 65. [The Urban immovable property-tax levied by Bombay Finance Act (II of 1932), held to be a tax on lands and buildings and hence valid].
3. *Ralla Ram* v. *Prov. of East Punjab*, (1948) F.C.R. 207 (224-5) [upholding the validity of the Punjab Urban Immovable Property Tax Act].
4. *Municipal Corporation* v. *Gordhandas*, I L.R. (1954) Bom. 41 (52).
5. *Oudh Sugar Mills* v. *State*, A. 1960 All. 136.
6. *Leventhal* v. *David*, A. 1930 P.C. 129 (132).
7. *Kunnathat* v. *State of Kerala*, A. 1961 S.C. 522 (564).
8. *Raza Buland Sugar Co.* v. *Rampur Municipality*, A. 1962 All. 83.
9. *Ravivarma* v. *State of Kerala*, A. 1964 Ker. 31.
10. *Govt. of A.P.* v. *H.M.T.*, A. 1975 S.C. 2037 (paras. 13-15).

VIII. A tax on land or building may be imposed either upon the occupier or upon the owner. It is not necessarily an 'occupation tax' in India.[3] A cess payable by an occupant of land, according to his land revenue assessment, would come under this Entry.[11]

IX. The following taxes have been held to be covered by the present Entry–

(i) A 'market tax' being the licence fee payable for holding a market on municipal land.[12]

(ii) A capital levy on agricultural land.[13]

(iii) A water tax assessed on the annual value of lands and buildings,[14] as distinguished from the quantum of water supplied and consumed.[14]

(X) A surcharge on property tax already levied is covered by this Entry.[15]

(XI) The Supreme Court has held that a gift tax would come under Entry 97 of List I and not the present Entry.[16]

Levies not covered by Entry 49 of List II. (i) The ower to levy tax on land or buildings cannot be interpreted to include the power to tax *machinery* or furniture[16] situated on a land or building, even though the machinery was there for the use of the building for a particular purpose.[17]

(ii) A tax ceases to be a tax on 'buildings', if the floorage of a building is adopted as the measure of the tax ; or it is varied according to the number of buildings owned by the person charged.[18]

'Lands'. 1. The Entry includes agricultural and all other kinds of lands[19] including forest lands,[7] though the State legislature has no power to tax forests as such.[7]

2. It includes not only the surface but also the underground strata (including the area occupied by electric supply lines),[20] including land containing mines and minerals.[21]

Entry 49, List II and Entry 86, List I : Land tax and wealth tax; 1. In the case of a tax on 'lands and buildings', the value, capital or annual value would be determined by taking the land or buildings as a unit and subjecting the value to a percentage of tax.[22] In the case of 'wealth tax' on the other hand, the charge is on the valuation of the total assets (inclusive of lands and buildings) less the value of debts and other obligations which the assessee has to discharge. Merely because in determining the taxable quantum under taxing statutes made in exercise of powers under Entries 86, List I and 49 of List II, the same *basis* of valuation of assets is adopted, trespass on the field of one legislative power over another may not be assumed.[22]

2. While a tax under Entry 49 of List II is directly imposed on the lands and buildings, a tax under Entry 86 of List I is to be levied on the value of the assets.[22] For determining the incidence of the tax, the State Legislature, under Entry 49

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11. *Habhubha* v. *State of Bombay*, A. 1959 Bom. 43.
12. *Ajoy v. Local Bd.*, A. 1959 Assam 221.
13. *Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 116 (*117*).
14. *Nizam Sugar Factory* v. *Badhan Municipality* A. 1965 A.P. 91.
15. *Kondayya* v. *Kurnool Municipality*, A. 1963 A.P. 379 (*380*).
16. *Second Gift Tax Officer* v. *Hazarath*, A. 1970 S.C. 999.
17. *New Manek Chowk Mills* v. *Ahmedabad Municipality*, A. 1967 S.C. 1801 (*1814*).
18. *Bhuvaneshwariah* v. *State*, A. 1965 Mys. 170 (*183 ; 206*).
19. *Jagannath* v. *State of U.P.*, A. 1961 S.C. 1562 (*1568*).
20. *Anant Mills* v. *State of Gujarat*, A. 1975 S.C. 1234 (para. 44).
21. *A.C.C.* v. *Govt. of A.P.*, *A.* 1963 A. P. 234 (para. 9).
22. *Sudhir* v. *W.T.O.*, A. 1969 S.C. 69 (62).

of List II, may adopt the annual or the capital value of the lands for determining tax liability, but that would not be an encroachment upon Entry 86 of List.[22]

In short, while Entry 86 of List I of the Constitution deals with the tax on the *capitalised value* of the assets, Entry 49 of List II is not directly concerned with the capitalised value of the lands and buildings though in a particular piece of legislation, the capital value of the land or building may be taken into account as the *basis* for levying the tax[3], e.g., the land tax may be fixed at 1% of the capital value of the land.[23] In short, under Entry 49 of List II, it is competent for the State Legislature to impose a tax on lands and buildings on the basis of a percentage of their capital value.[24]

3. In the case of a tax on the capital value of the *assets* (Entry 86 List I), tax is leviable where the property is subject to a charge the amount of which exceeds the capital value of the property, so that nothing is left as assets to the owner.

But in a land tax (Entry 49, List II), where the capital value is taken as a basis of the imposition, the charge may be completely ignored, and the tax levied notwithstanding that to the owner the property is of no value, in view of the charge.[25]

4. A levy on the capital value of the assets can be imposed only on the *owner* of the assets. But a tax on land or building may be levied not only on the owner but also on the occupier or lessee and the latter may be liable for the tax assessed on the basis of the full capital value of the land or building and not merely the value of the leasehold.[25]

5. Agricultural lands have been excluded from Entry 86 of List I, while both agricultural and non-agricultural lands are included in Entry 49 of List II. Non-agricultural lands are not excluded from the capital levy Entry 86 of List I.[26]

When a land tax may become an income tax. I. Under the present Entry, the State Legislature is empowered to levy a tax *on* lands and buildings. If in exercising this power, the imposition, in effect, amounts to a tax on *income* from non-agricultural land or building, the legislation will be *ultra vires,* since the power to tax non-agricultural income belongs exclusively to the Union, under Entry 82 of List I.

II. As is clear from the foregoing discussion, a tax on land does not become a tax on income simply because –

(i) It is based on the potentiality or productivity of the land, e.g., if the trees standing on the land are taken into consideration in making the assessment.[27]

(ii) It is based on the capital value of the land.[28]

III. On the other hand –

A tax purported to levied under the present Entry becomes an income tax –

(a) If it imposes the tax on the basis of the *actual* income from the land or the building.[25] It then ceases to be a tax *on* the land or the building.

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23. *Gordandas* v. *Muncipal Commr.*, A. 1963 S.C. 1742 (*1755*).
24. *Prithvi Cotton Mills* v. *Broach Municipality*, A. 1970 S.C. 192 (*195*).
25. *State of Orissa* v. *Tulloch*, A. 1964 S.C. 1284.
26. *Narayanamurthy* v. *Commr. of Wealth Tax*, A. 1964 Orissa 128 (*131*).
27. Cf. *Thuttampara Planting Co.* v. *Tahsildar*, A.. 1964 Ker. 141 (*142*).
28. *Ralla Ram* v. *Prov. of East Punjab*, A. 1949 F.C. 81.

(b) If the floorage of a building is adopted as the measure of the tax ; or it is varied according to the number of buildings owned by the person charged.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

OTHER CONSTITUTIONS

England.—In England, there is a Mineral Rights Duty since 1910, which is imposed at a particular rate on the rental value of all rights to work minerals and of all mineral wayleaves. The person assessed is the proprietor who works his own minerals or the person who received the rents from the preson who actually works. The term 'minerals' does not include common clay, common brick clay, common brick earth, sand, chalk, limestone or gravel, or any substance coming within these descriptions.

INDIA

'Taxes on mineral rights'. 1. A tax on mineral rights would ordinarily refer to tax on the extraction of minerals or on the right to do so.

2. It would not include—

A cess payable according to the annual rent value of the mining land, which is a land tax, even though such rent, in the case of a mining land, exceeds the rent which would have been payable if the lease related to the use of the surface only.[30]

Entries 54 of List I and 50 of List II. 1. Entry 50 of List II is to be read subject to 'any limitation imposed by Parliament .....'. But Entry 54 if List I says that the power of Parliament as to regulation of mines and minerals will not extend to the whole field of mines and minerals but only 'to the extent to which such regulation' is declared by Parliament to be expedient in the public interest. Hence, jurisdiction of the State over the subject would be lost only to the extent [31] that Parliament expresses its intention to 'occupy', either by express provision in the Union law or by necessary implication. Hence, the ambit of the State power is to be determined from the terms of the Union Act.

I. The State Legislature had no power to levy a fee in respect of a mining lease because s. 13 of the Mines and Minerals Development Regulation and Act, 1957 empowered the Union to levy such a fee, [32] and s. 18(1) showed the intention of Parliament to occupy the entire field of 'conservation and development of minerals' so that no matter was left in the State List in respect of which fee could be levied by the State Legislature.

II. On the the other hand—The State Legislature was competent to acquire a mining area or mineral right where the Mines and Mineral (R. & D.) Act, 1957 had no provision on that subject; [33] to the contrary, s. 17 of the Union Act

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29. *Bhuvaneswariah* v. *State*, A. 1965 Mys. 170 (*183, 206*).
30. *Murthy* v. *Collector of Chittor*, A. 1965 S.C. 177 (*182*).
31. Cf. *Western Coalfields* v. *S.A.D.A.*, A. 1982 S.C. 697 (*708*).
32. *State of Orissa* v. *Tulloch*, A. 1964 S.C. 1284. .
33. *State of Haryana* v. *Chanan*, A. 1976 S.C. 1654 (para, 32).

showed that Parliament had no intention to interfere with the vesting of lands in the States by the provisions of the Union Act.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :–

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics ;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

OTHER CONSTITUTIONS

Government of India Act, 1935.–Item 40 of List II was–"Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India–

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

'Medicinal and toilet preparations containing alcohol . . . . . .' which are excepted from Entry 51 of List II of the Constitution, were thus included in item 40 of List II of the Act of 1935.

INDIA

'Duty of excise'.–See p. 110, *ante*.

1. Unless the taxable event is the production or manufacture of goods, a levy cannot be held to be an 'excise duty'. Hence, a duty levied for the exclusive privilege of selling today from certain shops cannot be upheld as an excise duty under the present Entry.[34]

2. The powers conferred by Entries 51 and 54 being separate, there is nothing to debar the State Legislature to impose an excise tax because forests stand on it,[35] or because it is desribed as 'Bridge tax',[35] or a 'water tax',[36] or a 'land cess'.[37]

3. On the other hand, excise duty may be imposed in the form of licence fee, provided it has a nexus with the manufacture or production of the goods.[38-100]

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34. *Shinde Bros* v. *Dy. Commr.*, A. 1967 S.C. 1512 (*1521*).
35. *Leventhal* v. *David*, A. 1930 P.C. 129 (*132*).
36. *Raza Buland Sugar Co.* v. *Rampur Municipality*, A. 1962 All. 83.
37. *Ravivarma* v. *State of Kerala*, A. 1964 Ker. 31.
38 – 100. *Abdul Kadir* v. *State of Kerala*, A. 1976 S.C. 182 (para. 10).

Entries 54 of List II and 92 of List I : Tax on sale of newspapers. The sale of a newspaper is excluded from the taxing power of the State Legislature, because the exclusive power to tax such sale belongs to the Union Parliament, under Entry 92 of List I.

'Newspaper'. See under Entry 92 of List I. In order to be a newspaper, the dominant purposes of a paper must be to convey 'news' or a report of recent events.[1-30] If that purpose is absent, the fact that it is published daily or that it has been registered under the Press Registration Act, does not convert it into a newspaper so as to claim exemption from sales tax[1-30] imposed by the State Legislature under the present Entry.[1-30]

Entries 54 of List II and 96B of List I. In the purported exercise of levying a purchase tax under Entry 54 of List II, a State Legislature cannot impose a tax which, in its pith and substance, is a tax on inter–State consignments.[31] To determine this, the court has to advert to the taxing[31] event and the charging section.

55. Taxes on advertisements other than advertisements published in the newspapers *and advertisements broadcast by Radio or Television.*[32]

OTHER CONTITUTIONS

(A) *U.S.A.* – It is competent for a State to impose a tax on advertisements, including advertisements in newspapers,[33] provided it does not constitute a burden on inter-State commerce[3] or a discriminatory tax on the Press as such.[34]

(B) *Government of India Act, 1935,* – Item 48 of List II included 'taxes on advertisements'.

INDIA

Tax on Advertisements. A tax on advertisement, which is specifically authorised by the present Entry, does not constitute a tax on 'professions' or 'callings' under Entry 60 of List II. Hence, it is not subject to the monetary limit imposed by Art. 276(2),[35] though a film which has been advertised would be taxable even where it is not exhibited after being advertised.[35]

'Advertisement'. – "To advertise means to give public notice of, to announce publicly, especially by a printed notice".[36] The idea underlying the word 'advertisement' has reference "not so much to the vehicle or instrumentality used for getting the notice before the public, as to the diffusion, bringing home to the public, the information or matter contained in the notice"[37]. It thus includes notice by posting on signboards as well as by publishing in handbills or newspapers.[37]

1–30. *S.T.O.* v. *Express Printing Press,* A. 1983 Bom. 190 (paras. 7-9).
31. *Goodyear* v. *State of Haryana*, A. 1990 S.C. 781 (paras. 27-30, 37, 39, 41, 72-73, 81).
32. Italicised words added by the Constitution (42nd Amendment) Act, 1976.
33. *Western Livestock* v. *Bureau of Revenue,* (1938) 303 U.S. 250 (*260*).
34. *Grosjean* v. *American Press, (1936) 297 U.S. 233.*
35. *Ismail & Co.* v. *State of Kerala,* A. 1965 Ker. 237 (*238-39*).
36. Webster's International Dictionary.
37. Ballentine, Law Dictionary, 1948, p. 47.

'Other than advertisements published in newspapers'. – *See* under Entry 92, List I and Entry 54, List II, above.

56. Taxes on goods and passengers carried by road or on inland waterways.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 52 of List II of that Act was –
"Dues on passengers and goods carried on inland waterways."

INDIA

'Taxes on goods and passengers . . . . . .' – This Entry is to be read with Entries 30 and 89, List I.

'Taxes on goods and passengers'. 1. This Entry authorises a tax the incidence of which is on goods and passengers (by road or inland waterways), even though the amount of the tax is measured by the fares,[38] or by the distance travelled.[38]

2. It is open to the Legislature to recover this tax from the owners or operators of the carriers.[39] The present Entry does not specify who should be the assessee. Hence, where a tax is payable at a certain rate on all passengers and goods carried by stage carriages, it is a tax under this Entry, even though it is levied on the *operator*.[39] It is not a tax on income, for, had it been a tax on income, the operator would not have been liable to pay in a year in which he did not make any profit or gain[40]. Further, the operator is entitled to pass on the tax to the passenger or consignor of the goods, even though the statute does not confer that right expressly.[56]

In short, the method or machinery of *collection* does not affect the nature of the tax,[41] where there is a nexus between the tax and the machinery.[41]

For the same reason, the Legislature may make the producer liable for this tax even where he sells the goods to a purchaser *before* the goods are carried away from the place of production, provided only the liability of the producer arises only when the goods are carried from his place, by road or inland waterways.[42]

"Can we say that between the product of tea and the tax which is levied on the tea carried from his garden, there is no rational nexus? Considerations of administrative convenience as well as considerations or facility in recovering the tax cannot be treated as irrelevant in this context. The tea which is taxed has been produced by the producer and even when he sells it to a purchaser, it is obvious that it would be carried away and not left with the producer, and so, the Legislature may have thought that it would be appropriate to make the producer liable to pay the tax".[41]

3. It is open to the Legislature to tax goods and passengers either individually or collectively.[43]

4. The tax imposed under the present Entry is of a regulatory and compensatory character.[44] But this does *not* mean that the measure of the tax

38. *Sainik Motors* v. *State of Rajasthan*, A. 1961 S.C. 1480 (*1484*).
39. *Karthikeya* v. *State of Kerala*, A. 1974 S. C. 436 (paras.43, 45).
40. *Ramkrishna* v. *State of Bihar*, A. 1963 S. C. 1667 (*1673*).
41. *Khyerbari Tea Co.* v. *State of Assam*, A. 1964 S. C. 925 (*935*).
42. *Mathurai* v. *State of Madras*, A. 1914 Mad. 569.
43. *H. P. Barua* v. *State of Assam*, A. 1955 Assam 249 (S.B.).
44. *Bolani* v. *State of Orissa*, A. 1975 S.C. 17.

should be proportionate to the expenditure incurred on the regulation provided and the services rendered.[45]

'Goods'.—See Art. 366 (12), *ante*.

'Carried'. 1. It has no reference to the *mode* in which the goods are carried. The Entry is not limited to goods carried by a common or public carrier.[46]

2. Nor has it any reference to the *purpose* for which the goods are carried.[43]

3. Nor is the length of the journey of any moment from the standpoint of the present Entry. Any State *through* which the goods are physically carried by road or inland waterways is entitled to tax the goods so carried, irrespective of the distance over which the goods are carried so far as the territory of that State is concerned.[13] Is not necessary for the validity of this tax that the carried goods must join the mass of goods in the taxing State.[41]

4. Similarly, the proportion of the distance carried by goods with the distance carried by railway is also immaterial. As soon as the goods are carried for any distance within a State by road or inland waterways, the goods are taxable by that State, under the present Entry.[41]

5. The basis of the tax is the *carriage* of the goods but the Entry does not say that the tax can be levied only on the preson who actually carried the goods.[48] It may be imposed on any other person provided, however, there is rational nexus between such person and the goods carried.[46]

6. It is open to the Legislature to tax goods and passengers either individually or collectively.[47]

Ancillary power. It is competent for the State Legislature, under the present Entry, to devise machinery for the recovery of such taxes by requiring the bus operator or bus owner to pay the tax.[49]

Art. 301 and Entry 56, List II. Since the taxing power under Entry 56, List II is of a regulatory nature, it would not violate Art. 301, even though the tax so imposed is levied on passengers and goods carried from a place outside the taxing State to a place outside that State.[40]

Entries 23-24, List I and 56, List II. The Present Entry does not exclude national highways or waterways. Hence, tax on goods and passengers carried on national highways or waterways fall within State power under the present Entry.[45]

Entries 26 and 56 of List II. Entry 56 gives taxing power while Entry 26 of List II is unrelated to taxing power; hence, there is no reason to read Entry 56 as controlled by Entry[46]. Hence, it is not correct to hold that the power conferred by Entry 56 is to be confined to passengers or goods carried within the State. Even when the goods are transported through the taxing State in course of inter–State trade and commerce, the taxable event is the carrying of goods on *roads within* the State thereby making use of the facilities provided by the State.[45]

Entries 52 and 56 of List II. 1. These two entries cover the imposition of 'octroi' or terminal tax upon goods.[45]

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45. *International Tourist Corpn.* v. *State of Haryana*, A 1981 S.C. 774 (paras. 8–9,14).
46. *Atma Ram* v. *State of Bihar*, A. 1952 Pat. 359.

As to the distinction between the two kinds of taxes, see under Entry 52, *ante*. The following points may be reiterated –

(a) Both taxes are interlinked with the destination of the goods and their user in the local area on arrival of the goods. Where the goods merely pass through[51] a local area without being consumed therein, the mere fact that the transport carrying the goods halt within the local area for transhipment or like purposes would not justify the levy of either a terminal tax or octroi duty.[47]

(b) In the case of terminal tax, the goods reach their final destination and immediately attract payment of terminal tax, irrespective of their user.[47] But at the same time, the goods while halting at a local area should leave for their destination within a *reasonable time* and if the goods are kept within that area for such a long and indefinite period that the purpose of reaching the final destination is frustrated or defeated, they may be exigible to terminal tax also at the halting local area.[47] In short, where the goods enter into a local area which is also the destination of the goods either temporarily or otherwise, the terminal tax would be leviable.[47]

(c) But 'octroi' would not be leviable by any local area unless the goods are brought within that area for 'consumption, use or sale'.

Entries 56 and 57 of List II. If the tax is not on passengers but on vehicles, the tax comes not under Entry 56 but under 57.[48]

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 48A which was inserted in Llist II, by the India and Burma (Miscellaneous Amendments) Act, 1940, was –

"taxes on vehicles suitable for use on roads, where mechanically propelled or not, including tramcars".

INDIA

'Taxes on vehicles'. 1. The tax, under the present Entry is leviable by the State Legislature on all vehicles 'suitable for use on roads', which are kept in the State.[49]

2. But such tax must have some nexus with the vehicles using the public roads of the State because it is of a compensatory nature.[50] Hence, any vehicle which does not actually use the public roads is not taxable, even though registered under the State Motor Vehicles Act.[49–50]

Entries 57 List II and 35 of List III. 1. While the matter of *principles* on which taxes on mechanically propelled vehicles are to be levied falls under Entry 35 of the Concurrent List, the power to tax vehicles, whether mechanically propelled or not, belongs exclusively to the State Legislature under Entry 57 of List II.[51]

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47. *Man Mohan* v. *Delhi Municipality*, A. 1981 S. C. 991 (para.7).
48. *Municipal Board* v. *Raghubir*, A. 1966 S. C. 1502 (*1505*).
49. *Travancore Tea Co.* v. *State of Kerala*, A. 1980 S. C. 1547 (paras. 4, 6).
50. *Bolani Ores* v. *State of Kerala*, A. 1975 S. C. 17.
51. *State of Assam* v. *Labanya Probha*, A. 1967 S. C. 1575.

2. This power of the State Legislature under the present Entry being subject to Entry 35 of List III,[52] if there is an existing law made by Parliament laying down the principles on which taxes on mechanically propelled vehicles should be levied, then any State legislation enacted under the present Entry must conform to those principles as laid down in the existing law or the earlier law made by Parliament. If the provisions of the State law are repugnant to those principles, the law made by the State Legislature must fail to the extent of the repugnancy, unless reserved for the consideration of and assented to by the President.[53] But no assent of the President is necessary to validate the State law, in the absence of any such repugnancy,[53] or any such existing Central law.[53]

3. If, however, Parliament, while enacting a law relating to motor vehicles refrains from indicating any principles relating to their taxation, the State's power to tax such vehicles or to grant exemption would remain uninhibited.[52]

58. Taxes on animals and boats.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 47 of List II was identical.

59. Tolls.

OTHER CONSTITUTIONS

(A) England. – A right to realise toll is regarded as a franchise appurtenant to a franchise of market or fair.

Where a market is established under statutory authority, toll is authorised by that statute, e.g., the Markets and Fairs Clauses Act, 1847; the Diseases of Animals Act, 1950; the Food and Drugs Act, 1955.

(B) *Government of India Act, 1935.* – Item 53 of List II was identical.

INDIA

'Tolls'. 1. This Entry authorises the State Legislature to levy a 'toll' which means a payment realised for some benefit, e.g., for the use of a market, or a bridge; the temporary use of land[54], which the person or authority claiming the toll provides to the person liable to pay the toll.[55] It is not essential that the toll should be collected prior to the rendering of the benefit. Thus, provided that it is not collected twice in respect of the same benefit, a toll may be collected from a trader either when he enters the market place or when he leaves it; or from a vehicle when it either enters into or leaves the limits of the Municipality which levies a toll for the use of its roads.[56]

2. Usually, the consideration for a toll is some amenity, service, benefit or advantage which the person entitled to the toll undertakes to provide for the public in general, or the person liable to pay the toll.[55] It cannot be used by a local authority who has the *statutory duty* to maintain roads, bridges etc.[55] Nor can it be imposed as a compensatory tax for the use of trading facilities.[55]

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52. *Jayaram* v. *Union of India*, A. 1983 S. C. 1005 (para. 10).
53. *Phoolchand* v. *State of M.P.*, A. 1966 M. P. 131 (*133*).
54. *Automobile Transport* v. *State of Rajasthan*, A. 1958 Raj. 114 (*119*).
55. *Atiabari Tea Co.* v. *State of Assam*, A. 1961 S. C. 232 (*243*).
55. *Kamaljeet* v. *Municipal Bd.*, A. 1987 S.C. 56.

3. Toll cannot be imposed on goods merely passing *through* a local area by the National Highway.[55]

4. Tolls are of various kinds and Entry 59 is not confined to 'toll through and toll traverse'.[57]

Existing (Central) Law.—Indian Tolls Act. (VIII of 1851; XV of 1864; VIII of 1888); Ganges Tolls Act (I of 1867).

60. Taxes on professions, trades, callings, and employments.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 46 of List II was the same as the present Entry of *our* Constitution.

INDIA

'Tax on trade'. As to the meaning of this expression, see under Art. 276, *ante.* It may be a tax on the income derived from trade [subject to Art. 276 (2)]; or it may be a tax on the total business *turnover* of a trader even though he may not have earned any taxable income,[58] or according to the amount of capital or value of place of business;[59] or a fixed sum, according to the nature of profession or trade.[60]

A tax imposed by a District Council on persons carrying on the trade of husking, milling or grinding of grains, is a tax under the present Entry.[61]

A non-resident may be taxed by a local area under this power, if he carries on trade or business within that area.[62]

It is competent for a local authority to impose a composite tax on circumstances and property'—'circumstances' meaning a man's financial position depending on his income from trade or business within that area [present Entry] and 'property' [under Entry 49 of this List].[62]

The connotation of the term 'trade' in this Entry or Art. 276 is not limited to an occupation which primarily concerns itself with sale and purchase of goods. Pursuit of a skilled employment with a view to earn profit, such employment not being in the nature of a learned profession or agriculture, may amount to 'trade', e.g., the business of pressing cotton into bales.[63]

A tax levied on the promoters of a gambling scheme, based on the entry fees, is a tax on gambling under Entry 62 and not a tax on trade.[57,63]

Similarly, where the object of a tax is an act of entertainment, it comes under Entry 62 and not the present Entry, where it falls upon the giver or the receiver of the entertainment.[64]

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57. *Hindusthan Vanaspati* v. *Municipal Board*, A. 1962 All. 25
58. *Dt. Board* v. *Prag Dutt.* (1949) 4 D. L. R. (All.) 1 (F.B.).
59. Cf. Sch. IV, Bengal Municipal Act, 1932.
60. Cf. Sch. IV, Calcutta Municipal Act, 1951.
61. *Dr. Council Bhandra* v. *Kisurilal*, A. 1949 Nag. 190.
62. *Ram Narain* v. *State of U. P.*, A. 1957 S. C. 18 (*23*).
63. *State of Bombay* v. *Chamarbaugwala*, A. 1957 S. C. 699 (*710*).
64. *Western India Theatres* v. *Cantonment Board*, A. 1959 S. C. 582 (*585*).

A tax imposed upon the *business* carried on by a company comes under the present Entry, even though it is measured with reference to the share capital.[65]

'Trades, callings'. These words seem to have been used in the widest sense in which they are usually used in fiscal statutes, as connoting "any activity for gaining livelihood".[66]

Tax on professions, employments. 1. A tax on pensions cannot be levied under this Entry,[67] because it is not a tax on employment but a tax on income, coming under Entry 82 of List I.[68] The present Entry applies only to persons who are carrying on a profession or are employed in a service,[67,69] during the assessable period. Income from *past services* or income from *investments* cannot be brought in under the present Entry.[67]

2. A tax imposed in exercise of the present power cannot be challenged on the ground that it is a tax on income within the meaning of Entry 82 of List I [see Art. 276, *ante*].

3. A 'circumstances and property' tax is a composite tax imposed under this Entry and Entry 49 of List II.[70]

'Circumstances and property tax'.

I. 'Circumstances and property tax' is levied by a State Legislature or local authority on lands and buildings or on financial status derived from professions, business or employment and comes under Entries 49 and 60 of List II, even though the assessment of the tax depends on the amount of income earned by the assessee from various sources. A tax on circumstances and property is a composite tax and the word 'circumstances' means a man's financial position, his status as a whole, depending among other things, on his income from trade or business.[71]

II. A circumstances tax will not be a tax on income under Entry 82 even though the assessment of the tax depends upon the amount of income earned by the assessee from various sources. The reason is that income tax may be levied only when there is income[2]; but in the case of circumstances tax where a man's status has to be determined, his total business turnover may be considered for purposes of taxation, *though he may not have earned any* taxable income.[72] If a tax is imposed an a trade or profession, whether he derives any income from it or not.[73]

Moreover, the maximum limit of Rs.*2500* imposed by Art. 276 makes it clear that the tax under that Article, read with Entry 60 of List II, is not relatable to the quantum of income, as in the case of 'income tax'.[74]

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65. *Calcutta Chemical Co.* v. *Bhagalpur Municipality*, A. 1952 Pat. 465.
66. *Cf. Mazagaon Dock* v. *I.T. Commr.*, A. 1958 S. C. 864 (*866*).
67. *Sitaram* v. *Janpad Sabha*, A. 1952 Nag. (*401*).
68. *Shrikrishna* v. *Ujjain Municipality*, A. 1953 M. B. 145.
69. *Waliati Ram* v. *Rupar Municipality*, A. 1960 Punj. 669 (*672*).
70. *Zilla Parishad* v. *Jugal Kishore*, A. 1969 All. 40 (F. B.).
71. *Rqm Narain* v. *State of U.P.*, A. 1957 S.C. 18; cf. *Commr. of I.T.* v. *Thakar Das*, A. 1960 S.L.C. 1219.
72. *Dt. Board* v. *Prag Dutt*, A. 1948 All. 382 (F.B.).
73. *Western U. P. Electric Co.* v. *Town Area* A. 1957 All. 433.
74. *Sushil Chandra* v. *State*, A. 1969 All. 317 (F.B.).

III. Since Entry 60 does not require that there should be separate taxes on professions, trades, callings and employments, there is nothing to debar the State Lagislature to levy the circumstances taxs on the basis of the total income of the assessee, subject, of course, to the constitutional limit.[74]

Scope of the Entry. A. On the one hand, it has been held that –

(i) A tax imposed upon the *business* carried on by a company comes under the present Entry, even though it is measured with reference to the share capital.[65]

(ii) A tax imposed in exercise of the present power cannot be challenged on the ground that it is a tax on income within the meaning of Entry 82 of List I [see Art. 276, *ante*], but the power conferred by this Entry is subject to the limitation imposed by Art. 276 (2), and the present Entry cannot be invoked at all unless the impugned tax is in reality 'a tax on professions, trade, calling or employment,' Art. 276 (1) does not mean that the State might levy a tax on income and then call it a profession tax.[75]

B. On the other hand –

(a) A tax levied on the promoters of a gambling scheme, based on the entry fees, is a tax on gambling under Entry 62 and not a tax on trade.[76]

(b) Similarly, where the object of a tax is an act of entertainment, it comes under Entry 62 and not the present Entry, whether it falls upon the giver or the receiver of the entertainment.[64]

(c) A tax graduated according to the number of *bidis* manufactured is a duty of excise and not a tax on trade or calling.[77]

Analogous Provisions. – This Entry has to be red with Entry 82 of List I and Art. 276. The result is that though a tax on professions, trades, etc., is in the nature of an income-tax, a State tax on professions, etc., will be valid if it does not exceed the limit of Rs. 2500 per month.

It should also be read with Entry 62 of List II. Where a tax is an 'entertainment tax' under Entry 62, it cannot, at the same time, be a tax on 'calling' within the purview of the present Entry so as to be subject to the limit imposed by Art. 276[78] [see, further, under Entry 62 of List II].

Entry 60, List II and Art. 276(2). 1. The power conferred by this Entry is subject to the limitation imposed by Art. 276(2), and a levy which does not fix a maximum below Rs.2500 shall be invalid in *toto*.[67,79]

2. The limit imposed by Art. 276(2) will not, however, be attracted to a 'composite tax', which draws power not only from the present Entry but also from some other Entry, e.g. 49 of List II, to which Art. 276(2) does not extend;[80] such as a 'tax on circumstances and property' which is referable to both Entries 49 and 60 of List II.[80] This does not mean, however, that by combining the two sources of power, a local authority acquires an unlimited charter to impose disproportionately excessive levies on the 'circumstances' of a man which includes his income from profession, trade or calling. If it is excessive, 'income' will then cease to be the yardstick or measure of the tax, and the tax will be a tax on 'income' falling under Entry 82 of List I.[80]

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75. *Rajagopalachari* v. *Corpn. of Madras*, A. 1964 S. C. 1172.
76. *State of Bombay* v. *Chamarbangwala*, A. 1957 S. C. 699 (*710*).
77. *Mohanlal* v. *Gram Panchayat*, A. 1962 M. P. 136.
78. *Kantilal* v. *Palitana Municipality*, A. 1955 Sau. 90.
79. *Bankim* v. *Dt. Panchayat Officer*, (1964) 69 C.W.N. 219 (*230*). [See under Art. 276(2), *ante*].
80. *Engineering Co.* v. *Zila Parishad*, A. 1980 S.C. 1088 (paras. 19-21).

61. Capitation taxes.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 45 of List II was the same as the present Entry of our Constitution.

INDIA

'Capitation tax'. – A capitation tax is a poll tax upon the person simply,[12] without any regard to his property, business, employment or other circumstances.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 50 of List II was the same as the prsent Entry of *our* Constitution.

'Luxury'. A **'luxury'** is something which conduces enjoyment over and above the necessaries of life, even though the article may be popular among a large number of people, including the poorer sections, such as tobacco, beer.[82]

2. A tax on luxuries is a tax on *goods* or articles which constitute luxuries, e.g., tobacco[81], as distinguished from a tax on its *production*, in which case it becomes an excise duty.[81]

3. But the concept of 'luxuries' is not confined to goods; it extends to *services*, e.g., the *provision* of lodging accomodation with services in a hotel.[82] A tax imposed on such provision, irrespective of its actual utilisation or actual consumption, will be a tax on luxuries.[82]

4. Even necessities and comforts which have to them the additional element of *extravagance* and indulgence might become luxuries.[82]

5. In order to come under the present Entry –

(a) The article on which the tax is imposed must be a 'luxury'.[83]

(b) The tax must be correlated to the quality, quantity or value of the luxuries. A tax imposed on the *privilege of vending liquor* cannot be regarded as tax on luxuries.[84]

'Entertainments'. 1. This word is not controlled by the word 'luxuries'. Hence, it would include entertainments like a cinema show, a dramatic performance or a cricket match.[85]

2. It cannot be contended that because the word 'cinema' is specifically mentioned in Entry 33 of List II and omitted from the present Entry, no tax can be imposed under the present Entry upon cinemas.[85] 'Cinema' had to be separately

81. *Abdul Kadir* v. *State of Kerala*, A. 1966 S. C. 182 (para.12).
82. *Express Hotels* v. *State of Gujarat*, A. 1989 S. C. 1969 (paras. 7-9) (C.B.).
83. *Kaithakuttu* v. *Board of Revenue*, A. 1966 S. C. 46 (*51*).
84. *Cawasji & Co.* v. *State*, A. 1969 Mys. 23 (*36*).
85. *Srinivasamurthy* v. *State of Mysore*, A. 1959 S. C. 895.

mentioned in order to make it clear that the power of the State Legislature to make laws with respect to cinemas was subject to item 60 of the Union List.[85]

3. The Entry does not draw any distinction between the person who derives the amusement and the person who caters it.[85]

4. Not being a technical term, its meaning is to be gathered from its use in common parlance.[86] So understood, it would mean any act which affords pleasure, diversion or recreation of any kind, including games or sports even though it may be purely educative,[87] or it may involve skill, such as video game.[87]

5. Where the tax is imposed on the act of offering entertainment through a Machine (as distinguished from the ownership or possession of the Machine) it would come under the present Entry, even though for the purpose of calculation the Machine is made the criteria, without relating the quantum of the tax to the capacity or cost of each Machine.[88]

Tax on entertainment : Entries 60 and 62 of List II. 1 The question whether a particular tax is a tax on entertainments under the present Entry or a tax on callings under Entry 60 becomes material because of the limitations imposed by Art. 276(2) upon a tax under Entry 60.[85]

2. The tax authorised by this Entry is a tax imposed in respect of the show, exhibition, performance or the like. It may be levied either upon the person who offers the entertainment or upon the person who enjoys it or on both.[64]

3. Where the incidence of the tax falls on the person who offers the entertainment, it does not become a tax on 'calling' or 'profession' within the meaning of Entry 60 of List II, if the tax is to be paid in respect of an entertainment.[64] (say, a cinema show), irrespective of whether it is given by a professional exhibitor or by one following a different calling, e.g., by a charitable society to raise funds for a charity,[85] and the tax is levied on each of the exhibitions, seperately.[73,82] In such case, what is taxed is not the calling of the person providing the entertainment but the entertainment itself,[85] and the question of applying Art.276(2) does not, consequently, arise in such cases.

4. On the other hand, if the incidence of the tax is upon the person because he is engaged in the business of providing the entertainment irrespective of the number of occasions when he provides the entertainment, it is a tax on calling. It would be an entertainment tax if the tax is imposed on every act of entertainment, e.g., on a cinema show, so that there would be no such tax if no cinema show is held.[64]

Tax on betting and gambling. 1. The tax contemplated by their Entry is a tax on the activity of betting and gambling and not a tax on those who bet or gamble.[89]

2. A tax on the promoters of a gambling prize competition, being a percentage of the entry fees received, is a tax on betting and gambling and not a tax on 'trade' under Entry 60 of List II. The tax is levied on the promoter for the convenience of collection, with the expectation that he will indemnify himself at the expense of the gamblers.[89]

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86. *Porritts* v. *State of Haryana*, A. 1979 S. C. 300.
87. *Geeta Enterprises* v. *State of U. P.*, A. 1983 S. C. 1098 (paras. 6-7, 13).
88. *Ramesh* v. *State* A. 1989 Bom. 251(paras. 5, 8).
89. *State of Bombay* v. *Chamarbaugwala*, A. 1957 S. C. 699 (712).

3. A 'wagering contract' is 'gambling',[90] its essence being an *intention* of the parties that though it purports to be a contract for sale, no actual transfer of the goods should take place under it but the parties should only pay or receive (as the case may be) the difference according as the market price should vary from the contract price on a future date. Such a transaction is not a commercial transaction but a 'wager' on the rise or fall of the market.[91] Where, therefore, a State Legislature seeks to tax a 'forward contract' as defined by it, and the wagering intention is not an essential element of the definition, the tax would not be covered by the present[92] Entry, but would come under Entry 48 of List I.[92]

Entries 34 and 62 of List II.—See under Entry 34, *ante.*

Acts coming under the present Entry. S. 12 of the Bombay Lotteries and Prize Comptitions Act, 1948.[89]

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

OTHER CONSTITUTIONS

Government of India Act, 1935.— Item 51 of List II of that Act was identical with the present Entry.

INDIA

'Rates of stamp duty . . . . . .' 1. This Entry relates to *rates* of stamp duty in respect of all documents other than those included in Entry 91, Llist I. All other matters relating to stamp duties, save *rates*, is included in Entry 44, List III, *post.*

2. Read with Entry of List III, this Entry would give the State Legislature the power to prescribe the *mode* of computation of the stamp duty or the *basis* on which the duty is to be calculated on the rate specified in the law.[93] A change in the basis or measure of the duty (e.g., to provide that instead of the consideration for a conveyance, the basis of stamp duty for a conveyance shall be the market value of the property) does not change the nature of the duty, because stamp duty is a charge on the instrument and that nature is not altered by changing the quantum or measure of the duty.[94]

'Duty in respect of documents'. The occasion for levy of the stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.[95]

'Other than those specified in List I'. Since the following doucments are not mentioned in Entry 91 of List I, the State Legislature is competent to alter the rate of stamp duty in regard to them within its own jurisdiction—

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90. *Bullion & Grain Exchange* v. *State of Punjab*, A. 1961 S. C. 268 (*271*).
91. *Bulion & Grain Exhange* v. *State of Punjab*, A. 1961 S. C. 268 (*271*).
92. *Waverly Jute Mills* v. *Raymon & Co.*, A. 1963 S. C. 90 (*95*).
93. *Ramkishori* v. *State*, A. 1988 M. P. 145 (paras. 3-4) D. B.
94. *State of T. N.* v. *Chandrasekharan*, A. 1974 Mad. 11.
95. *Cf. Shasharatnam* v. *G. T. O.* A. 1960 A. P. 115 (*119*).

(a) Acknowledgement.[96]

(b) Application[87] or certificate[88] of enrolment of an Advocate[97-98]

Entries 91 of List I, 63 of List II and 44 of List III. 1. the power to levy stamp duty is concurrent, under Entry 63 of List II. But that Entry does *not* include the power to prescribe the *rate* of such duty.

2. The power to prescribe the *rate* of stamp duty is divided between the exclusive jurisdiction of the Union and a State : (a) as regards the instruments specified in Entry 91 of List I, the power belongs exclusively to Parliament; (b) as regards *other* instruments, the power belongs to the States, under Entry 63 of List II.[99]

64. Offences against laws with respect to any of the matters in this List.

OTHER CONSTITUTIONS

(A) *Canada.*—Though Criminal law is within the exclusive jurisdiction of the Dominion Parliament [Sec. 91 (27)] the Provinces have the power to pass laws imposing "fine, penalty or imprisonment for any law of the Province" [Sec. 92 (15)].

(B) *Government of India Act,* 1935.—There was no item corresponding to the present Entry, but the present power was deduced as a power *anciliary*[100] to that of legislation relating to the different subjects included in List II.

INDIA

Offences. 1. Though Criminal law is a concurrent subject under List III, Entry 1, each State has, under the present Entry, the exclusive power to pass punitive laws for violation of the laws which its Legislature is competent to enact, together with ancillary matters, belongs to the State Legislature. It need not resort to the Concurrent List for such legislation.[1]

2. By reason of this Entry, the State Legislature may, while making a law pertaining to a tax on sale or purchase, provide for punishments for non-compliance with the provisions of that law,[2-3] or for anti-social activities.

Analogous Provisions.—Entry 93, List I.

65. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

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96. *Chander Bhan* v. *Mehar Singh,* A. 1965 Punj. 279 (*283*).
97. Rupendra, in re., A. 1958 A. P. 63 (S. B.).
98. *Vittal* v. *State of Mysore* A. 1966 Mys. 138 (*140*).
99. *Bar Council* v. *State of U. P.,* A. 1973 S. C. 231 (para.11).
100. *Srinivasamurthy* v. *State of Mysore* A. 1959 *S.* C. 895.
1. *Lakhinarayan* v. *Prov. of Bihar,* A. 1950 F. C. 59.
2. *State of Mysore* v. *Ismail,* A. 1958 *Mys.* 143.
3. *Ashok* v. *State* A. 1987 *All.* 235 (*paras.* 49, 53).

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 2 of List II of that Act included the present subject.

INDIA

'Jurisidiction'.—Juridiction is the authority to judge or declare the law between parties brought into Court (*Bracton*). It is "the power to hear and determine the subject-matter in controversy, to adjudicate or exercise any judicial power over the parties.[4]

This Entry, read with Entry 18, gives the State Legislature exclusive power to create and determine the powers and jurisdiction of Courts in respect of 'land', without the necessity of invoking the concurrent power relating to 'civil procedure'.[5] Similarly, under this Entry, read with Entry 3 of List II, the State Legislature is competent to lay down the jurisdiction and powers of the different Benches of the State High Court, though 'constitution and organisation of the High Court' is a Union power under Entry 78 of List I[6].

Juridiction of Courts with respect to matters in List II. The State Legislature has ample powers with regard to the jurisdiction and powers of Courts to deal with the species of property described in Entry 18 of this List.[7]

Analogous Provisions. – *See* Entry 95, List I; 46 of List III, *post.*

66. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

OTHER CONSTITUTIONS

Government of India Act., 1935.—Item 54 List II was the same.

INDIA

'Fees'. As to what are 'fees' in order to come under the present Entry, see under Art. 277 and Entry 96 of List I.

1. This Entry gives power to the State Legislature to levy fees in most general terms in all matters which are within its legislative field. If the conditions of a 'fee' are satisfied, the nomenclature given by the Legislature is immaterial.

Thus, cess imposed by a State Legislature for purpose of controlling sugar or a cess levied upon owners of mines in a notified area to render services to such owners by developing the notified area,[8] can be treated as a fee under this Entry; or a fee for keeping stalls in a market [Entry 28];[9] or a water tax to be imposed by a municipality [Entry 5].[10]

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4. Bailey on Writs, p. 637.
5. *Megh Raj* v. *Allah Rakhia*, A. 1947 P. C. 72.
6. *Patel* v. *Venkatalakshamma*, A. 1955 Mys. 65 (*73-4*).
7. *Brij Bhukan* v. *S.D.O.*, A. 1955 Pat. 1. (S.B.).
8. *Hingir-Rampur Coal Co.* v. *State of Orissa*, A. 1961 S. C. 459 (*467*).
9. *Haralal* v. *Dibrugarh Municipaality*, A. 1958 Assam 156.
10. *Jagdish* v. *Saharanpur Municipality*, A. 1951 All. 585 (*586*).
11. *M. K. Mills* v. *Krishangarh Municipality*, A. 1960 Raj. 135 (*137*).

2. But in order to come under this Entry, the imposition must be a fee for services rendered by the State relating to any of the subjects included in this List. Thus, if a Municipality maintains a burial ground [Entry 10, List II], it can levy a fee for every person buried in that burial ground;[11] if a State Government maintains an establishment for the inspection of factories, it may levy a fee on factories by way of realising the expenses involved.[12] But a 'fee' cannot be justified with reference to the general purposes of 'local' government.[11]

3. The power to levy a fee under the present Entry is dependent upon the State Legislature's power to legislate with respect to independent subject-matter in the State List. If, for any reason, e.g., a declaration by Parliament under Entry 54 of List I,[13] the State Legislature loses its power over that subject–matter, it loses the power to impose a cess in relation to that subject-matter.

4. But in order to come under this Entry, the imposition must be a fee for services rendered by the State relating to any of the subjects included in this List. Thus, if a Municipality maintains a burial ground [Entry 10, List II], it can levy a fee for every person buried in that burial ground;[14] if a State Government maintains an establishment for the inspection of factories, it may levy a fee on factories by way of realising the expenses involved.[15] But a 'fee' cannot be justified with reference to the general purposes of 'local government.'[14]

5. An imposition cannot be justified under this Entry when the authority fails to show that any services are being rendered which has a proximate relationship with the imposition.[16] Thus, a license fee cannot be imposed–

(i) Where it is sought to cover the cost of supervising the manufacture of an article, but is imposed on *consumers* of that article who have nothing to do with the manufacturing process[16].

In such a case, the consumer cannot be made to pay for the expenses of the ancillary process of supervision that the manufacturer does not misuse his licence; for, by such supervision the State is rendering no service to the consumer but is merely protecting its own rights.[16]

(ii) Nor can the costs of inspection for enforcing the conditions of the licence be imposed on the licensee himself, for, such inspection does not render any 'service' to the licensee but, on the other hand, exposes him to penalty if violation of the conditions is detected.[17]

6. If the tests formulated by the Supreme court for holding a levy to be a 'fee' are not satisfied in a given case, it would be a tax and fall outside the legislative power conferred by Entry 66 of List II.[18] These tests have however been relaxed in recent cases and it is now fairly settled that, if the other conditions are satisfied, a levy would not cease to be a fee merely because the correlationship between the levy and the services rendered is one of a general character and not of mathematical exactitude.[19]

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12. *Umaid Mills* v. *State of Rajasthan*, A. 1954 Raj. 178.
13. *State of Orissa* v. *Tulloch*, A. 1964 S. C. 1248 (*1292*).
14. *M. K. Mills* v. *Kishangarh Municipality*, A. 1960 Raj. 135 (*137*).
15. *Umaid Mills* v. *State of Rajasthan*, A. 1954 Raj. 178.
16. *Indian Mica Industries* v. *State of Bihar*, A. 1971 S. C. 1182.
17. *Corp. of Calcutta*, v. *Liberty Cinema*, A. 1965 1107.
18. *Om Prakash* v. *Giri*, A. 1986 S. C. 726.
19. *Sreenivasa Traders* v. *State of A. P.*, A. 1983 S. C. 1246; *S. P. C.* v. *State of Kerala*, A. 1981 S. C. 1863.

7. On the other hand, an imposition purported to be made under the present Entry cannot be valid[20] if it lacks any of the two characteristics of a 'fee' (see above), viz.–

(a) The authority levying the fee must render some service for the fee levied, however remote that service may be.[20]

An imposition cannot be justified under this Entry when the authority fails to show that any services are being rendered which have a proximate relationship with the imposition.[15]

On this principle, the following have been held to be a tax and not a 'fee' covered by the present Entry–

A fee for registration of animals sold, based not upon the kind of animal registered but upon the price paid in respect of each animal sold,[21-22] irrespective of the class to which it belonged.[22]

(b) The fee realised must be spent for the purposes of the imposition and should not form part of the general revenues of the State.[20,23]

Thus, by s. 4(5) of the Haryana Rural Development Fund Act, the State Government was authorised to spend money credited to the Fund virtually on any object which the State Government considered to be expedient for the development of rural areas.[18] [See also under Art. 277, Vol. K.]

Analogous Provisions. 'Fees taken in all Courts excepting the Supreme Court' are included in Entry 3 of List II, while fees taken in the Supreme Court come under Entry 77 of List I and fees before authorities other than courts, relating to matters enumerated in List I, are dealt with by Entry 96 of List I.

The result is that the present Entry 66 of List II empowers the State Legislature to provide for payment of fees before authorities other than courts, in respect of matters enumerated in List II, e.g., fees payable for administrative appeal or revision before authorities prescribed by Sales Tax Act.[24]

Entries 65 of List II and 11A of List III. This Entry, read with Entry 11A in List III, gives the State Legislature power to regulate the jurisdiction and organisation of all Courts relating to matters specified in List II, [25–100] excluding the Supreme Court (and the High Courts as to constitution and organisation).

List III – Concurrent List.

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

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20. *Chief Commr.* v. *D.C.M.*, A. 1978 S. C. 1118 (paras. 4-5).
21. *Nagpur Kshatriya Samaj* v. *Corporation of Nagpur*, A. 1952 Nag. 102.
22. *Dhaniram* v. *Janpad Sabha*, A. 1915 M. P. 219 (*221*).
23. *State of Maharashtra* v. *Salvation Army*, A. 1975 S. C. 846.
24. *Cf. State of Orissa* v. *Chakobhai*, A. 1961 S. C. 264.
25–100. *Ashok* v. *State*, A. 1987 All. 235 (paras. 61,64) F. B.

OTHER CONSTITUTIONS

(A) *Canada*.—Sec. 91 (27) of the Br. North America Act gives the Dominion Parliament *exclusive* jurisdiction over—

"The Criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

Cl. (27) of Sec. 91 of the Br. North America Act makes Criminal law an exclusive Dominion subject, in the fullest sense, except that under cl. (14) of s. 92 "administration of justice in the Province", and under Cl. (15) of sec. 92, "the *imposition* of punishment by the fine, penalty, or imprisonment for enforcing any law of the Province in relation to any matter coming within any of the class of subjects enumerated in Sec. 92", are Provincial subjects.[1] From this it has been held that the Dominion Legislature has the exclusive right by legislation *to create and define crimes* and to impose *penalties* for their commission and also to direct how penalties for the infraction of criminal law shall be *applied*.

"If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation may be seriously affected if not stultified.[2]

But, by purporting to create penal sanctions under the present power, the Dominion Parliament cannot enact legislation which, though in form criminal, purports to deal with matters exclusively committed to the Provinces.[3] As already explained, the validity of the impugned law is to be determined with reference to the test of 'pith and substance'. The power with respect to 'criminal law' gives the Dominion Parliament the power to make *new* crimes[4] even though such acts were not included in the conception of criminal law in 1867; or to amend[5] the criminal law even though the *effect* of such legislation is obviously to affect existing civil rights, [s. 92 (13)] by making it lawful for a citizen to do what he had a right to do until the Dominion legislation.

On the other hand, the Dominion cannot assume exclusive control over civil rights "by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dodinion".[3] Thus,

(a) In the guise of making a new crime, the Dominion Parliament cannot interfere with the relations between employers and employees by prohibiting strikes or lock-outs prior to or pending a deference to a Board of Conciliation.[6]

(b) Where the pith and substance of a Dominion Legislation is to provide for the protection and encouragement of the dairy industry and with that object it prohibits the manufacture, importation and sale of margarine, it is not a law in relation to criminal law merely because incidental penalties are provided for the breach of the prohibition.[7]

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1. *A.-G. for Ontario* v. *Hamilton Street Ry.*, (1903) A. C. 524.
2. *Toronto City Corporation* v. *The King* (1932) A. C. 98.
3. *A.-G. Ont.* v. *Reciprocal Insurers* (1924) A. C. 328.
4. *Proprietary Articles Assoc.* v. *A.-G. for Canada*, A. C. 310.
5. *A.-G. for Br. Columbia* v. *A.-G. for Canada*, (1937) A. C. 368.
6. *Toronto Electric Commrs.* v. *Snyder*, (1925) A. C. 396.
7. *Canadian Federation* v. *A.-G. for Quebec*, (1951) A. C. 179.

(c) In the purported exercise of the power in relation to criminal law, the Dominion Parliament cannot make in substance a law for the regulation of the business of insurance, e.g., by making it an indictable offence to solicit or accept any insurance risk except on behalf of a company licensed under the Canadian Insurance Act, 1917.[3]

(d) While the Dominion Parliament is competent to declare corruption in municipal elections or negligence of a given order in the management of railway trains, to be a criminal offence, it cannot make use of the machinery of the criminal law for the purpose of assuming control over municipal corporations [s. 92 (8) or Provincial Railways [s. 92 (10)].[3]

Conversely, it has been held that –

(i) The Provincial power to impose 'penalty' [s. 92 (15)] includes the power to provide for the *forefeiture* of contraband goods.[8]

(ii) In the exercise of its power to 'enforce any law of the Province in relation to any matter coming within any of the classes of subjects enumerated in s., 92' [s. 92 (15)], the Provincial Legislature may lay down the *procedure* relating to the trial and punishment for offences against Provincial laws relating to matters enumerated in s. 92,[9] or impose a condition in a bond given by a broker on registration under a Provincial Act that the bond should fall due on his conviction for a criminal offence, even though it would indirectly impose an additional punishment for the criminal offence created by Dominion legislation.[10]

(iii) The Provincial Legislature is incompetent to make a law enjoining the closing of all shops on certain 'holy days' prescribed by the Roman Catholic Church, inasmuch as the law was related to the moral and religious order and thus appertained to 'criminal law' [s. 91 (27).][11]

(B) *Australia.* – The Commonwealth Parliament has no express power relating to criminal law ; hence, the power belongs to the States. It has, however, been held that power to punish may be exercised by the Commonwealth Parliament as incidental to its legitimate powers under the various provisions of the Constitution Act.[12]

(C) *Government of India Act, 1935.* – Item I of List III of that Act was the same as the present Entry of *our* Constitution.

INDIA

Scope of the present Entry. 1. The present Entry does not seek to define 'criminal law'. It first enlarges the ambit of the expression by including it in all matters included in the Indian Penal Code (1860), and then excludes from such enlarged ambit all offences against laws coming under Lists I and II.[13] The reason for this exclusion is that offences against laws with respect to a matter specified in List I or II are given a place in Entry 93 of List I and Entry 64 of List II, respectively.[13]

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8. *The King* v. *Nat Bell Liquors,* (1922) A. C. 128.
9. *C. P. Wine Co.* v. *Tuley,* (1921) A. C. 417.
10. *Lymburn* v. *Mayland,* (1932) A. C. 318.
11. *Henry Birks* v. *Montreal,* (1915) 5 D. L. R. 321 (321-5).
12. *R* v. *Kidman,* (1915) 20 C.L.R. 425. *R* v. *Sharkey,* (1949) 79 C.L.R. 121.
13. *Ratnanaiah* v. *Supdt., Central Jail,* A. 1976 S. C. 31 (paras. 12-13).

2. Thus, many of the offences in the I.P.C. relate to matters referable to Entries in List I, such as currency, weights and measures, Armed Forces. The State Legislature cannot claim any legislative power relating to such subjects, by virtue of Entry 1 of List III.[13] The Madras High Court opined[14] that even as regards such matters included in List I, the power to legislate a criminal law does not cease to be concurrent so long as Parliament does not actually enact a law relating to such subject. It seems the view of the Madras High Court rests on a wrong construction of the words 'offences against laws . . . . . .matters'.

'Criminal Law' As to what is criminal law, the observation of the Judicial Committee in interpreting the corresponding provision of the Br. North America Act [Sec. 91 (27)], would be very useful.[15]

"Criminal law means the criminal law in its widest sense . . . . The power must extend to legislation to *make new crimes*. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition : nor can it be discovered by reference to any standard but one : Is the act *prohibited* with *penal* consequences?

Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality – unless the moral code necessarily disapproves all acts prohibited by the State . . . . It appears to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished".[15]

In a later case,[16] the Judicial Committee observed –

"The characteristic feature of a crime . . . . the intent to do wrong . . . . There is no other feature of wrongness than the intention of the Legislature in the public interest to prohibit the act or omission made criminal".[16]

The present Entry has been held to cover laws creating offences for purposes of social reform and prescribing punishment therefor, e.g., for the removal of social disabilities of Harijans[17] or for prevention of excommunication.[18]

On the other hand, the present power is subject to the following limitations :

(i) Under the pretext of legislating for criminal law, Parliament cannot assume legislative authority over subjects included in the State List. The scope of the legislation must, of course, be determined with reference to the doctrine of 'pith and substance'.[18]

(ii) 'Criminal law' in the present Entry means the ordinary criminal law of the land and does not include 'military law'.[19]

'Including all matters included in the Code of Criminal Procedure'. The word 'including' is a word of enlargement and not *restriction*. Hence, all matters included in the Code of Criminal Procedure at the date of commencement of the

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15. *Propriety Association* v. *Att. Gen.*, A. 1931 P. C. 94 (99).
16. *A.-G. of Br. Columbia* v. *A.-G. of Canada*, A. 1937 P. C. 91 (92).
17. *Emp.* v. *Kalidas*, (1948) 51 Bom. L.R. 100.
18. *Saifuddin* v, *Tayebji*, (1953) 55 Bom. L.R. 1 (9).
19. *Cf. Meads* v. *The King*, (1948) 52 C.W.N. 834 (P.C.) affirming (1944) 49 C.W.N. (F.R.) 23.

Constitution, whether they relate to procedure or to a *substantive* right would be concurrent legislative subject. Investigation of offences is included in the present Entry.[20]

Offences, penalties therefor and destination of fines. In general, the power to legislate in respect of criminal law includes the power to impose penalties for disobedience as well as to legislate for the destination of fines so imposed.[21] Criminal law, under *our* Constitution, is a concurrent subject. But Entries 93 of List I and 64 of List II say that offences relating to laws with respect to any of the matters included in List I is an exclusive Union subject, while offences with respect to the matters included in List II is an exclusive State subject and these are expressly excluded from the present Entry. Hence, it is the *residue* of the power relating to criminal law that belongs to the Concurrent List.

It would follow, therefore, that while legislating with respect to offences within its own Legislative List, the Union or State Legislature is entitled not only to impose the penalties but also to prescribe the destination of the fines or forfeitures provided for by the law.

If, however, the law creating an offence *does not* lay down the destination of the fines or forfeitures imposed by it, the question arises whether the fines or forfeitures should go to the Union or State revenues. As the Federal Court has held,[21] in such cases, the receipts should go to the State revenues as receipts arising out of the administration of justice which is a State subject[22] [Entry 3, List II], whether the penalty is imposed by a Central or State law.

"No doubt fines imposed by Criminal Courts in the Province would be properly credited to Provincial Revenues as receipts accruing in respect of the administration of justice, *but only if not otherwise appropriated by competent authority*".[23]

For the same reason, the provision in a surety bond executed by a person charged under s. 379, I.P.C., that in case of default, the money would be payable to the State Government, is not invalid.[22]

Excluding offences . . . . . with respect to matters specified in List I or List II.—These words make it clear that while the present Entry is the general legislative head relating to offences, it excludes from its ambit special offences created by laws relating to matters included in Lists I and II, under Entry 93 of List I and Entry 64 of List II. The result is that if a State law is covered by Entry 64 of List II, read with some other Entry in that List, it is not necessary for the State Legislature to invoke the Concurrent power under Entry 1 of List III[24] ; hence, in such a case, no question or repugnancy to a Central law can possibly arise.[25] Further, once it is held that a legislation comes within Entry 64 of List II, it would not be necessary for the State Legislature to invoke the Concurrent

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20. *Ukha* v. *State of Maharashtra*, A. 1963 S.c. 1531 (*1541*).
21. *Corpn. of the City of Toronto* v. *the King*, (1939) A.C. 98.
22. *Yadavrao* v. *State*, A. 1954 M.B. 142.
23. *United Provinces* v. *Governor-General*, (1932) F.C.R. 124.
24. *Ramnaiah* v. *Supdt.*, A 1974 S.C. 31.
25. *Lakhinarayan* v. *Prov. of Bihar*, A. 1950 F.C. 59 (*63-4*).

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power for *ancillary* matters[24], such as laying down the procedure for the trial[26] of the offences created by it under Entry 64 of List II, or laying down certain presumptions[22] which would apply in such trial.

In short, what is excluded from the ambit of the Concurrent power are only specific offences against laws with respect to any of the matters specified in the Union and State Lists, and not offences of a general nature.[27-28] It has thus been held –

(a) Entries 1,2 and 93 of List I confers on Parliament exclusive jurisdiction to make laws relating to the recruitment, maintenance, operation, conduct and discipline of the Armed Forces and offences relating thereto ; but that power cannot be extended to cover the general criminal law, e.g., relating to adultery.[28]

(b) Entries 41 and 64 of List II gives the State Legislature *exclusive* jurisdiction to legislate with regard to the State Public Services relating to the recruitment, conduct and discipline of State public servants and offences relating thereto, but not offences relating to the general law of crimes which may be committed by anybody.[27]

Existing (Central) Laws. – Indian Penal Code (XIV of 1860) ; Prevention of Seditious Meetings Act (X of 1911) ; Police (Incitement to Disaffection) Act (XXII of 1922) ; Prevention of Corruption Act (II of 1947) ; Howrah Offences Act, 1857 ; Indian Official Secrets Act, 1923.

Legislation by Parliament. – Protection of Civil Rights Act (XXII of 1955) ; Drugs and Magic Remedies (Objectionable Advertisement) Act (XXI of 1954) ; Young Persons (Harmful Publications) Act, 1956 ; Suppression of Immoral Traffic in Women and Girls Act, 1956 ; Railway Property (Unlawful Possession) Act, 1966 ; Criminal Law Amendment Act, 1961 ; Unlawful Activities (Prevention) Act, 1967.

Medical Termination of Pregnancy Act, 1971 ; Indecent Representation of Woman (Prohibition) Act, 1986.

Commission Sati (Prevention) Act, 1987 ; Terrorist and Disruptive Activities (Prevention) Act, 1987 ; Prevention of Corruption Act, 1988 ; Religious Institutions (Prevention of Misuse) Act, 1988.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

OTHER CONSTITUTIONS

(A) *Canada.* – 'Procedure in criminal matters' is an exclusive Dominion subject [Sec. 91 (27)].

But the Province has the power – (a) to impose punishment for any law of the Province [Sec. 92 (15)]; (b) as to the constitution, maintenance and organization of criminal Courts [Sec. 92. (14)]. In the result, though the Dominion Parliament may give jurisdiction to Provincial Courts in criminal matters, in spite of any provincial statute relating to such Courts, the Dominion Parliament cannot regulate the procedure under a Provincial penal statute, coming under Sec. 92 (15).

(B) *Government of India Act, 1935.* – Item 2 of List III of that Act was the same as present Entry.

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26. In re Krishna A. 1954 Mad. 993
27. *Jagjit* v. *State of Punjab*, I.L.R. (1978) 2 P. & H. 335 (D.B.).
28. *Tripathi* v. *State*, (1988) Cr. L.J. 582 (paras. 11-14) J. & K.

INDIA

'Criminal proceedings'. – Unless there is a context which so indicates, 'criminal proceedings' indicate only those proceedings which are capable of being instituted under the ordinary criminal law of the land and do not include proceedings under military law (i.e., *court martial proceedings*).[29]

'Including all matters included in the Code of Criminal Procedure'. – The word 'including' is a word of enlargement and not *restriction*. Hence, all matters included in the Code of Criminal Procedure at the date of commencement of the Constitution, whether they relate to procedure or to *substantive right*, would be a concurrent legislative subject.[30] Investigation of offences would come under this Entry.[31]

Powers of Criminal Courts. – Parliament has exclusive power as regards the powers of all Courts (except the Supreme Court) with respect to any of the matters included in List I (Entry 95, List I). But Part II of the Code of Criminal Procedure (V of 1898) deals with the powers of Criminal Courts. Hence, notwithstanding Entry 95 of List I, a State Legislature shall have concurrent power (under Entry 2, List III) to legislate as regards the powers of Criminal Courts, even though the offence to be tried by such Courts is not under List I, e.g., an offence under the Arms Act (Entry 5 of List I).[32]

Existing (Central) Laws. – Coroner's Act (IV of 1871) ; Special Tribunals (Supplementary Provisions) Act (XXVI of 1946). Forfeiture Act, 1859 ; Indian Criminal Law Amendment 1908, 1932, 1938 ; Prevention of Seditious Meetings Act, 1911.

Legislation by Parliament. – Special Criminal Courts Jurisdiction Act, 1950 ; Criminal Law Amendment Act, 1952 ; Probation of Offenders Act, 1958 ; Abolition of Whipping Act, 1955 ; Criminal Procedure Code, 1973.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community ; persons subjected to such detention.

OTHER CONSTITUTIONS

Government of India Act, 1935. – There was no item in that Act corresponding to the present Entry. Item 34 of List III simply was 'Persons subjected to preventive detention under *Federal authority*'. As a result, the Provinces had no power of preventive detention save in the interests of 'public order'. Thus, it was held that the Provincial Legislature had no power to provide for preventive detention for 'black-marketing'.[33] The present Entry has been inserted to remove such difficulties.

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29. *Meads* v. *King-Emp.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by P.C. in *Meads* v. *King*, (1948) 52 C.W.N. 834 (P.C.)
30. *Narayanaswami* v. *Inspector of Police*, (1948) 11 F.L.J. 43 (F.B.).
31. *Ukha* v. *State of Maharashtra*, A. 1936 S.C. 1531 (*1541*).
32. *The King* v. *Mrinal Kanti*, (1950) 54 C.W.N. 753 (*755*).
33. *Basudeva* v. *Rex*, (1949) 4 D.L.R. 186 (F.B.)

INDIA

'Preventive detention'.—The present Entry is complementary to Entry 9 of List I.

The object of preventive detention is to *prevent* a man from doing something while that of punitive detention is to *punish* him for having done something.[4]

'Reasons connected with'.—These words imply that the connection between the reason for which preventive detention is sought to be prescribed and 'security of a State', 'public order' and the like must be 'real and proximate, not far-fetched and problematic'.[5] [See under Entry 1, List II, *ante*].

'Security of State' and 'Public Order. 'Law and Order', 'Public Order' and 'Security of the State' represent three concentric circles, differing in extent. The largest of them represents 'law and order', next represents 'public order' and the smallest represents security of the State.[6]

(a) A contravention of law affects order, but before it can be said to affect public order, it must affect the community or the public at large.[6] An act might affect law and order but not public order.[6]

(b) An act might affect public order but not security of the State.[6]

'Public order' and 'Law and order'. 1. As stated earlier a narrower construction to this expression has been given under the present Entry (which provides for deprivation of liberty) than that given under Entry 1 of List II (which relates to legislative competence).[7] [See p. 135, *ante*].

2. In the present context, public order is to be distinguished from 'law and order'. The distinction is as follows[8] :

> "Whether an act amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular *individuals* or a group of *individuals* it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the *community at large* and/or the *even tempo* of the community then it becomes a breach of the public order."[8]

3. "Conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really *turn out* to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the *smaller* circle."[9]

4. The distinction between a breach of law and order and a breach of public order lies not in the nature, or quality of the act, but in the degree and extent of its reach upon society.[9] Acts similar in nature but committed in different contexts and circumstances might cause different reactions.[9]

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4. *Gopalan* v. *State of Madras*, (1950) S.C.J. 174 (*205, 263*).
5. *R* v. *Basudeva*, A. 1950 F.C. 67 (*69*).
6. *Ram Manohar* v. *State of Bihar*, A. 1966 S.C. 740.
7. *Kanu* v. *State of W.B.*, A. 1972 S.C. 1956 ; *Amiya* v. *State of W.B.*, A. 1972 S.C. 2259 ; *Arun* v. *State of W.B.*, A. 1970 S.C. 1228.
8. *Gulab* v. *State of U.P.*, A, 1987 S.C. 2332 (*2337*).
9. *Ashok* v. *Delhi Admn.*, A. 1982 S.C. 1143 (*2338*).

Thus –

(i) A murder committed in a house ordinarily affects law and order but not public order, because even though people might be shocked thereby, the life of the community keeps moving at an even tempo.[10]

(ii) But even the killing of an individual by a member of another community, during a time of communal tension, may affect public order, because the repurcussions of the act embrace large sections of the community and incite them to make further breaches of law and order.[10]

'Maintenance of supplies and services. . . . . ' – Under the Government of India Act, 1935, it was held that though black-marketing in essential commodities might lead to a breach of the public peace, its connection with 'public order' was too remote to justify preventive detention for blackmarketing, under Entry 1 of List II of that Act. Hence, the above -quoted words have been introduced in the Constitution, conferring express power of preventive detention for maintenance of essential supplies and services.[11] 'And' in this expression is used in the disjunctive sense, so that under the Entry, preventive detention may be provided for the maintenance of either *supplies* essential to the community or *services* essential to the community or both.[12] It includes the maintenance of supply of *goods* or commodities essential to the community, even though 'supply of goods' is included in Entry 27 of List II.[11] The word 'maintenance' implies that an *apprehended* act of black-marketing may be controlled under the present Entry. That expression 'for reasons connected with' is significant. If the detention is for a reason connected with the maintenance of supplies and services essential to the community, e.g., black-marketing, it is covered by Entry 3 of List III even though it may affect the 'supply of goods'.[12] Where with regard to an essential commodity there is a system of controls, on which the maintenance of supplies and services depends, evasion of the control orders will prejudicially affect the 'maintenance' or up-keep of the supplies and services essential to the community. No distinction can in this respect be made between the acts of a petty shop-keper and those of a big trader [11]

'Security of a State'. – See p. 13, *ante*.

Analogous Provisions. The legislative power with respect to preventive detention is divided between List I and III as follows –

List I	List III
Entry 9 : Connected with Defence; foreign affairs; security of *India*.	Entry 3 : Connected with security of a *State* : public order; suplies and services essential to the community.

10. *Arun* v. *State of W.B.*, A. 1970 S.C. 1228.
11. *Jagarnath* v. *State of Bihar*, A. 1952 Pat. 185 (*188*) F.B.
12. *Dayanand* v. *State of Bihar*, A. 1951 Pat. 47.

Legislation by Parliament. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980;[13] National Security Act, 1980; Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art IV, Sec. 2 (2) of the United States Constitution provides—

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

The matter of inter-State delivery of criminals is regulated by an Act of Congress under which the Governor of the State to which the accused has fled, as a matter of course, delivers up the accused at the request of the Governor of the State where the offence was created. There have been some exceptional cases where the requisition has been ignored, e.g., on the ground that the accused would not receive *fair* trial in the State where he stands accused.[14] The constitutional obligation of inter-State rendition of criminals has thus been interpreted as a *moral* duty and not as a mandatory legal duty.[14]

The word 'crime' in the above clause has been interpreted to include only serious offence as distinguished from misdemeanour or trival offence.[15]

Again, the charge against the accused, in order to obtain an extradition, must be made in the form of some judicial proceeding having all the requisites which would have been sufficient for the arrest and detention of the accused had he been within the State seeking extradition.[16]

If the State upon which the demand is made has herself a complaint against the fugitive, she may enforce it before honouring the demand for extradition.[17] Extradition does not lie unless there has been a 'fleeing from justice'. Hence, (a) the accused must have been within the jurisdiction of the State accusing him and (b) must have fled from it.[18] But if the offender was within the State against which the offence was committed, at the time of the act constituting the offence, he may be liable to extradition, if he is found later outside that State.[19]

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13. *Cf. State of A.P.* v. *Subbarajamma*, A. S.C. 389 (paras. 1, 10).
14. *Kentucky* v. *Dennison*, (1861) 24 How. 66.
15. Hughes's Case, 1 Phil. (N.C.) 57 (64).
16. *People* v. *Brady*, 56 N.Y. 182.
17. *Taylor* v. *Taintor*, 16 Wall. 366.
18. Ex parte Smith, 3 McLean 133.
19. *Roberts* v. *Reilly*, (1885) 116 U.S. 80.

(B) *England.* – Though Great Britain is not a federal State, the Commonwealth is of a quasi-federal nature which necessitates a law for the rendition of a person who commits an offence in one part of the Queen's Dominions and flees to another part. This is provided for by the Fugitive Offenders Act, 1881, 1967.

(C) *Government of India Act, 1935.* – Item 3 of List III of the Government of India Act, 1935, was –

"Removal of prisoners and accused persons from one unit to another unit."

INDIA

Inter-State removal of offenders. One State is not bound under the Constitution to enforce the *criminal* judgments or orders of another State. Criminals may therefore seek to excape punishment by fleeing from the State where the offence was committed. When the States are independent, the transmission of an offender by the State where he has fled to the State where the offence is committed, is secured by 'extradition', which is an international procedure.

In a federal State, similar arrangement is necessary by reason of the fact that each State's jurisdiction is territorial and one State is not bound to enforce the criminal law of another State. The present Entry seeks to prevent such a situation, by making the inter-State delivery of criminals a concurrent subject of legislation. By making the subject of inter-State rendition of criminals concurrent, the Indian Constitution enables the Union to lay down compulsory and uniform rules for rendition, depriving the States of any discretion to refuse delivery in any case as has been claimed in the U.S.A

Legislation by Parliament.—Parliament has enacted the Transfer of Prisoners Act (XXIX of 1950) to provide for the removal from one State to another of persons confined in a prison.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Congress has no power relating to marriage and divorce, so that the laws relating to these vary from State to State.

(B) *Australia.* – In Australia these are exclusive federal subjects. Cls. (xxi) and (xxii) of Sec. 51 of the Constitution Act are –

"(xxi) Marriage.

(xxii) Divorce and matrimonial causes; and in relation thereto, rights, and the custody and guardianship of infants";

(C) *Canada.* – The Dominion has exclusive power [Sec. 91 (26)] over – "Marriage and divorce"; but the Provinces have exclusive authority over "the solemnisation of marriage in the Province" [Sec. 92 (12)].

It has been held that the Provincial jurisdiction as to solemnisation of marriage is an exception to the Dominion power.[20]

20. In re Marriage Legislation in Canada, (1912) A.C. 880.

(D) *Government of India Act, 1935.* – Items 6-7 of List III of the Government of India Act, 1935, were –

"6. Marriage and divorce; infants and minors; adoption".

"7. Wills, intestacy and succession, *save as regards agricultural land*".

INDIA

Competence of the State Legislature to modify personal law. Under the *Government of India Act.* 1935, questions were raised whether a Provincial Legislature could modify a rule of Hindu or Mahomedan Law.[21] The present Entry specifically gives a concurrent power to the State Legislature over all matters governed by personal law,[22] at the commencement of the Constitution.

Under the present Entry, the Legislature may not only enact general laws relating to marriage etc., but also different laws applying to different areas or classes of persons provided the classification is reasonable and does not offend against the equal protection guaranteed by Art. 14. Thus, it can prohibit bigamy amongst the Hindus without affecting the Mahomedan law relating to the matter.[22] But it cannot legislate as regards the marriage or succession of *particular* individuals in so far as such legislation denies the individual 'equal protection'.[23]

'Intestacy'. – Intestacy is the condition of dying without having made a will. 'Intestate' means and includes "every person deceased who has left undisposed of by will the whole, or any portion, of the estate on which he might (if not subject to incapacity) have tested".

'Succession'. – Succession is the 'transmission of the rights and obligations of a deceased to his heirs' and 'includes both intestate and testamentary succession'. 'Succession' in the present entry also comprehends devolution by survivorship under the Mitakshara law of joint family.[24]

A law which acquires an impartible estate and vests it in the Government is not a law relating to succession to impartible estates but comes under Entry 42 of List III.

'Personal law'. The Entry confers legislative power to enact laws, amend, alter or repeal the personal laws in whole or in part.[28]

Whether the power extends to agricultural land. There has been some controversy as to whether the power to enact personal laws under the present Entry extends to agricultural property as well, which comes under Entry 18 of List II. Two single Judges of the Allahabad High Court expressed the view that the power extends to agricultural lands as well, as there is no word of limitation in the present Entry as in Entries 6 and 7 of List III.[25] But this view has been overruled by a Division Bench of that High Court.[26]

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21. *Atmaram* v. *Emp.*, A. 1949 Bom. 71.
22. *Srinivasa* v. *Saraswathi*, A. 1952 Mad. 193.
23. *Ameeroonissa* v. *Mahboob*, (1953) S.C.R. 404, (413.) [No such question arose in the pre–Constitution case of *Jogendra* v. *Debendra*, A. 1942 P.C. 44, for then there was no provision like Art. 14 of the Constitution to consider].
24. Re Hindu Women's Property Act, A. 1941 F.C. 72 (79).
25. *Shakuntala* v. *Beni*, A. 1964 All. 165 (166); *Ram Jag* v. *Director*, A. 1968 All. 419.
26. *Prema Devi* v. *Jt. Director*, A. 1970 All. 238 (*241*).

In the opinion of the Author, it cannot be overlooked that agricultural land was specifically excluded from the corresponding item 7 of List III of the Government of India Act, 1935, and the same exclusion still exists in Entries 6 and 7 of List III of the Constitution which follow the present Entry. In this situation, it cannot but be held that the omission of the words "save as regards agricultural land" from the present Entry was a deliberate omission.[27] According to the doctrine of pith and substance as well, it must be held that the exclusive power of the State Legislature relating to land or land tenure cannot come into operation where the Legislature seeks to enact a personal law relating to succession or the like, which relates to *all* property. The subject-matter of such legislation is not 'property' but 'person'. It is because Entries 6 and 7 of List III would have, but for the words of exclusion, affect agricultural property, that the makers of the Constitution inserted the words of exclusion in those Entries. But they have been deliberately omitted from Entry 5, presumably because they were anxious to enact a uniform personal Code, comprehending all kinds of property. The Division Bench decision,[26] therefore, deserves reconsideration.

Existing (Central) Laws. – The Child Marriage Restraint Act (XIX of 1929; Hindu Widow's Remarriage Act (XV of 1856); Indian Christian Marriage Act (XV of 1872); Indian Divorce Act, 1869; converts Marriage Dissolution Act, 1886; Indian Foreign Marriage Act (XIV of 1903); Anand Marriage Act (VII of 1909); Child Marriage Restraint Act, 1929; Arya Marriage Validation Act (XIX of 1937); Dissolution of Muslim Marriages Act (VIII of 1939); Parsi Marriage and Divorce Act (III of 1936); Muslim Personal Law (Shariat) Application Act (XXVI of 1937); Indian Succession Act (XXXIV of 1925); Indian Majority Act (IX of 1875); Guardians and Wards Act (VIII of 1890); Partition Act (IV of 1893); Hindu Inheritance Removal of Disabilities Act (XII of 1928); Married Women's Property Act (III of 1874) Bangalore Marriage Validating Act (XVI of 1936). Caste Disabilities Removal Act, 1850; Hindu Disposition of Property Act, 1906; Hindu Gains of Learning Act, 1930.

Legislation by Parliament. – Special Marriage Act (XLIII of 1954); Hindu Marraige Act (XXV of 1955); Hindu Adoptions and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956; Hindu Succession Act, 1956.

Dowry Prohibition Act, 1961; Foreign Marriage Act, 1969; Muslim Women (Protection of Rights on Divorce) Act, 1986.

6. Transfer of property other than agricultural land; registration of deeds and documents.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 8 of List III of the Government of India Act, 1935, was the same as the present Entry.

INDIA

'Transfer'. This word would include partition of a joint family property.[29]

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27. This is also the view taken in *Lakshmi Devi* v. *Surendra*, A. 1957 Orissa 1; *Haridass* v. *Hukmi*, A. 1965 Punj. 254.
28. *Srinivasa* v. *Saraswathi*, A. 1952 Mad. 193.
29. *Santhamma* v. *Neelamma*. A. 1959 Mad. 642 (*650*).
30. *Bapalal* v. *Thakurdas*, A. 1982 Mad. 399 (para. 10).
31. *Lingappa* v. *State of Maharashtra*, A. 1985 S.C. 389 (para. 26).

Transfer of non-agricultural property.—Legislation relating to the relationship of landlord and tenant, including rent control, with respect to non-agricultural land will come under the present Entry and not Entry 18 of List II.[30]

But transfer of agricultural land, whether belonging to Scheduled Tribes or other persons, would come under Entry 18 of list II.[31a]

Analogous Provision.—Transfer of agricultural land is a State subject, in Entry 18, List II, *ante*.

Existing (Central) Laws.—Transfer of Property Act (IV of 1882); Indian Registration Act[31] (XVI of 1908); Conveyance of Land Act (XXXI of 1954); Government Grants Act (XV of 1895).

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 10 of List III of that Act was the same as the present Entry.

INDIA

'Contracts relating to agricultural land'.—Contracts relating to agricultural land are excluded from the present Entry in the Concurrent List, as it was in the corresponding Item 10 of List III of the Government of India Act, 1935. A contract between a landlord and tenant for payment of rent in respect of agricultural land irrespective of the form in which it might be clothed, is a contract relating to agricultural land and is accordingly excluded from the Concurrent List.[32] Hence, the State Legislature has exclusive competence over such contracts and no question of repugnancy to the provisions of any existing Indian law would thus arise.

Read in this connection Entry 24 of List II which gives the State Legislature exclusive jurisdiction to legislate with respect to "relation of landlord and tenant, and collection of rents . . . .". *See also* Entry 30 of List II,—'relief of agricultural indebtedness'.

Other contracts would come under the present Entry, but not 'forward contracts' which fall under Entry 48 of List I.[33]

Entry 7 of List III and Entry 34 of List II. In upholding the validity of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, a Division Bench has held that where the object of the Legislature is to prohibit certain noxious contracts of a gambling nature, it would come under the Concurrent List III (Entry 7) and not Entry 34 of List II, even though one feature of such contracts is the award or 'prizes' to subscribers and the legislation has an incidental impact on 'lotteries'.[34]

31a. *Cf. Samsamkaran* v. *I. G. of Registration*, A. 1969 A.P. 134.
32. *Hulas Narain* v. *Deen Mohammad*, A. 1943 P.R. 9. (S. 178 B of the Bihar Tenancy Act, 1934, upheld).
33. *Waverly Jute Mills* v. *Raymon & Co.*, A. 1963 S.C. 90 (97).
34. *Srinivasa Enterprises* v. *Union of India*, A. 1981 S.C. 504 (para. 15).

Existing (Central) Laws.—Indian Contract Act (IX of 1872); Powers of Attorney Act (VII of 1882); Carriers Act (III of 1865); Indian Partnership Act (IX of 1932); Indian Sale of Goods Act (III of 1930); Indian Bills of Lading Act (IX of 1856).

Legislation by Parliament.—Specific Relief Act, 1963, Chit Funds Act, 1982[35]; Prize Chits and Money Circulation Schemes (Banning) Act, 1978[16].

8. Actionable wrongs.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 14 of List III of the Act was—"Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II."

INDIA

'Actionable wrong'.—An actionable wrong is an act or omission amounting to the infringement of a legal right and causing damage, for which an action for damages lies.[36] In a wider sense it includes breach of contract also, but since there is a separate entry relating to contract, the present entry may be taken to relate to actionable wrongs in the ordinary sense of 'torts'.

Existing (Central) Laws.—Indian Fatal Accidents Act (XIII of 1855); Employers' Liability Act (XXIV of 1938); Legal Representatives' Suits Act, 1855; Sheriff's Fees Act, 1852; Judicial Officers' Protection Act, 1850.

9. Bankruptcy and insolvency.

OTHER CONSTITUTIONS

(A) *U.S.A.—Art. I, Sec.* 8 (4) empowers Congress to establish—

"uniform laws on the subject of bankruptcies, throughout the United States."

This power has, however, been interpreted as a *concurrent* power. If and in so far as Congress abstains from exercising this power, the States are at liberty to legislate on the subject; but whenever Congress legislates, the State legislation must yield to the uniform laws prescribed by Congress.[37]

(B) *Australia.*—Sec. 51 (xvii) of the Constitution Act confers (concurrent) power upon the Commonwealth Parliament, subject to Sec. 109, to legislate with respect to—"Bankruptcy and Insolvency".

This placitum, together with Sec. 77 (iii), empowers the Commonwealth Parliament to confer upon State Courts all powers appropriate to bankruptcy juridiction,[38] (b) Commonwealth bankruptcy law, affecting the allowances payable to the member of a State Legislature, is valid.[39]

(C) *Canada.*—Sec. 91 (21) of the British America Act confers exclusive jurisdiction upon the Dominion Parliament to legislate in relation to 'Bankruptcy and Insolvency'.

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35. *Sri Visalam C.F.* v. *Union of India*, A 1989 Knt. 125 (para. 10.1) D.B.
36. *State of Tripura* v. *Prov. of East Bengal*, (1950) S.C.R. 1.
37. *Sturges* v. *Crowninshield*, (1819) 4 Wh. 122.
38. *Bond* v. *Bond & Co.*, (1930) 44 C.L.R. 11.
39. *Stuart Robertson* v. *Lloyd*, (1942) 47 C.L.R. 482.

Under this power, the Dominion Parliament is competent to interfere with 'property, civil rights' and procedure within the Provinces, so far as a general law relating to bankruptcy and insolvency might affect them.[40] Similarly, notwithstanding the Provincial power over the administration of justice and constitution of Courts [sec. 92 (14)], the Dominion Parliament has the power to establish an Insolvency Court and to regulate its procedure[41] or to invest Provincial Courts with a new jurisdiction in insolvency.[42]

(D) *Government of India Act, 1935,* – The first part of item 12 of List III contained this subject.

INDIA

'Bankruptcy and Insolvency'. Broadly speaking, 'bankruptcy' involves the vesting of the property of debtors in trustees, while 'insolvency' provides for assignments and compositions by insolvent debtors with 'bankruptcy'.[43] While laws of insolvency operate at the instance of the debtor, bankruptcy laws operate at the instance of the creditor.

From another standpoint –

"Bankruptcy is the state or condition of a person who is *absolutely* unable to pay a debt, without respect to time. The term imports a want of assets convertible into money sufficient to pay the debt. The term is distinguishable from insolvency which means inability to meet obligations as they mature".[44]

Object and scope of Bankruptcy and Insolvency laws. The following, *inter alia,* may be said to be the objects of such legislation:[45] (a) The equitable and rateable distribution of the debtor's estate among his creditors, whether he is willing or not. (b) The discharge of the debtor, who has not been guilty of fraudulent conduct, from future liability for the debts then existing. (c) Ancillary provisions, such as punishment for frauds committed in contemplation of bankruptcy; laying the conditions in which the law of insolvency is to be brought into operation, and the effect of its operation.

In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court *to stop individual action* by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

The justification for such proceeding by a creditor generally consists in *an act of bankruptcy by the debtor*, the conditions of which are defined and prescribed by the statute law".[46]

It cannot be maintained that legislative provision as to *composition* by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.[46]

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40. *Cushing* v. *Deputy*, (1880) 5 App. Cas. 40.
41. *Hodge* v. *Queen*, (1882) 7 O.A.R. 246.
42. *A.G. of Canada* v. *Sam Chak*, (1909) 44 N.S. 19.
43. *A.-G. Alberta* v. *A.-G. Canada*, A. 1943 P.C. 76 (*81*).
44. *Hudson Furniture Co.* v *Harding*, 70 Fed. Rep. 468.
45. *A.-G. for Ontario* v. *A.G. for Canada*, (1894) A.C. 189.
46. *Br. Columbia* v. *A.-G. of Canada*, A. 1937 P.C. 95 (*98*).

Ancillary matters. In exercise of the power under the present Entry, a law of Insolvency may provide that no stamp duty need be paid in respect of transfer of a property which is vested on the Official Assignee.[47]

Existing (Central) Laws. – Presidency Towns Insolvency Act (III of 1909); Provincial Insolvency Act (V of 1920).

10. Trust and Trustees.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 9 of List III of that was the same.

INDIA

Analogous Provision. – *See* Entry 28, *post,* relating to 'charities' and charitable and religious endownments, and Entry 11 as to official trustees.

Existing (Central) Laws. – Indian Trusts Act (II of 1882); Public Accountants' Default Act, 1850.

11. Administrators-General and official trustees.

Government of India Act, 1935. – This Entry corresponds to the latter part of item 12 of List III of the Government of India Act, 1935.

'Administrator-General'. – The Administrator-General is an officer appointed by a Provincial Government or the Central Government under the Administrator-General's Act (III of 1913), for the protection and administration of the estate of a deceased person where the next-of-kin take no steps or are resident abroad.

Existing (Central) Laws. – Official Trustee's Act (II of 1913).

Legislation by Parliament. – Administrator-General Act, 1963.

11A. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.

Amendment. By the 42nd Constitution Amendment Act, 1976, the expression 'administration of justice' has been transferred from Entry 3 of List II, in order to make it a concurrent power, instead of an exclusive State power, as held in the case of *Narottam Das.*[48]

'Administration of justice'. It includes civil as well as criminal justice. This power must include the power of defining, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily.[48]

It is, of course, open to the Union Legislature to bar the jurisdiction of the new Court by a special enactment with regard to any of the matters in List I, but so long as such jurisdiction is not barred, the Court will have jurisdiction to try all suits and proceedings, including those which relate to matters within List I.[48]

(i) The Bombay City Civil Court Act, 1948, purports to create an additional Civil Court for Greater Bombay having jurisdiction to try *all* suits and proceedings of a civil nature not exceeding ten thousand rupees in value. It was contended

47. *Official Assignee* v. *Inspector-General*, A. 1981 Mad. 54 (para. 6).

48. *State of Bombay* v. *Narottam Das*, A. 1951 S.C. 69; *Mahindroo* v. *Bar Council*, A. 1968 S.C. 888.

that the Act was *ultra vires* the Legislature of Bombay because it conferred jurisdiction on the new court not only in respect of matters on which the Provincial Legislature is competent to legislate but also in respect of matters included in List I regarding which only the Central Legislature could legislate. *Held*, the Act was within the power of the Provincial Legislature with respect to 'administration of justice' constitution of all Courts . . . . . ' (cf. Entry 3 of List II of the Constitution), which empowers the Provincial Legislature to confer *general* jurisdiction upon the Courts relating to matters included in all the Lists, subject to special legislation by the respective Legislatures within their own fields.[48]

(ii) The Union Parliament has, under Entry 63 of List I, the power to legislate with respect to the Universities specified in that Entry. Hence, Parliament may enact that suits in which these Universities are concerned shall be tried only by particular Courts mentioned in that enactment; but until such an enactment is made by Parliament a Court (established under Entry 3 of List II), which would otherwise be the proper Court to try a suit relating to the University, shall have jurisdiction to try such suit. In short, in the absence of special legislation, the Civil Court, having jurisdiction under s. 9 of the Civil Procedure Code, shall have jurisdiction to try any matter arising under any subject specified in the three Lists as the case may be.[48]

(iii) Entry 30 of List I deals with "carriage of passengers and goods . . . ." Now, if any of the goods carried by a carrier is lost and a suit is brought in regard to them, the suit will be triable by the Court having jurisdiction over the matter under the Civil Procedure Code, subject to any special legislation on the subject by the Union Legislature, notwithstanding the fact that 'carriage of goods' is a subject mentioned in List I.[48]

'Constitution of Courts'. 1. Barring the Supreme Court and High Courts [see Entries 77-8, List I], the constitution of all Courts is a State subject. The Indian Constitution thus follows the Canadian example and differs from that of the American system by avoiding a dual hierarchy of Courts—Federal and State. It is the State Courts which are to administer both Federal and State laws; and administration of justice as a whole [subject to Entries 77-9 of List I and 46 of List III] is made a State subject. Of course, Parliament has the power to create additional Courts for the better administration of particular Union Laws [Art. 247].

2. While both the constitution as well as jurisdiction of the Supreme Court is included in Entry 77 of List I, only the constitution of the High Court is included in Entry 78 of List I, and the administration of justice in all Courts has been made a concurrent subject under the new Entry 11A of List III.

'Court'. The characteristics of a Court have been fully explained at pp. 193 ff. and 308 ff of Vol.G. Shortly speaking—

(i) To be a Court, the person or persons who constitute it must be entrusted with 'judicial' functions, i.e., of deciding litigated questions according to law, and such powers must be derived from the State[49] (as distinguished from the agreement of parties as in case of arbitration).

(ii) A Court has the power to pronounce a definitive judgment.

(iii) A Court is bound by the rules of evidence.

49. *Bharat Bank* v. *Employees of Bharat Bank*, A. 1950 S.C. 188 (*195*).

(iv) A party has a *right* to be heard and to adduce evidence in support of his cause before a Court.

(v) A Court is under an obligation to decide solely on the basis of the materials on the record and in accordance with the law.

(vi) Another point of distinction between the judicial and arbitral functions is that while the former is concerned with the ascertainment, declaration and enforcement of the rights and liabilities *as they exist,* or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitrator is to ascertain and declare, but *not to enforce*, what in the opinion of the arbitrator *ought to be* the respective rights and liabilities of the parties in relation to each other.[50]

It is to be noted that Revenue Courts are also included in the present Entry. In the result, an administrative tribunal which cannot come under any of the three classes of civil, criminal or revenue courts, are outside the purview of the present Entry, e.g., a Rent Controller.[51]

Jurisdiction of Courts other than the Supreme Court and the High Courts.

1. The expression 'constitution and organisation of Court' is wide enough to include the power to confer jurisdiction (both civil and criminal) upon the Courts set up by the State Legislature under the present Entry.

2. While Entry 95 of List I, Entry 65 of List II and Entry 46 of List III of the Constitution confer power in the respective Legislatures to invest the Courts with *special* jurisdiction relating to particular subjects included in those Lists, when the Legislature was dealing with those subjects, item 3 of List II confers power upon the State Legislature to invest the Courts with *general* jurisdiction to try all causes of a civil nature, subject to the power of the Central and State Legislatures to make 'special provisions' relating to the particular subjects included in their respective legislative list.[52] In other words, the several Legislatures, while legislating within their respective spheres, can exclude or bar the jurisdiction of the Courts in regard to those matters, and can also confer special jurisdiction relating to those matters.[51] Thus, a valid Act of the Union or State Legislature may provide that any suit or proceeding concerning the subject-matters of that Act shall be triable by the Court or Courts specified therein.[52]

3. But so long as no such special Courts or jurisdiction are created, the Courts established under Entry 3 of List II shall have jurisdiction to try matters arising under the special Acts referred to above.[52]

4. In exercise of this power relating to jurisdiction of Courts, the State Legislature is competent to legislate with regard to the jurisdiction of Courts, both affirmatively as well as negatively. In other words, it can not only confer

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50. *A.G. of Australia* v. *R.*, (1957) 2 All E.R. 45 (*50*) P.C.

51. *State of U.P.* v. *Ratan*, A. 1956 All. 258 (265). [The contrary view taken in *Kedarnath* v. *Nagindra*, A. 1954 Pat. 96 (99) is not sound. The alternative view taken in this Patna High Court is, however, correct, namely, that the power to set up administrative tribunals may be claimed by the respective Legislatures as ancillary power under different substantive powers, e.g., under Entry 6 or 7 of List III, while legislating with respect to transfer of property or contracts, the Union or the State Legislature, as the case may be, may provide administrative tribunals to determine disputes arising under those laws.]

52. *State of Bombay* v. *Narottamdas*, A. 1951 S.C. 69 (*71*), Fazl Ali J.

jurisdiction upon the Courts, but also *bar* jurisdiction upon any matter or take away existing jurisdiction from them. This power must include the power of defining, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and peculiarily.[52-53] It is, of course, open to the Union Legislature to bar the jurisdiction of the new Court by a special enactment with regard to any of the matters in List I, but so long as such jurisdiction is not barred, the Court will have jurisdiction to try all suits and proceedings, including those which relate to matters within List I.[53-54]

Power of State Legislature as to jurisdiction of High Court. Under the present Entry, read with Entry 65 of List II, the State Legislature has to legislate with respect to the jurisdiction of the State High Court except in so far as it is excluded by Entry 95 of List I.[55] The present Entry, thus, includes the power to provide for an arrangement to deal with a class of cases, e.g., to provide that all appeals in the High Court shall be heard by not less than two Judges.[55]

Revenue Courts. The constitution and organisation of a Revenue Court and the procedure therein would come under this Entry.

Hence, this Entry would include the subject of recovery of public demands arising within the State.[56] If, however, the demand has to be recovered in a State outside the State in which it arises, the subject-matter would come under Entry 43 of List III[56].

Special Courts. 1. By reason of this Entry, parliament has concurrent power to set up Special Courts for the trial of offences of a special class.[57]

2. The State Legislature has similar power to create special courts to try particular subjects. As soon as such special court is established, the cause that arise in respect of those subjects would then be excluded from the jurisdiction of the courts of general jurisdiction.[58]

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

OTHER CONSTITUTIONS

(A) *Australia.* – Sec. 51 (xxv) of the Constitution Act gives the Commonwealth Parliament concurrent jurisdiction to legislate with respect to –

"The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States".

(B) *Government of India Act, 1935.* – Item 5 of List III of that Act was the same as the present Entry.

INDIA

This Entry includes the power to define 'foreign judgments' and to provide for their enforceability.[59]

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53. *Amarendra v. Bikash*, A. 1957 Cal. 534 (544); *Kochikka* v. *Kunjipennu*, A. 1961 Ker. 226 (230).
54. *Ahmed* v. *Inspector*, A. 1959 Mad. 261 (268); *Siddamma* v. *Nanje*, A. 1952 Mys. 75.
55. *Amarendra* v. *Bikash*, A. 1957 Cal. 534 (544).
56. *Mukherjee & Co.* v. *Union of India*, A. 1964 Cal. 165 (171-2).
57. In re., Special Courts Bill, 1978 A. 1979 S.C. 479 (para. 44).
58. *State of Bombay* v. *Narottam*, A. 1951 S.C. 69 (85).
59. *Gouri Lal* v. *Jugal Kishore*, A. 1959 Punj. 265 (269) F.B.

Existing (Central) Laws.—Indian Evidence Act (I of 1872); Bankers' Books Evidence Act (XVIII of 1891); Indian Oaths Act (X of 1873); Commercial Documents Evidence Act (III of 1939); Recusant Witnesses Act (XIX of 1953); Destruction of Records Act, 1917.

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 4 of List III was—

"Civil procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act."

INDIA

'Civil Procedure'.—This expression in the present Entry is used in the general sense meaning the procedure applicable to litigation generally; it does not include a special law of procedure which is applicable only to litigation regarding a special matter.[60]

But the present Entry is not restricted to matter already included in the Code of Civil Procedure.[61]

'Including all matters included in the Code of Civil Procedure'.— These words mean that all matters, *whether relating to procedure or not*, included in the Code of Civil Procedure at the date of commencement of the Constitution, are concurrent legislative subjects. The above words *enlarge* the scope of the present Entry, by including every matter included in the Code of Civil Procedure whether they are matters of procedure or not.[62] But there is no warrant for including in this Entry anything which neither relates to civil procedure nor is included in the Code.[63]

Arbitration.—Arbitration is "a reference to the decision of one or more persons of a particular matter in difference between the parties".[64] It is a 'substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law'.

Analogous provisions.—'Civil procedure' in the present Entry must be held to exclude matters relating to the jurisdiction and powers of Courts relating to matters included in Lists I and II which are specially included in Entry 95 of List I and 65 of List II, excepting of course, those provisions of the Civil Procedure Code (Act V of 1908) itself, which relate to jurisdiction and powers of Courts, e.g., *res judicata*, execution, etc., for the present Entry expressly includes '*all matters* included in the Code of Civil Procedure'.

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60. *Bir Bikram* v. *Tofazzal*, (1942) 46 C.W.N. 999 (*1002*).
61. *Shri Ram* v. *Gauri Shankar*, A. 1961 All. 321.
62. *Viswanath* v. *Harihar*, (1938) 17 Pat. 714 (*725*).
63. *Stewart* v. *Brajendra.*, A. 1939 Cal. 628.
64. *Collins* v. *Collins*, (1858) 28 Ch. 186.

Existing (Central) Laws. – Code of Civil Procedure (V of 1908); Indian Arbitration Act (X of 1940); Suits Valuation Act, 1887; Unclaimed Deposits Act, 1866.

Legislation by Parliament. – Limitation Act, 1963.

14. Contempt of Court, but not including contempt of the Supreme Court.

Scope of Entry 14. 1. This Entry relates to the contempt of all Courts, including the High Court,[65] but excluding the Supreme Court.

2. By virtue of this power, it is competent for Parliament to regulate the *procedure* in a High Court to punish for contempt, even under its inherent jurisdiction, notwithstanding Art. 215.[65]

'Contempt of Court'. – See Vol.C, pp. 141 *et seq* where the law of contempt of Court has been fully dealt with.

'Court'. – See under Entry 3, List II, *ante*.

Analogous Provisions. – Art 19 (2) excepts contempt of Court from the guarantee of 'freedom of speech and expression' and empowers the State to make any law relating to this subject. That legislative power is contained in the present Entry.

Contempt of the Supreme Court is left to be dealt with by that Court [Art. 129], subject to regulation by Parliament [Entry 77, List I, *ante*].

Legislation by Parliament. – Contempt of Courts Act, 1971.[65-66]

15. Vagrancy; nomadic and migratory tribes.

Other Constitutions

(A) *England.* – The offence of vagrancy is rather widely comprehended in the Vagrancy Act, 1824, which punishes three classes of offenders, viz., (a) Idle and disorderly persons; (b) Rogues and vagabonds; (c) Incorrigible rogues[67].

(B) *Australia.* – Sec. 51 (xxvi) of the Consititution Act gives concurrent power to the Commonwealth to legislate with respect to –

"The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."

(C) *Government of India Act, 1935.* – Item 23 of List III of the Act was –

"European vagrancy; criminal tribes".

India

"Vagrancy". – Vagrancy means the wandering or going about from place to place by an idle person who has no lawful, visible means of support, and who subsists on charity and does not work for a living though able so to do.

Existing (Central) Laws. – European Vagrancy Act (IX of 1874).

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65. *Bd. of Revenue* v. *Vinay*, A. 1981 S.C. 728 (para. 13).
66. *Advocate Genl.* v. *Koteswara*, (1984) 2 Cr. L. J. 1171 (A.P.).
67. Kenny, Outlines of Criminal Law, 1958, pp. 411-5.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

OTHER CONSTITUTIONS

(A) *England.*—The expression 'mental deficiency' is much wider than 'lunacy' and covers all cases of material abnormality, including idiots, imbeciles, feeble-minded and persons having criminal propensities owing to mental defectiveness (vide the Mental Deficiency Acts, 1913 and 1927 and s. 2 of the Homicide Act, 1957). Mental Health Act, 1959, 1983.

Other statutes relating to lunacy include the Trial of Lunatics Act, 1883; Criminal Lunatics Acts, 1800, 1884. Mental Treatment Act, 1930.

(B) *Government of India Act, 1935.*—Item 18 of List III of the Act was the same as the present Entry, but 'Ranchi European Mental Hospital' was placed in List I (Item 52).

INDIA

"Lunacy".—Lunacy is an "imbecility of mind, a weakness of mind between the limits of absolute idiocy on the one hand and of perfect capacity on the other".

Analogous Provisions.—While correction of criminals through prisons, reformatories and the like has been made a State subject (Entry 4, List II), the correction of *mental deficients* has been made concurrent, by the present Entry.

Existing (Central) Laws.—Ranchi Mental Hospital Act, 1922.
Legislation by Parliament.—Mental Health Act, 1987.

17. Prevention of cruelty to animals.

Government of India Act, 1935.—The present Entry is the same as item 22 of List III of the Act of 1935.

Existing (Central) Laws.—Prevention of Cruelty to Animals Act (XI of 1890).
Legislation by Parliament.—Prevention of Cruelty to Animals Act, 1960.

17A. *Forests.*

Amendment. This Entry has been transferred from Entry 19 of List II to the Concurrent List, by the Constitution (42nd Amendment) Act, 1976.

Forest. 1. This word includes within its compass—(i) forest produce in its natural state lying in the State such as trees with fruits, shrubs, bushes, pastures etc.; (ii) mines and quarries embedded in the earth, with their produce locked up in the land; (iii) stray animals living in the forest;[69] (iv) land included in a forest.[70]

2. Even if any forest produce is severed from its place of origin, through the intervention of human agency, it will continue to be a part of the forest if such produce continues to lie in the forest in its primary or predominantly primary state.[69,71] But it will cease to be part of the 'forest' if it loses its primary state by reason of any sophistication done to it.[69]

68. *Ingram* v. *Wyatt* (1828) 1 Hag. E.R. 401.
69. *Waghmare* v. *State of Maharashtra*, A. 1978 Bom. 119 (paras. 21-22) F.B.
70. *Durgaji* v. *State of Bihar*, A. 1958 Pat. 65.

17B. Protection of wild animals and birds.

Amendment. This Entry has been transferred from Entry 20 of List II, by the 42nd Amendment Act, 1976.

Legislation by Parliament. – Wild Life (Protection) Act, 1972 [passed by virtue of resolutions under Act. 252(I) of the Constitution, because at that time, this Entry was in List II].

18. Adulteration of foodstuffs and other goods.

OTHER CONSTITUTIONS

(A) *U.S.A.* – The State has the power to control adulteration of foods and drugs under its police powers. Congress has also legislated on the subject under its power of inter-State and foreign commerce.[72] (The Food and Drugs Act, 1960, thus prohibits the misbranding and adulteration of food and drugs).

(B) *Canada.* – The Dominion Parliament has drawn the power to control adulteration under its 'criminal power' [s. 91 (27)].[73-74]

(C) *Government of India Act, 1935.* – This subject belonged to the State List under the Government of India Act, 1935 (Item 30 of List II).

INDIA

'Adulteration'. It means the "mixing with any substance intended to be sold of any ingredient which is dangerous to health or which makes the substance *other than* that as which it is sold or inteded to be sold."

A very comprehensive definition of the word 'adulterated' has been adopted in s. 2 (i) of the prevention of Food Adulteration Act (XXXVII OF 1954).

Legislation by Parliament. – Parliament has enacted the Prevention of Food Adulteration Act (XXXVII of 1954) which repeals all corresponding Provincial or State laws on the subject. This Act, thus, forms the sole and exclusive Indian law on the subject.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 19 of List III of the Act was –

"Poisons and dangerous drugs".

INDIA

'Drug'. – A drug is defined in Sec.3 (b) of the Drugs Act (XXIII of 1940) as follows :–

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71. *Harsi Timber Assocn.* v. *State*, A. 1987 M.P. 57 (para. 6).
72. *The Dermott* v. *Wisconsin*, (1913) 228 U.S. 115.
73-74 *R.* v. *Perfection Creameries*, (1939) 3 Dom. L.R. 185.

"'drug' includes all medicines for internal or external use of human being or animals, and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals, other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine."

'Drugs'. While drugs, generally, come under the present Entry, it may come –

(a) under Entry 51 of List II, if it is a narcotic drug as to excise duty;[74]

(b) if it is opium, its cultivation, manufacture and sale for export shall be exclusively under Entry 59 of List I.[74]

Analogous Provisions. A drug which falls under the present Entry may be the subject of an excise duty under Entry 51 List II if it is a 'narcotic' or a narcotic drug or an intoxicating liquor.[75]

Existing (Central) Laws. – Poisons Act (XII of 1919); Drugs and Cosmetics Act, 1940.

Legislation by Parliament. – Insecticides Act, 1968; Narcotic Drugs and Psychotropic substances Act, 1985.

20. Economic and social planning.

'Planning'. – Planning is essential to social and economic progress. In a democratic government where the administration is diversified and is under the control of various persons and agencies, some integrated programme and the special study of particular problems e.g.,material resources of the country in housing, population, consumption, are absolutely necessary for a long-range development.

Successful planning tends to make people's lives happier by an improvement of the environments and by enabling activities being carried on more efficiently and has wastefully, and thus increasing wealth.[76]

The present Entry confers the power to legislate for land development and town and country planning.[76.]

20A. Population control and family planning.

Amendment. This Entry has been, inserted by the Constitution (42nd Amendment) Act, 1976, transferring a portion from Entry 3 of List II (see *ante*).

21. Commercial and industrial monopolies, combines and trusts.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Congress has assumed the power to make anti-trust laws from the federal 'commerce power'.

(B) *Canada.* – The power to deal with restrictive trade practices, such asunfair combinations, has been deduced by the Dominion Parliament from its 'criminal' power [s. 91 (27)].[77]

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75. *Indian C. & P. Works* v. *State of A.P.*, A. 1966 S.C. 713 (*715*).
76. *Maniklal* v. *Kakwana*, A. 1967 S.C. 1373 (*1382*).
77. *P.A.T.A.* v. *A.-G., Canada*, (1931) A.C. 310; *A.-G. of Br. Columbia* v. *A.-G. of Canada*, (1937) A.C. 368.

INDIA

'Monopolies, combines and trusts'.—Prevention of concentration of means of production to the common detriment is one of the directive principles of our State policy [*see* Art. 39 (*b-c*)]. For this prupose, the State may impose reasonable restrictions upon the freedom of trade or business.[78]

This entry also empowers the State to make laws conferring monopoly on itself to the exclusion of citizens doing a particular business.[78-79] It is not confined to the grant or creation of commercial or industrial monopolies.[78]

Entry 26 of List II which invests the States with exclusive authority to legislate with respect to trade and commerce within the State does not derogate from the authority conferred by the present Entry concurrently on Parliament and the State Legislatures to create commercial and industria monopolies.[78]

21. Commercial and industrial monopolies, combines and trusts.

'Monopolies'. 1. This entry empowers the State to make laws conferring monopoly on itself to the exclusion of citizens doing a particular business.[79-80] It is not confined to the grant or creation of commercial or industrial monopolies.[75]

2. It also gives the State power to control monopolies.[80]

3. The power under the present Entry is not controlled by the generality of power relating to 'trade and commerce' under Entry 26 of list II or 33 of List III.[80]

4. It cannot be contended that by reason of the present Entry, a monopoly in favour of the State cannot be created by subordinate legislation, in the absence of the statute itself creating such monopoly.[81]

Legislation by Parliament.—Monopolies and Restrictive Trade Practices Act, 1969.

22. Trade Unions; industrial and labour disputes.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Congress has undertaken to legislate regarding labour disputes only as regards labour engaged in railroads.[82]

As regards the right of collective bargaining or the right of the worker to join a trade union, the earlier attempts to guarantee such right by federal legislation failed owing to the attitude of the Supreme Court.[83] But in 1937, the Supreme Court upheld the validity of the National Labour Relations Act. 1935, known as the Wagner Act[84] which guarantees to all workers engaged in *inter*-State commerce to join any union, and makes it obligatory upon the employer to bargain collectively with the unions and to interfere with them in any way. It is to be noted, however, that federal ligislation relating to trade unions or labour *disputes* does not extend beyond *inter*-State commerce.

(B) *Australia.*—Sec. 51 (XXXV) of the Constitution Act empowers Parliament to legislate with respect to—

"Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State."

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78. *Narayanappa* v. *State of Mysore*, A. 1960 S.C. 1073 (*1078*).
79. *Kondala* v. *A.P.S.R.T.C.*, A. 1961 S.C. 82 (*87*).
80. *Narayanappa* v. *State of Mysore*, A. 1960 S.C. 1073 (*1078*).
81. *State of T.N.* v. *Hind Stone*, A. 1981 S.C. 711 (paras. 7, 9); *Narayanappa* v. *State of Mysore*, A. 1960 S.C. 1073.

This placitum does not empower Parliament to interfere with State instrumentalities.[85] But municipal corporations established under State laws are not such instrumentalities.[86] The immunity of State instrumentalities is confined to stictly governmental functions.[87]

Under the above placitum, Parliament has power (a) to make reference of industrial disputes to the Commonwealth Court of Conciliation;[88] (b) to provide for registration of associations and for cancellation of such registration;[89] (c) to prohibit the doing of anything in the nature of a 'lockout' or 'strike' as defined by the Act.[90] The power of arbitration conferred by this placitum is a power of judicial determination.[91] It does not authorise the establishment of a tribunal which would give its decree on discussion amongst themselves, without hearing the disputants.[92]

'Extending beyond the limits of any one State' means that the dispute is one existing in two or more States, or in other words, covering Australian territory comprised within two or more States.[93]

(C) *Government of India Act, 1935.* – Item 29 of List III of that Act was the same as the present Entry.

INDIA

'Industrial and labour disputes'. 1. This Entry has a wide scope. It not only includes the power to legislate with respect to industrial disputes or disputes arising out of 'industry', but also any labour dispute, i.e., dispute arising between employers and employees of any class, – even though the employers were not conducting an 'industry' in the usual sense of that word.[94] Hence, the Industrial Disputes Act is not *ultra vires* on the ground that it defines 'industry' as comprising both industrial and non-industrial concerns.[95] It also includes the power to legislate with respect to the dispute of an *individual* workman with his employer.[96]

2. Though the Union Parliament has no power to legislate on the powers of a Municipality (Entry 5, List II), it has power to legislate with respect to disputes between a Municipality and its employees, provided the legislation is, in its 'pith and substance', a legislation with respect to 'labour disputes'.[94] A Central Act

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82. *Texas & New Orleans, R R* v. *Brotherhood of Ry. Clerks,* (1930) 281 U.S. 548.
83. *Adair* v. *U.S.* (1908) 298 U.S. 161; *Schechter Poultry Corporation* v. *U. S.,* (1935) 295 U.S. 495.
84. *National Labour Relations Board* v. *Jones,* (1937) U.S. 1.
85. *Federated Amalgamated Assocn.* v. *N. S. W. Ry. Employees Assocn.,* (1906) 4 C.L.R. 488.
86. *Federated Municipal Employee's Union* v. *Melbourne Corporation,* (1919) 26 C.L.R. 508.
87. *Merchant Service Guild* v. *Commonwealth Steamship Assocn.,* (1920) 28 C.L.R. 436.
88. *R* v. *Commonwealth Court of Conciliation,* (1910) 11 C.L.R. 1.
89. *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union,* (1925) 36 C.L.R. 442.
90. *Stemp* v. *Australian Glass Manufacturers,* (1917) 23 C.L.R. 226.
91. *R* v. *Commonwealth Court of Conciliation,* (1910) 11 C.L.R. 1.
92. *Australian Railways Union* v. *Victorian Ry. commissioners,* (1930) 44 C.L.R. 319.
93. *Caledonian Collieries* v. *Australasian Coal Employees,* (1930)42 C.L.R. 527.
94. *D.N. Banerjee* v. *P.R. Mukherjee,* (1953) S.C.R. 302.
95. *Niemla Textile Finishing Mills* v. *2nd Punjab Tribunal,* A. 1957 S.C. 329.
96. *F.L. Corpn.* v. *Union of India,* A. 1970 Delhi 60 (66); *T.V.S. Iyengar* v. *State of Madras,* A. 1907 Mad. 82 (84).

relating to industrial disputes is not *ultra vires* on the ground that the power conferred by the Act to reinstate dismissed employees is in conflict with the power of appointment and dismissal balonging to the Commissioners under the Bengal Municipal Act. For, the Act deals with industrial disputes and not with local Government (Entry 5 of List II). The incidental encroachment is cured by the doctrine of 'path and substance'.[94]

3. Read with Entry 24 of this List, it confers the power to provide for bonus to workmen.[97]

Existing (Central) laws. – Industrial Disputes Act (XIV of 1947);[98] Industrial Disputes (Banking and Insurance Companies) Act (LIV of 1949); Trade Unions Act (XVI of 1926); Industrial Employment (Standing Orders) Act, 1946.

Legislation by Parliament. – Industrial Disputes (Banking Companies Decision) Act, 1955; Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955; Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956; Industrial Disputes Appellate Tribunal Act, 1950; Essential Services Maintenance Act, 1981.

23. Social security and social insurance; employment and unemployment.

OTHER CONSTITUTIONS

(A) *U.S.A.* – There being no specific grant of such power to the Congress in the Constitution, it was originally supposed that the unenumerated power belonged to the States and not to the federal government. But in 1937, the Supreme Court held[99] that Congress was empowered to legislate on social security under its general power to raise and spend money for the 'general welfare of the United States' (Art. 1 s. 8), and upheld the validity of the Federal Social Security Act, 1935.

The Social Security Act, 1935, as amended, has a threefold programme – 1. Unemployment Compensation and Insurance. 2. Old Age and Survivors' Insurance. 3. Public Assistance, including – (a) Old age assistance, (b) aid to dependent children, (c) aid to the needy blind.

This programme is mainly carried out by the States, under the supervision of the national Social Security Board, and the administration is run at the cost of the national Government, by way of grants-in-aid.

As regards employment, until 1933, this was wholly regulated by the States. In 1933, Congress passed the Wagner-Peyser Act, 1933, to establish a nation-wide, co-ordinated system of public employment offices, to make grants to the States for carrying out the purposes of the Act.

The Vocational Rehabilitation Act, 1920, aids the rehabilitation of a disabled person by enabling him to engage in a remunerative occupation.

(B) *Switzerland.* – Under Art. 34, as amended in 1947, the Confederation has legislative power with respect to all forms of social insurance – sickness, accident, old-age, widows, surviors, invalidity and unemployment.

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97. *Jalan Trading Co. v. Mill Mazdoor Sabha*, A. 1967 S.C. 691 (*717*).
98. *A.P.S.W.I.C.S. v. Lab. Court*, A. 1987 A.P. 182 (para. 11) F.B.

(C) *Canada.* – It was held by the Privy Council[100] that Employment and Social insurance in so far as it affects the rights of employers and employees in the Provinces, is a subject within the exclusive competence of the Provincial Legislature under Sec. 92(13) ('property and civil rights in the Province'), and that, accordingly, a Dominion legislation (1935) which provided a system of compulsory unemployment insurance throughout Canada, was *ultra vires.*

The above decision has since been partially overriden by the constitutional amendment of 1940 [B.N.A. Act, 1940] which has added sub-sec. (2A) to s. 91, giving the Dominion Parliament exclusive legislative authority with respect to–

'*Unemployment* insurance'.

In the result, all other forms of social insurance save 'unemployment insurance' falls within the Provincial legislative sphere.

(D) *Australia.* – See placita (xxiii) and (xxiiiA) quoted under Entry 24, *post.*

INDIA

Social Security. Social security is a generic term which includes insurance against industrial accidents, sickness and the like. The principle underlying all social security legislation is that the support of deserving persons, children and the unemployed should not be left to doles or private charity but should be items in the economic programme of the State (*see* Art. 41).

'Social Insurance' includes sickness insurance; accident invalidity, old age, widows' and orphans' insurance; unemployment insurance.

Existing (Central) Law. – Employees State Insurance Act (XXXIV of 1948); Dock Workers (Regulation of Employment) Act (IX of 1948).

Legislation by Parliament. – Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959; Contract Labour (Regulation and Abolition) Act, 1970; Bonded Labour System (Abolition) Act, 1976; Child Labour (Prohibition and Regulation) Act, 1986; Cine–Workers and Cine–Thatre Workers (Regulation of Employment) Act, 1981.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Labour legislation was originally regarded as a State subject, but the development of the factory system and the integration of business into huge corporations called for federal protection of labour since the beginning of the 20the century. Congress, accordingly, took up labour legislation as an incident of its power to regulate *inter-State commerce* and the Supreme Court upheld such legislation even though "it is attended by the same incidents which attend the exercise of the police power of the States".[1]

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99. *Steward Machine Co.* v. *Davis,* (1937) 301 U.S. 548; *Helvering* v. *Davis,* (1937) 301 U.S. 619.

100. *A.-G. of Canada* v. *A.-G. for Ontario,* A. 1937 P.C. 89.

1. *U.S.* v. *Darby Lumber Co.,* (1941) 312 U.S. 100; *Second Employers' Liability Cases,* (1912) 223 U.S. 1.

The jurisdiction of Congress in the sphere of labour legislation has thus been confined to industries engaged in inter-State commerce.

As regards inter-State industries, Congress has imposed restrictions upon the employment of child labour [Public Contracts Act, 1936; Fair Labour Standards Act, 1938].[1]

As regards regulation of wages, the Supreme Court had nullified the earlier attempts of Congress on the ground that it was an interference with the freedom of contract.[2] Later, the Supreme Court conceded the validity of fixing minimum wages for women, in connection with a *State law*:[3]

"What can be closer to the public interest than the *health* of women and their protection from unscrupulous and over-reaching employers? And if the protection of women is a legitimate end of the exercise of State power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature was entitled to adopt measures to reduce the evils of the 'sweating system', the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of the most injurious competition."[3]

Subsequently, the Supreme Court has upheld the validity of *federal* legislation to fix both minimum wages as well as maximum hours of labour, in inter-State industries, not only as regards women but also as regards male labour (Fair Labour Standards Work, 1938).[4] See also under Entry 23, *above*.

(B) *Australia*. – Placitums (xxiii) and (xxiii-A)5 of S.51 of the Constitution Act are –

"(xxiii) Invalid and old-age pensions.

(xxiii-A) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits medical and dental services (but not so as to authorise any form of civil conscription) benefits to students and family allowances[5].

(C) *Canada*. – Labour legislation, in general, comes within the Provincial power relating to 'civil rights in the Province',[6] e.g., regulation of hours of work[7] regardless of the economic consequences of such local regulation.

The Dominion Parliament can enact regulatory labour legislation only if – (i) the activities ot which the legislation relate come within federal authority by specific enumeration, e.g., inter-Provincial railways, steamships, telegraph and telephone operations; criminal law; or (ii) the subject-matter falls within the residuary power of the Dominion, e.g., radio; or (iii) the legislation is necessary to implement international engagements, under s. 132 of the B.N. Act; or (iv) in time of war or other national emergency.[6,8]

As regards 'old age pensions', the Dominion Parliament has been given concurrent power by the B. N. A. Amending Act, 1951 (14 & 15 Geo. VI), by adding s. 94A to the Act ot 1867.

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2. *Adkins* v. *Children's Hospital*, (1923) 261 U.S 525.
3. *West Coast Hotel Co.* v. *Parrish*, (1937) 300 U.S. 379.
4. *U.S.* v. *Darby Lumber Co.* (1941) 312 U.S. 100.
5. Added in 1947.
6. *Toronto Electric Commrs.* v. *Snider*, (1925) A.C. 396.
7. *Canadian Pacific Ry.* v. *A.-G. for Br. Columbia*, (1950) A.C. 182.
8. *Frances Pulp & Power Co.* v. *Manitoba Press*, (1923) A.C. 695.

(D) *Government of India Act, 1935.* – Item 27 of List III of the Act was – "Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions".

INDIA

'Welfare of Labour'. – Labour legislation is a concurrent subject under the Constitution, and such legislation would therefore apply to *all labour* whether employed in an establishment[9] e.g., railway) subject to the control of the Union or the States,[9] industrial as well as non-industrial.[10]

Under the present Entry, the Legislature may regulate the hours of employment of persons who are employed in the business of shops and commercial establishments;[11-12] provide for payment of bonus to workmen,[13] as well as non-workmen.[14] It may, also incidentally, provide for compulsory saving of the bonus so paid.[15]

Entries 22-24. 1. These Entries confer wide powers on the Legislature to secure the welfare of labour, as distinguished from the regulation of 'industries', which falls under List I, Entry 52 and Entry 24 of List II.[15] Welfare of labour would include the regulation of conditions of employment in industries, including wages, leave, provident fund, workmen's compensation, old age pensions, maternity benefits, conditions of work, provisions for safety.[15]

2. Provision for an employer's contribution for the employee's compulsory insurance would come under these Entries, and not under Entry 47 of List III.[16]

Acts coming under this Entry. Bihar Shops and Establishments Act, 1933;[17] Employees' State Insurance Act, 1948.[16a]

Existing (Central) Laws. – Workmen's Compensation Act (VIII of 1923); Local Authorities Pension Gratuities Act (I of 1919); Payment of Wages Act (IV of 1936); Employers' Liability Act (XXIV of 1938); Mines Maternity Benefit Act (XIX of 1941); Mica Mines Labour Welfare Fund Act (XXII of 1946); Coal Mines Labour Welfare Act (XXXII of 1947); Coal Mines Provident Fund and Schemes Act (XLVI of 1948); Minimum Wages Act (XI of 1948); Children Pledging of Labour Act (II of 1933); Indian Dock Labourers Act (XIX of 1934); Weekly Holidays Act (XVIII of 1942); Industrial Employment (Standing Orders) Act (XX of 1946); Dock Workers (Regulation of Employment) Act (IX of 1948); Tea Districts Emigrant Labour Act (XXII of 1932).

Legislation by Parliament. – Plantations Labour Act (LXIX of 1951); Mines Act, 1952; Employees' Provident Funds Act, 1952; Maternity Benefit Act, 1961; 1988, Motor Transport Workers Act, 1961;[9] Beedi and Cigar Works (Conditions

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9. This avoids the situation as in Canada where Provinces have no right to legislate in respect of the employees of Dominion Railways [*C.N.R* v. *Att.-Gen.*, (1948) 1 D.L.R. 580], in view of section 92 (10) (a) of the B.N.A. Act.
10. *N.T.F. Mills* v. *2nd Punjab Tribunal*, A. 1957 S.C. 329 (*339*).
11. *Manohar Lal* v. *The State*, A. 1951 S.C. 315 (declaring the Punjab Trade Employees Act, 1940 to be intra vires).
12. *Cf. A.P.S.W.I.C.S.* v. *Lab. Court*, A. 1987 A.P. 182 (para. 18) F.B.
13. *Jalan Trading Co.* v. *Mill Mazdoor Sabha*, A. 1967 S.C. 691 (*717*).
14. *Malabar Tile Works* v. *Union of India*, A. 1968 Ker. 143.
15. *Milkhi Ram* v. *State of Punjab*, A. 1966 Punj. 513.
16. *Bedi Warks* v. *Union of India*, A. 1974 S.C. 1832 (para. 6).
16a. *Gasket Radiators* v. *E.S.I. Corpn.*, A. 1985 S.C. 790 (para. 6).

of Employment) Act, 1966; Beedi Workers Welfare Fund Act, 1976; Beedi Welfare Cess Act, 1976; Cine–Workers Welfare Fund Act, 1981; Cine–Workers Welfare Cess Act, 1961 Limestone & Dolomite Mines Labour Welfare Fund Act, 1972; Iron Ore Mines, manganese Ore Mines & Chrome Ore Mines Labour Welfare Fund Act, 1976; Slum Areas Improvement and Clearance Act, 1956; Equal Remuneration Act, 1976.

Personal Injuries (Compensation Insurance) Act, 1963; Sales Promotion Employees (Conditions of Service) Act, 1976; Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; Dock Workers (Safety, Health and Welfare) Act, 1986; Child Labour (Prohibition and Regulation) Act, 1986.

[18]25. *Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I;* **vocational and technical training of labour.**

Amendment. The 42nd Amendment Act, 1976, omitted Entry 11, List II, and transferred that subject to be combined with Entry 25 of List III. As a result, no part of the subject of education now belongs to the exclusive State List. Barring the topics covered by Entries 63, 64, 65 and 66 of List I,[19] the residue of education has become concurrent. Hence, problems arising out of Union legislation encroaching upon the State sphere[20] will be obviated.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Education has always been regarded as a State function. Each State has a department of education which supervises the State's educational programme. Congress has entered into the field of education through its system of grants-in-aid, but its activities have so far been confined to *higher* education. Thus, the Morrill (Land Grant College) Act, 1862, authorizes federal grant to States, of both land and money, for the establishment of colleges and universities offering instruction in agriculture, mechanical arts and military science. The Federal Government also offers financial assistance for the training of high-school teachers in agriculture, domestic economy and industrial arts, under the Smith-Hughes Act, 1917.

(B) *Canada.* – Subject to certain reservations,[21] 'education' is a Provincial subject, under s. 93 of the B. N. Act, and the powers of the Provincial Legislature are plenary,[22] and the word 'education', in s. 93, is used in a most comprehensive sense.[23]

(C) *Australia.* – Similarly, in Australia, education is left to the States, there being no express power of the Commonwealth in this respect, in the Constitution. The Commonwealth has, however, assumed control over education under its power of grants-in-aid, and under its powers over Defence, Trade and Commerce.[3]

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17. *Jugal Kishore* v. *Labour Commr.*, A. 1958 Pat. 442.
18. Substituted by the Constitution (42d Amendment) Act, 1976.
19. *Darsha* v. *Agra University*, A. 1982 All. 359 (para. 14).
20. *Cf. Chitralekha* v. *State of Mysore*, A. 1964 S.C. 1828; *Gujarat University* v. *Sri Krishna*, A. 1963 S.C. 703.

(D) *Government of India Act, 1935.* – Entry 17 of List II of the Act, as amended in 1940, was –

"Education *including Universities* other than othose specified in paragraph 13 of List I."

INDIA

'Education'. 1. The present Entry as inserted in 1976 gives the residuary power over education and Universities concurrently to their Union and the States, subject to the exceptions specified in the Entry itself. These exceptions are – (i) Universities mentioned in Entry 63, List I; (ii) Institutions of national importance (Entry 64, List I); (iii) Union agencies for professional education, etc. (Entry 65, List I); (iv) Co–ordination and determination of standards (Entry 66, List I).

2. The State Legislature has no power to legislate with respect to the matters included in Entries 63-66 of List I. In the result, though the State Legislature has the power to legislate with respect to the medium of instruction, if legislation for imposition of an exclusive medium of instruction in a regional language or in Hindi is likely to result in the lowering of standards in institutions for higher education or research or scientific or technical education, the subject would be excluded from the present Entry and fall within Entry 66 of List I.[21]

3. This power includes the power to impose restrictions on the management of educational institutions in matters relating to education, even though such institutions be charitable.[22]

4. 'Education' is a generic term and would include general education, technical education, professional or vocational education, physical education.

Subject to the provisions of entries 63-66 of List I. By reason of these words, the present Entry must be harmoniously construed with Entries 63-66 of List I.[21] The result is –

I. Entries 63-66 of List I are carved out of the subject of education and in respect of the subjects included in Entries 63-66, the popwer to legislate is vested exclusively in Parliament,[21] even though they relate to 'education', or 'Universities'.[21]

II. Entries 25 of List III and 66 of List I necessarily overlap; but to the extent of overlapping, the power conferred by Entry 66 of List I must prevail over the power of the State under Entry 25.[21] Thus, medium of instruction, not being an item in the Legislative Lists, has to be regarded as a power incidental to the power to legislate regarding 'education'. Power to legislate in respect of the medium of instruction, in so far as it has a direct bearing and impact upon the legislative head of 'co-ordination and determination of standards in institutions of higher education or research and scientific and technical institutions', must also be deemed to be vested in the Union (by Entry 66 of List I).[21]

In the result, –

"The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the co-ordination of such standards either on an All India or other basis impossible or even difficult'.[21]

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21. *Cf. Gujarat University* v. *Sri Krishna,* A. 1963 S.C. 703 (*716-7*).
22. *Katra Education Society* v. *State of U. P.,* A. 1966 S.C. 1307 (*1311*).

In other words, though the State Legislature has concurrent power to legislate relating to medium of instruction in institutions for primary or secondary education, the State Legislature shall have no power to legislate as as to the medium of instruction in institutions for higher and scientific or technical education, if such legislation is likely to result in a lower of the standards in such institutions.[22]

Whether State legislation relating to medium of instruction[22] or syllabi, courses of study[22] or standards for admission[20] to Universities and other institutions for higher and technical education shall be invalid will, thus, depend upon whether such legislation would render it impossible or difficult for Parliament to exercise its power with respect to co-ordination and determination of standards in the institutions for higher education. Thus,

(i) If State legislation relating to the imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text-books and journals, competent teachers and incapacity of students to understand the subjects, is likely to result in the *lowering of standards* in institutions for higher education, the legislation would be invalid.[22]

(ii) But –

(a) A State legislation which extends the period of use of English as the medium of education by ten years cannot be invalid inasmuch as English being the only medium of instruction all over the country until such legislation, the continuance of its use cannot have the effect of lowering the standards.[21]

(b) If a State law prescribes a higher percentage of marks for extra-curricular activities in the matter of admission to colleges, it cannot be said that it would appreciably encroach upon the Central field by lowering the standard.[20]

Once, however, it is held that a State legislation, in its pith and substance, relates to the co-ordination and determination of standards for higher education or would directly affect the power of Parliament relating to that subject, the State legislation would be invalid, whether or not Parliament has actually exercised its power under Entry 66 of List I, for,

"The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union".[20]

III. Any Act made by the State Legislature under the present Entry shall be invalid if the Union Parliament has passed a law on the same subject, in exercise of the powers conferred by Entries 63 to 66 of List I.[23]

IV. But in other cases it has been held that where the State Law does not relate to the *standard* in an institution for higher education, but merely prescribes *additional* qualifications for admission to such institution, the State law would not be incompetent.[23] In these latter cases,[24] the test adopted has been 'inconsistency' and not that of 'occupying the field' which was applied in the former group of cases.[25]

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23. *Osmania U.T.A.* v. *State of A.P.*, A. 1987 S.C. 2034 (paras. 23-24); *Gujarat University* v. *Krishna*, A. 1963 S.C. 703 (715); *D.A.V. College* v. *State of Punjab*, A. 1971 S.C. 1731.
24. *Ambesh* v. *Principal*, A. 1987 S.C. 400 (paras. 17-18); *State of A.P.* v. *Lavu*, A. 1971 S.C. 2560; *Chitralekha* v. *State of Mysore*, A. 1964 S.C. 1823; *Rajendran* v. *State of Madras*, A. 1968 S.C. 1012.
25. *L.N. Mishra Institute* v. *State of Bihar*, A. 1988 S.C. 1136 (paras. 37-38).

V. Acquisition of the property of an educational institution will come under Entry 42 of List III and neither Entry 66 of List I nor 25 of List III.[25]

Vocational and technical training of labour. While Union agencies for vocational and technical training (in general) and for the training of police officers is a Union subject under Entry 65(a) of List I, – the vocational and technical training of *labour* has been taken out of that Union power and made a concurrent subject under Entry 25 of List III, by the Constitution (42nd Amendment) Act, 1976.

Entries 65(a) of List I and 25 of List III. 1. Entry 65(a) of List I does not relate to vocational or technical training *as such*; it only refers to *Union agencies* and institutions for professional, vocational or technical training.

2. The Union Government has established a number of agencies and institutions for regulating the study of professional and technical education.[26] The regulation of these institutions belongs exclusively to Parliament, under Entry 65 of List I. But professional, vocational or professional education, *as such*, appertains to Entry 25 of List III. The qualification that Entry 25 of the concurrent List is subject to Entry 65 of the Union List is for the *limited purpose* of stating that any agency or institution established by the Union, falling within the purview of Entry 65 of List I, shall not be governed by Entry 25 of List III.[26] The qualification is not to put professional or technical education in the Union List. Hence, under Entry 25 of List III, the State Government can exercise concurrent power over these subjects of education[26] (of course, subject to Art. 254).

Existing (Central) Laws. – Indian Universities Act (VIII of 1904); Calcutta University Act (II of 1857).

26. Legal, medical and other professions.

'Legal, medical and other professions'. – For a full treatment, see Vol. C, pp. 322, 359-60.

Ancillary power. Legislating under this Entry, Parliament is competent to prescribe the stamp duty payable on an application for enrolment as an advocate.[27]

Entries 77-78 of List I and 26 of List III. The power to legislate in regard to persons entitled to practise before the Supreme Court and the High Courts is carved out of the present Entry and made the exclusive field for legislation by Parliament.[28]

Existing (Central) Laws. – Indian Medical Degrees Act (VII of 1916); Indian Medical Council Act of 1956; Indian Nursing Council Act (XLVIII of 1947); Dentists Act (XVI of 1948); Chartered Accountants Act (XXXVII of 1949); Legal Practjtioners Act (XVII of 1879); Legal Practitioners (Women) Act (XXIII of 1923); Legal Practitioners (Fees) Act (XXI of 1926); Indian Bar Councils Act (XXXVIII'of 1926); Pharmacy Act, 1948.

Legislation by Parliament. – Notaries Act (LII of 1952); Bar Councils (Validation of State Laws) 1956; Advocates Act, 1961; Medical Council Act, 1956.

Analogous Provisions. – Practice before the Supreme Court and High Courts (Entries 77-8 of List I) is excluded from the scope of the present Entry.

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26. E.g. the Institutes of Technology, the Indian Institute of Science [India, (1988-89), pp. 78-79.].
27. Rupendra, in re, A. 1957 Andhra 63 (S.B.).
28. *Mohindroo* v. *Bar Council*, A. 1968 S.C. 888; *Bar council* v. *State of U.P.*, A. 1974 S.C. 231.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

'Displaced Person'.—See definition in s. 2 (10) of the Displaced Persons (Debts Adjustment) Act, 1951.

Existing (Central) Laws.—Rehabilitation Finance Administration Act (XII of 1948); Resettlement of Displaced Persons (Land Acquisition) Act (LX of 1948). West Bengal Land Development and Planning Act, 1948.[29]

Legislation by Parliament.—Displaced Persons (Claims) Act (XLIV of 1950); Displaced Persons (Debts Adjustment) Act (LXX of 1951); Displaced Persons (Compensation and Rehabilitation) Act (XLVI of 1954); Displaced Persons (Claims) Supplementary Act (XII of 1954).

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

OTHER CONSTITUTIONS

Government of India Act, 1935.—This was a State subject under the Act of 1935 (Item 34 of List II). That item was the same as the present Entry but for the words 'religious institutions' which have been added in the present Entry.

INDIA

'Charities'.—The word 'charities' has acquired a technical meaning,[30] since *Pemsel's case,*[31] as meaning—

"relief of property, advancemen. of education, advancement of religion and other purposes beneficial to the community".[32]

'Charities', 'Charitable institutions'. etc.—The additional words after 'charities' in this Entry are only illustrative of the directions which the power to legislate in respect of charities may take. The word 'charities' is a generic term of wide scope, including all public secular, charitable and religious trusts and institutions, recognised as such by the Indian law, and a power to legislate in respect of charities will include the power to legislate in respect of *all* matters connected with charitable and religious institutes and endowments,[33] e.g., the power to throw open the Hindu temples to all Hindus who had previously been excluded by custom or usage.[33]

The power to legislate with respect to religious *institutions* which may not come within the expression 'religious endowments' has been expressly conferred by the present entry.

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29. *Benoy Krishna* v. *State of W.B.*, A. 1966 Cal. 429 (*430*).
30. *Chesterman* v. *Federal Commissioner*, (1926) A.C. 128.
31. *Commissioner of I. T.* v. *Pemsel*, (1891) A.C. 531 (*583*).
32. See also *Trustees of Tribune Press* v. *Commissioner of Income-tax*, (1939) 43 C.W.N. 1065 (P.C.); *All India Spineers Association* v. *Commissioner of Income-tax*, (1944) 49 C.W.N. 1 (P.C.); *Haridasi* v *Secretary of State*, 7 Cal. 304 (P.C.); *Kayastha Pathsala* v. *Bhagavati*, (1937) All. 3 (P.C.); *Parmanandas* v. *Venayek*, 7 Bom. 19 (P.C.); *Saraswati* v. *Rajagopal*, (1954) S.C.R. 277.
33. *Manikkasundara* v. *Nayudu*, (1946) F.L.J. 57; *Gadadhar* v. *Prov. of Orissa*, A.I.R. 1950 Or. 47.

Read with Entry 47 List III, this Entry authorises the imposition of a fee rendering services in condition with maintenance, supervision and control over religious institutions.[34]

Entries 11 of List, II and 28 of List III. The power of the State Legislature under Entry 11 of List II would *prima facie* include the power to impose restrictions on the management of educational institutions even though they may be charitable institutions. If an enactment, in its pith and substance relates to education, it will be within the exclusive competence of the State Legislature, even though it incidentally affects charitable institutions or the powers of trustees of *educational institutions*.[35]

Existing (Central) Laws.—Religious Endowments Act (XX of 1863); Charitable Endowments Act (VI of 1890); Charitable and Religious Trusts Act (XIV of 1920); Musalman Wakf Validating Act (VI of 1913); Musalman Wakf Validating Act (XXXII of 1930); Musalman Wakf Act (XLII of 1923).

Legislation by Parliament.—Durgah Khwaja Saheb Act, 1955; Wakfs Act, 1954, Women's & Children's Institutions (Licensing) Act, 1956; Orphanage and other Charitable Homes (Supervision and Control) Act, 1960.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

'Prevention of extension of infectious diseases or pests'.—This Entry is the same as item 30 of List III of the Government of India Act, 1935.

Existing (Central) Laws.—Destructive Insects and Pests Act (II of 1914); Livestock Importation Act (IX of 1898); Lepers Act (III of 1898); Epidemic Diseases Act (III of 1897); Dourine Act (V of 1910).

30. Vital statistics including registration of birth and deaths.

OTHER CONSTITUTIONS

Government of India Act, 1935.—'Registration of births and deaths' was included in Item 14 of List II.

INDIA

Analogous Provisions.—See Entries 69, 94 of List I; 45 of List III.

Existing (Central) Laws.—Births, Deaths and Marriages Registration Act (VI of 1886).

31. Ports other than those declared by or under law made by parliament or existing law to be majort ports.

Government of India Act, 1935.—Under the Government of India Act, 1935 these other ports were included in Item 18 of List II.

'Ports other than major ports'.—'Major Parts' are included in Entry 27 of List I. All other ports are included in the present Entry.

Existing (Central) Laws.—Ports Act (XV of 1908).

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34. *Sudhindra* v. *Commr., H. R. E.* A. 1963 S.C. 966 (*976*).
35. *Katra Education Society* v. *State of U. P.*, A. 1966 S.C. 1307 (*1310*).

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

OTHER CONSTITUTIONS

Australia.—See under Entry 24, List I.

Government of India Act, 1935.—Item 32 of List III was—

"Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways."

INDIA

'Shipping and navigation on inland waterways other than national waterways'. The present Entry includes the same subjects as regards waterways (other than 'national waterways') as are included in Entries 24 and 30 of List I as regards 'national waterways'.

Legislation by Parliament.—**Merchant Shipping Act, 1958.**

Before 22-2-55	After 22-2-55
33. Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest.	33. Trade and commerce in, and the production, supply and distribution of, (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products; (b) foodstuffs, including edible oilseeds and oils; (c) cattle fodder, including oilcakes and other concentrates; (d) raw cotton, whether, ginned or unginned, and cotton seed; and (e) raw jute.

Amendment.—The italicised words were added by the Constitution (Third Amendment) Act, 1955, with effect from 22-2-55.

Object of Amendment. This Entry has to be read with Entry 52 of List I, which empowers Parliament to vest the control of particular industries in the Union.

Entries 26 and 27 of Sch. II of the Constitution give exclusive power to the State with respect to 'trade and commerce within the State' and 'production, supply and distribution of goods' 'subject to that provisions of Entry 33 List III'. The result of this is that the exclusive power to legislate regarding intra-Sate trade and commerce and production, supply and distribution of goods belongs

to the State Legislature, excepting such matters as are included in Entry 33 of List III. Now, in the original Entry 33 of List III, the only matter which was included was 'trade and commerce in, and the production, supply and distribution of—the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest in exercise of the power conferred on Parliament by Entry 52 of List I. By virtue of the power conferred by Entry 52 of List I, Parliament enacted the Industries (Development and Regulation) Act (LXV of 1951) declaring that the control of certain industries, specified therein, was expedient in the public interest. Hence, by the original Entry 33, only the products of those industries which are specified in similar Acts of Parliament as might be made under Entry 52 of List I were excluded from the exclusive legislative power of the State. The Essential Commodities Act, 1955 was also enacted in exercise of the present power.[36]

By means of the present amendment, the concurrent power which was given to Parliament with respect to the commodities mentioned in Art. 369, is placed on a permanent footing.

Since the amendment is not retrospective, the pre-existing Entries will determine the validity of laws made prior to 22-2-55.[37]

'Production, supply and distribution'.—This expression is wide enough to include *storage* of the commodities in question.[38]

Cl. (a) 'Products of industry . . . . declared by Parliament . . . . . '. 1. This clause refers to the power of Parliament under Entry 52 of List I, in exercise of which Parliament has enacted the Industries (Development and Regulation) Act, 1951.

2. Therefore, by reason of cl. (a) of the present Entry, any industry (such as cement),[39] will come under the concurrent power in Entry 33 of List III, as regards the trade and commerce and the production, supply and distribution of, the products of such industry.[39]

'Products'. It means a finished product and not the raw materials required for production.[40]

'Foodstuffs'.—This would include not only finished products, such as sugar, but also raw materials, such as sugarcane.[40]

Taxing power. This Entry does not confer any taxing power and would not, therefore, empower Parliament, in a law made under the present Entry, to encroach upon the exclusive power of the State Legislature to levy a tax on sale or purchase of goods.[41]

Entries 33 of List III and 32 of List II. Parliament's legislation to regulate the supply and distribution of essential commodities cannot be invalid because of its incidental encroachment upon the rights of co-operative societies, which comes under Entry 32 of List II.[42]

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36. *Jain* v. *Union of India*, A. 1970 S.C. 267 (*269*).
37. *Waverly Jute Mills* v. *Raymon & Co.*, A. 1964 S.C. 90 (*94*).
38. *Badri Prasad* v. *State*, A. 1968 Pat. 346.
39. *Trans Yamuna C.D.A.* v. *Lt. Governor*, A. 1988 Del. 247.
40. *Tika Ramji* v. *State of U.P.*, (1956) S.C.R. 393 (*409*; 412; *418*).
41. *Hoechst* v. *State of Bihar*, A. 1983 S.C. 1019 (para. 76).
42. *Rahuri S.S.K.* v. *State*, A. 1987 Bom. 248 (para. 13).

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A short history of the Essential Supplies (Temporary Powers) Act, 1946, and subsequent legislation. Under Entries 27 & 29 of List II of the Government of India Act, 1935, 'trade and commerce within the Province' and 'production, supply and distribution of goods' were Provincial subjects. By the India (Central Government and Legislature) Act 1946 (9 & 10 Geo. VI, C. 39), the Central Legislature was empowered to make laws with respect to trade and commerce in and the production, supply and distribution of certain specified goods, for a temporary period, viz., the period mentioned in s. 4 of that Act. It was in exercise of this power that the Central legislature passed the Essential Supplies (Temporary Powers) Act (XXIV of 1946), for controlling the production, supply and distribution of, and trade and commerce in the goods specified in the British Act mentioned above. The Essential Supplies Act came into force on 19-11-46.

S. 1 (3) of the Act provided that the Act "shall cease to have effect on the expiration of the period mentioned in s. 4 of the India (Central Government and Legislature) Act, 1946".

S. 4 of the India (Central Government and Legislature) Act, 1946 provided–

"The period mentioned . . . is the period of one year beginning with the date on which the Proclamation of Emergency in force at the passing of this Act ceases to operate, or, if the Governor-General by public notification so directs, the period of two years beginning with that date:

Provided that if and so often as a resolution approving the extension of the said period is passed by both Houses of Parliament, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the Proclamation of Emergency ceases to operate".

The Proclamation of Emergency referred to in the preceding section ceased to operate on 31-3-46. Under the second part of the section, however, the Governor-General issued a notification on 3-3-47, continuing in force the Essential Supplies Act for a period of 2 years from the date of cessation of the Proclamation of Emergency. The notification, therefore, extended the life of the Essential Supplies Act till 31-3-50.

Under s. 9 read with s. 19 (4) of the Indian Independence Act, 1947, the Governor-General passed an Order on 14-8-47, which substituted the words 'Dominion Legislature' for 'both Houses of Parliament' in the Proviso to s. 4 of the India (Central Government and Legislature) Act, 1946, and also introduced a new s. 4A, by way of adaptation, providing that the powers of the Dominion Legislature shall be exercised by the Constituent Assembly. On 25-2-48, the Constitutent Assembly passed its first resolution extending the operation of the Essential Supplies Act by one year up to 31-3-49. On 23-3-49, a second resolution was passed by the Constituent Assembly extending the life of the Act by another year, up to 31-3-50.

On 20-12-49, the Constituent Assembly passed a third resolution extending the Act by another year from 1-4-50, *i.e., up* to 1-4-51.

On 14-8-50, the Parliament of India passed the Essential supplies (Temporary Powers) Amendment Act (LII of 1950), substituting 31-12-52 in place of 1-4-51 in s. 1 (3) of the Essential Supplies Act, 1946. This Act derived its validity from a resolution of the Provincial Parliament under Art. 249 [as adapted by the Constitution (Removal of Difficulties) Order No. II (Second Amendment) Order], by which the Provisional Parliament assumed powers included in Entries 26-7 of List II of the Constitution (see under Art. 249, *ante*). Art. 369 also supported such legislation. Hence, the Essential Supplies Act, 1946,[42a] was to continue, as amended, up to 31-12-52.

By the Essential Supplies (Amendment) Act (LXV of 1952), Parliament further extended the life of the principal Act up to 26-1-55, by substituting the words 'twenty-sixth day of January, 1955' in place of 'thirty first day of December, 1952', in s. 1 (3) of the principal Act.

Before expiry of the Act on 26-1-55, the President promulgated the Essential Commodities Ordinance (I of 1955). This Ordinance was replaced by the Essential Commodities Act, 1955.

For the prevention of blackmarketing and hoarding, the Act has been amended by the Essential Commodities (Special Provisions) Act, 1981, 1987.

Existing Laws.. – While Phosphorus Matches Prohibition Act, 1913.

Legislation by Parliament. – The Essential commodities Act (X of 1955) has been passed after amendment of the present Entry, providing for the control of production, supply and distribution of the commodities mentioned in the Entry.[43] Produce Cess Act, 1966; Cocoanut Development Board Act, 1979; Cotton, Copra and Vegetable Oils Cess (Abolition) Act, 1987; Jute Packaging Materials (Compulsory Use in Packing Commodities) Act, 1987; National Dairy Development Board Act, 1987; Essential Commodities (Speical Provisions) Continuance Act, 1987.

[44]33A. *Weights and measures except establishment of standards.*

Weights and Measures. While the regulation of weights and standards comes under the present Entry, the establishment of *standards* of weights and measures falls under Entry 50 of List I.

34. Price control.

OTHER CONSTITUTIONS

(A) *U.S.A.* – Control of prices by the State was originally regarded as an undue interference with the freedom of property and contract.[45] But an exception was

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42a. The constitutional validity of several provisions of the Essential Supplies Act was impeached in various cases. the questions, as settled by the Supreme Court decision in *Harishankar* v. *State of M. P.*, (1955) 1 S.C.R. 380, deserve to be noted since there are corresponding provisions in the subsequent legislations:

(a) Ss. 3-4 are not invalid on the ground of delegation of legislative authority.

(b) S. 3 is not invalid on the ground of contravention of Art. 19 (1) (f)-(g).

(c) S. 6 is not invalid on the ground of delegation of the power to repeal or modify existing laws.

43. *Cf. Jain* v. *Union of India*, A. 1970 S.C. 267 (*269*).

44. Inserted by the Constitution (42 Amendment) Act, 1976, transferring it from Entry 29 of List II; see *ante*.

45. *Chesapeake* v. *Manning* (1901) 185 U.S. 238 (*246*).

later introduced as regards business 'affected with public interests'.[46] It was also held permissible under the police power, to restrict harmful methods of competition.[47] During War, the power unquestionably follows from the 'Defence power'.

(B) *Australia.* – In time of peace, price control by the States was held to be *ultra vires* being in contravention of freedom of inter-State trade and commerce under S. 92.[48] But in time of war, it is justified by the 'Defence power' of the Commonwealth,[49] which subsists even after cessation of actual hostilities.[50]

(C) *Government of India Act, 1935.* – There was not item in that Act corresponding to the present Entry. The power was deduced in favour of the Provincial Legislature under its power over distribution of goods, under item 29 of List II.[51] But the attempt to punish black-marketing as an offence against public order failed.[52]

INDIA

'Price Control'. – The present Entry creates concurrent and independent power of legislation for price control. It need not be deduced from other powers, such as defence, distribution of articles, etc.

It authorises the fixing of maximum as well as minimum[53] prices.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 20 of List III of the Act was – 'Mechanically propelled vehicles'.

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Analogous Provisions. – Vehicles other than mechanically propelled vehicles are included in Entry 13 of List II. See also Entries 24 and 30 of List I.

Entry 57 of List II and 35 of List III. The two entries deal with two matters, though allied ones; an attempt should, therefore, be made to harmonise them rather than to bring them into conflict.[54]

While Entry 57 is solely concerned with taxes on vehicles, Entry 35 deals with the principle on which taxes on motor vehicles are to be levied.[53] Taxes on vehicles connote the liability to pay taxes at the rates at which the taxes are to be levied. On the other hand, the expression 'principles of taxation' denote rules of guidance in the matter of taxation.[54] Where a State law levying a tax on motor vehicles does not lay down any *principles* of taxation, no question of repugnance with any existing Central law arises.[54]

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46. *Tyson* v. *Banton*, (1927) 273 U.S. 418.
47. *Sunshine anthracite Co.* v. *Adkins*, (1939) 310 U.S. 381.
48. *McArthur* v. *Queensland*, (1920) 28 C.L.R. 530.
49. *Farey* v. *Burvett*, (1916) 21 C.L.R. 433.
50. *Dawson* v. *Comonwealth*, (1947) 73 C.L.R. 157.
51. *Khetridas* v. *Pratapmull*, A. 1946 Cal. 197 (*204*).
52. *Rex* v. *Basudev*, (1950) D.L.R. 56 (P.C.).
53. *Secy. to Govt.* v. *A.G. Factory*, A. 1959 A.P. 538 (*543*).
54. *State of Assam* v. *Labanya Prabha*. 1967 S.C. 1575 (*1577*).
55. *Shyam Lal* v. *Abdul Ghaaffor*, (1964) [S.C./C.A. 306/64.].

Entries 35 of List III and 49 of LIst I. While legislating under the concurrent power relating to motor vehicles, it is competent for the State Legislature to provide for permits for stage carriages on inter-State routes.[55] Such law merely controls motor vehicles and does not relate to trade and commerce.[55]

Legislation by Parliament. – Motor Vehicles Act, 1988.

36. Factories.

OTHER CONSTITUTIONS

Government of India Act., 1935 – Item 26 of List III of that Act was the same.

INDIA

'Factory'. – A factory is thus described in Halsbury :

"Every place in which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the making of any article, or part of any article or altering, repairing, ornamenting, or finishing it, or otherwise adapting it for sale is *prima facie* a 'factory' or a 'workshop'. If the employer of those who work there has the right of access to the place or has control over it; if any machinery moved or worked by steam, water or other mechanical power is used in such manufacture, or in aid of such manual labour, the place is a 'factory'. If no machinery moved or worked by any mechanical power is used, there the place is, generally speaking, a 'workshop'; but to this rule there are some exceptions." .....

Existing (Central) Laws. – Factories Act (LXIII of 1948); Coton Ginning and Pressing Factories (XII of 1925).

37. Boilers.

Government of India Act., 1935. – This Entry is the same as item 21 of List III of the Government of India Act, 1935.

'Boiler'. – A boiler is a closed vessel for generating steam under pressure.

Existing (Central) Laws. – Indian Boilers Act (V of 1923).

38. Electricity.

Government of India Act, 1935. – This Entry is the same as item 31 of List III of the Government of India Act, 1935.

'Electricity'. – See, in this connection, Arts. 287-8.

In view of the present Entry, a State Legislature is competent to levy a surcharge on the bills for supply of electricity, so long as such provision does not conflict with any provision of a Central law.[56]

Existing (Central) Laws. – Indian Electricity Act (IX of 1910); Electricity (Supply) Act (LIV of 1948).

39. Newspapers, books and printing presses.

OTHER CONSTITUTIONS

Government of India Act, 1935. – Item 17 of List III of that Act was also indentical.

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56. *Amalgamated Electricity Co.* v. *Ajmer Municipality*, A. 1969 S.C. 227 (234).

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'Newspapers books and printing presses'.—It has been held that the power conferred by these words is wide enough to include the power to suppress the printing of 'objectionable matters' even though such legislation incidentally relates to 'public order'.[57]

Existing (Central) Laws.—Press and Registration of Books Act (XXV of 1867). *Legislation by Parliament.*—Delivery of Books (Public Libraries) Act (XXVII of 1954). Parliamentary Proceedings (Protection of Publication) Act, 1977. Young Persons (Harmful Publications) Act, 1956; Newspapers (Price & Page) Act, 1957.

40. Archaeological sites and remains other than those declared by or *under law made by*[58] Parliament to be of national importance.

Amendment. The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante.*

Analogous Provision.—Read with Entry 67, List I.

Existing (Central) Laws.—Ancient Monuments Preservation Act (VII of 1904).

Legislation by Parliament.—Ancient Monuments and Archaelogical Sites and Remains, Act, 1958.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

Evacuee property. Since Entry 18 of List II is general and the present Entry is specific, under the present Entry, Parliament has the power to pass a law providing for the management of evacuee property, including land, notwithstanding Entry 18 of List II,[59] and also any *ancillary* power necessary for the purpose of legislating upon taking possession, custody, and disposal of evacuee property,[60] including extinguishment of a mortgage,[61] vesting of an evacuee property in the Official Trustee.[62]

'Disposal'.—This word is wide enough to include a legislation providing for the extinction of a usufructuary mortgage on the expiry of a certain period.[61]

'Declared by the law to be evacuee property'.—Substantive power to legislate under the present Entry does not arise until a property has been decelared to be 'evacuee property' by law.[61]

'Including agricultural land'.—This means that a legislation which comes under the present will not be hit by the fact that it relates to agricultural land, under Entry 18 of List II.

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57. *Shantilal* v. *State of Bombay*, A. 1954 Bom. 508.
58. Inserted by the Constitution (Seventh Amendment) Act, 1956.
59. *Sardara* v. *Custodian*, A. 1952 Pepsu 12.
60. *Sahib Dayal* v. *Asstt. Custodiam*, A. 1952 Punj. 389; *Samsuddin* v. *Custodian*, A. 1953 Sau. 73.
61. *Raghubir* v. *Union of* India, A. 1954 Punj. 261 (263).
62. *Fazalbhoy* v. *Official Trustee*, A. 1979 S. C. 687 (para. 17).

Analogous Provision.—See, in this connection, Art. 31 (5) (b) (iii), Vol. I. P. 830.

Law made by Parliament.—Administration of Evacuee Property (XXXI of 1950); Evacuee-Interest (Separation) Act (LXIV of 1951); Transfer of Evacuee Deposits Act (XV of 1954).

Before 1-11-56	After 1-11-56
42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.	42. *Acquisition and requisitioning of property.*[63]

OTHER CONSTITUTIONS

Government of India Act, 1935.—Item 9 of List II was—'Compulsory acquisition of *land*'. It has been held that this item conferred power upon the Provincial Legislature only to provide for acquisition of 'land' and that the power to provide for acquisition of *commercial and industrial undertakings*, not being mentioned in any of the Legislative Lists, belonged to the residue. The Madras Legislature was, accordingly, not competent to enact such a law unless authorised in that behalf by the Governor-General, under s. 104 of the Government of India Act, 1935.[64]

As to whether 'acquisition' included 'requisition' or taking of possession without acquiring title, the position was not quite clear. In *Lal Singh* v. *Berar*[65], the Federal Court held that 'acquisition' implies actual *transference* of the land or the rights thereto. The Bombay High Court next held[66] that 'acquisition' in item 9 of List II of the Government of India Act, 1935, did not include 'requisition' which implied a temporary deprivation of the owner of the use and possession without acquiring the ownership itself.

Since the above decision of the Bombay High Court deprived the State of the power to make any law relating to requisition, the British Parliament passed the Indian (Proclamation of Emergency) Act, 1945, and amended s. 102 to provide that when a Proclamation of Emergency was in force, the Central Legislature was competent to make laws for a Province or a part thereof, in respect of any matters not enumerated in any of the Lists of the 7th Sch.

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Amendment. By the Constitution (Seventh Amendment) Act, 1956, the present Entry has been substituted for the original Entry.

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63. Substituted by the Constitution (Seventh Amendment) Act, 1956.
64. *Rajahmundary Electric Supply Co.* v. *State of Madras*, (1954) S.C.R. 779.
65. *Lal Singh* v. *C.P. & Berar*, A. 1944 F.C. 61.
66. *Tan Bug* v. *Collector of Bombay*, I.L.R. 1946 Bom. 517.

Object of Amendment. The object of the amendment has been thus explained –

"The existence of three entries in the legislative lists (33 of List I, 36 of List II and 42 of List III) relating to the essentially single subject of acquisition and requisitioning of property by the Government gives rise to unnecessary technical difficulties in legislation. In order to avoid these difficulties and simply the constitutional position, it is proposed to omit the entries in the Union and State List and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject".[67]

Effects of Amendment. The effects of amendment of the present Entry are far-reaching :

(i) *Firstly,* while originally, the legislative power relating to acquistion and requisitioning was distributed by Entries in each of the three Legislative Lists, the Constitution (Seventh Amendment) Act, 1956 has omitted Entries 33 of List I and 36 of List II (*see ante*), and now only the concurrent Entry is a available to either the Union or a State Legislature.

While previously, the substantive power to enact legislation with respect to acquisition and requisitioning was divided between the Union and State Legislatures according to the purposes for which such acquisition or requisitioning was to be made, now the entire field is left open to concurrent legislation. In other words, while previously, the State Legislature could not enact a law affecting acquisition or requisitioning for Union purposes, nor could Parliament authorise it for State purposes, it would nwo be possible for laws made by either Legislature to applv to the entire field, subject of course, to the usual limitations of local jurisdiction and the canons applicable to the concurrent power of legislation. Hence, a contention such as was raised in the case of *State of Bombay* v. *Gulshan*,[68] viz. that a State could not requisition or acquire property for the accommodation of consular representatives because that was a 'Union purpose', can no longer be raised after the amendment. Either the State or the Union Legislature will now be competent to requisition or acquire property, for *any* public purpose.

Secondly, the original Entry 42 dealt with compensation and it was interpreted to act as a limitation upon the legislative power conferred by Entry 33 of List I or 36 of List II, in the sense that neither Legislature could provide as compensation something which was no compensation at all,[69] because the original Entry 42 laid down that the Legislature must lay down the principles on which compensation was to be 'determined' and 'given'.

Thus, the doctrine of 'colourable legislation' came to be applied to the legislative power relating to 'acquisition' and 'requisitioning'. In subsequent cases,[70] it was made clear that the doctrine of colourable legislation was relevant only in connection with legislative competence and that it could be invoked only because the words of Entry 42 stood there as stated.

It follows, therefore, that the doctrine of colourable legislation can no longer be invoked to impeach a law relating to requisitioning and acquisition on the basis of Entry 42 of List III. It is, however to be noted that the same words 'determined' and 'given' still exist in cl. (2) of Art. 31 and that even after the

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67. Statement of Objects and Reasons.
68. *State of Bombay* v. *Gulshan*, (1955) 2 S.C.R. 867.
69. *State of Bihar* v. *Kameshwar*, (1952) S.C.R. 889 (935-6).
70. *Gajapati* v. *State of Orissa*, (1954) S.C.R. 1. *Bhairabendra* v. *State of Assam* (1956) S.C.A. 736.

amendment of that clause by the Constitution (Fourth Amendment) Act, 1955, what the Court is expressly prohibited to do is to question the 'adequacy' of the compensation. Hence, if a Legislature now provides that *no* compensation is to be paid for an acquisition under the Act, the law would obviously be void for contravention of the mandatory provisions of Art. 31 (2) (in cases to which that clause is still applicable). The Court adheres to the view that the doctrine of colourable legislation arises. And the Court has already held that where *some* compensation has been provided for, even though grossly inadequate, no question of 'fraud on the power' arises.[71]

In any case, it was now made clear that the obligation to pay compensation is to be deduced solely from Art. 31 (2) and not from anything in Entry 42 of List III.[72-73]

In view of the repeal of Art. 31(2), by the Constitution (44th Amendment Act, 1978, the question of inadequacy or illusory compensation can no longer arise.

Scope of the Entry. 1. The power to legislate for acquisition of property is a specific and independent power under Entry 42 of List III and cannot be exercised as incidental to any other Entry of List I, II or III.[74-75]

2. A law relating to acquisition will come under this Entry even though it relates to military property ;[76] or land held under the Government on Ghatwali tenure ;[73] or an inter-State carriage permit, relating to inter-State commerce;[77] or the property of an educational institution ;[78] or of a bank ;[75] or of an industry the control of which has been taken over by the Union under Entry 52 of List I.[79]

3. There is nothing in this Entry to exclude property belong to a State.[80]

4. A law providing for acquisition of contract carriage will be covered by this Entry even though it may have an incidental impact on inter–State trade and commerce.[78]

Conversely, if a law, in its pith and substamce, comes under Entry 54 of List I (regulation of mines and mineral development), it would not be governed by the present Entry even though it may involve acquisition.[81]

On the other hand,–

No implied restriction such as the existence of a public purpose or an obligation to pay compensation, can be read into this Entry, which is a mere legislative head.[81a] Any such condition must be found from some express provision in the

71. *Visheswar* v *State of M.P.*, (1952) S.C.R. 1020.
72. See, in this context, *Shankara* v. *State of Mysore*, A. 1969 S.C. 453 (459); *State of Gujarat* v. *Shantilal* A. 1969 S.C. 634 (*650*).
73. *L.N. Mishra Inst.* v. *State of Bihar*, A. 1988 S.C. 1136 (paras. 37-38).
74. *R.E.S. Corpn.* v. *State of A.P.*, A. 1954 S.C. 251.
75. *Cooper* v. *Union of India*, A. 1970 S.C. 564.
76. *Sanabati* v. *State of Bihar*, A. 1957 Pat. 270 (*274*).
77. *Manmohan* v. *State of Bihar*, A. 1961 S.C. 189 (*195*).
78. *State of Karnataka* v. *Ranganatha*, A. 1978 S. C. 215.
79. *Ishwari K.S.M.* v. *State of U.P.*, A. 1980 S.C. 1955
80. *State of W.B.* v. *Union of India*, A. 1963 S.C. 1241 (*1265*).
81. *Gujarat Pottery* v. *Sood*, A. 1967 S.C. 964 (para. 27).
81a. *Balraj* v. *State of Punjab*, A. 1989 P & H 273 (para. 13).

body of the Constitution.[77] [This proposition will be of special importance after the repeal of Art. 31(2), by the Constitution (44th Amendment) Act, 1978].[79a]

'Acquisition'. Acquisition implies the extinguishment of the rights of the party whose property is acquired, and would not include regulation of the manner of its use.[82]

'Requisitioning'. Acquisition involves a transfer of title to the State , in requisition the title remains with the owner and only the possession goes to the requisitoning authority.[83]

Validating legislation. Under the presnt Entry, it is competent for the Legislature to validate, with retrospective efect, a procedure which had been held as discriminatory because there was then another procedure more favourable which the validating Act puts out of action.[84]

Ancillary Provision. 1. In a law for acquisition of the property in a company, it is competent for Parliament to provide for the acquisition of the landlords' rights in respect of leases and tenancies included in that property.[85]

2. But the present Entry would not authorise a State Legislature to levy a 'tax' on a factory, as distinguished from a tax on a land or building occupied by a factory (which is authorised by List II, Entry 49).[86]

Existing (Central) Laws. – Requisitioned Land (Appointment of Compensation) Act (LI of 1949); Land Acquisition Act (I of 1894) ; Land Acquisition (mines) Act (XVIII of 1885).

Legislation by Parliament. – Requisitioning and Acquisition of Immovable Property Act (XXX of 1952); State Acquisition of Lands for Union Purposes (Validation) Act, 1954 ; Coal Bearing Areas (Acquisition and Development) Act (20 of 1957).

Alcock Ashdown Co.' Ltd., (Acquisition of Undertakings) Act, 1973; Esso (Acquisition of Undertakings in India) Act, 1974; Burmah Shell (Acquisition of Undertakings in India) Act, 1976; Caltex (Acquisition of Shares of Caltex oil Refining (India) Ltd., and of the Undertakings in India of Caltex (India) Ltd.) Act, 1977; Swadeshi Cotton Mills Co. Ltd. (Acquisition and Transfer of Undertakings) Act, 1986.

Auroville Foundation Act, 1988; Jamia Millia Islamia Act, 1988.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

'Arising outside that State'.– It has been held by the Trav.–Cochin[86] High Court that this Entry includes all claims due to a State, arising outside that State, whether they accured before or a after the commencement of the Constitution. Hence, under this Entry, it is competent for Parliamment or a State to provide for the recovery of claims which were due to a pre-Constitution State by a State which represents that pre-Constitution territory under the Constitution.[87]

Existing (Central) Laws. – The Revenue Recovery Act., 1890 provides that on the requisition of the Collector of the district in which the arreas of land revenue acured, the Collector of another district in India may recover the amount of the arrears as if it were an arrear of land revenue which has accrued in his own district.

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82. *Babubhai* v. *Union of India*, A. 1983 Guj. 1(para.5).
83. *Jiwani* v. *L. A. Collector*, A. 1984 S. C. 1707 (paras. 16-17).
84. *State of Mysore* v. *Achiah*, A. 1969 S. C. 477 (482).
85. *Sankaranarayanan* v. *Union of India*, A. 1990 Ker. 5 (para. 15).
86. *Govt. of A.P.* v. *H.M.T.*, A. 1975 S.C. 2037 (paras. 14-15).
87. *Krishna* v. *Municipal S.T.O.*, A. 1954 T.C. 518 (*520*).

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

'Stamp duties.'—These are duties levied on documents of various kinds when they are executed. Stamp duties are levied either by means of 'judicial' or 'non-judicial' Stamps.

(a) Judicial stamp duties are otherwise known as court-fees. The power to levy such fees in respect of documents in the Supreme Court belongs to the Union under Entry 77 of List I while the corresponding power in respect of other Courts belongs to the States under Entry 3 of List II.

(b) The power to levy non-judicial stamp is concurrent, under Entry 44 of List III.

The power to prescribe *rates* of non-judicial stamp duties is, however, divided between the Union and the States, by Entry 91 of List I and 63 of List II.

45. Inquiries and statistics for the purpposes of any of the matters specified in List II or List III.

'Inquiries and Statistics'.—See under Entry 94 of LIst I.

While under Entry 94 of List I, Parliament has the exclusive power relating to inquiries and statistics for the purposes of any of the matters specified in List I, the present Entry gives concurrent power to Parliament with respect to inquiries and statistics relating to any of the matters specified in LIst II or List III, even though Parliament is incompetent to legislate with respect to such matters themselves.[88] Parliament has, thus, a comprehensive power over the entire field of inquiries and statistics.

1. The power extends to inquire into matters collateral to the matters included in the entries under the relevant Lists.[88]

2. It is wide enough to include an inquiry, whether a criminal offence is disclosed or not by the facts alleged.[82]

3. The only condition is that the purpose of the inquiry must be reasonably related to any of the matters enumerated in List II or III. If this condition is satisfied, this Entry may apply even if the acts alleged have been done by Ministers of the State.[89]

Legislation by Parliament.—Commission of Inquiry Act (LX of 1952) ; Collection of Statistics Act (XXX of 1953).

46. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

Government of India Act, 1935.—Item 15 of List III of the Act was identical.

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Jurisdiction of Courts other than the Supreme Court. By reason of this Entry, read with Entry 5 of this List, both Parliament and a State Legislature have the power to legislate with respect to the jurisdiction and powers of a High Court relating to intestacy and succession.[90]

88. *Ram Krishna* v. *Tendolkar,* (1958) S.C.A. 754 (765).
89. *State of Karnataka* v. *Union of India,* A. 1978 S.C. 68.
90. In re Gordon, A. 1959 Mys. 83.

Analogous Provision.—See under Entries 77 of List I ; 65 of List II ; 20 of List III.

Esisting laws.—Bombay High Court (Letters Patent) Act, 1866 ; Calcutta High Court (Jurisdictioal LImits) Act. 1919; Coroners Act, 1871 ; Fort William Act, 1881; Madras Public Propety Malversation Act, 1837; Forfeiture Act, 1959; Madras, Bengal and Bombay Childern (Supplementary) Act, 1925 ; Punjab Courts (Supplementing) Act, 1919, Sikh Gurudwaras (Suplementary) Act, 1925.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

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Fees. Read with the preceding entries, the present Entry would authorise the imposition of the following fees, *inter alia*—

(i) A fee for licensing of factories (read with Entry 36).[91]

(ii) A fee or contribution[92] for regulating religious and charitable institutions[93] (read with Entry 28).

A levy which was in the nature of a tax may be converted retrospectively into a fee, under the present Entry, by denuding the levy of those characteristics which went to make it a tax, e.g., by creating a separate fund.[93] But the power conferred by the present Entry would not be available if the imposition is not a 'fee' but a 'tax'.[94]

Analogous Provisions.—See Entries 96 of List I and 66 of List II.

EIGHTH SCHEDULE

[Article 344 (1) and 351]

Languages.

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
12. *Sindhi.*
13. Tamil.
14. Telugu.
15. Urdu.

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91. *Umaid Mills* v. *State of Rajasthan*, A. 1954 Raj. 178 (*181*).
92. *Ratilal* v. *State of Bombay*, A. 1954 S.C. 388.
93. *Sudhindra* v. *H.R.E. Commr.*, A. 1963 S.C. 966 (*975*).
94. *Nagappa* v. *I.O.M. Cess Commr.*, A. 1968 Mys. 42.

NINTH SCHEDULE

[*Article 31B*]

[1. *The Bihar land Reforms Act, 1950 (Bihar Act XXX of 1950).*
2.. *The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).*
3. *The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).*
4. *The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).*
5. *The Panch Mahals Mehwassi Tenure Ablition Act, 1949 (Bombay Act LXIII of 1949).*
6. *The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950)*
7. *The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).*
8. *The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).*
9. *The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).*
10. *The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).*
11. *The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 Uttar Pradesh Act I of 1951).*
12. *The Hyderabad (Abolition of Jagirs) Regulations 1358F. (No.LXIX of 1958, Fasli).*
13. *The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli)]*[2].-

[3]["14. *The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 150).*
15. *The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).*
16. *The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).*
17. *Sctions 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).*

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1. Item 12 was inserted and the subsequent items renumbered by the Constitution (21st Amendment) Act, 1967.
2. Added by the Constitution (First Amendment) Act, 1951, s. 14.
3. Added by the Constitution (Fourth Amendment) Act, 1955, s. 5.
4. Added by the Constitution (17th Amendment) Act, 1964, w.e.f. 20.6.1964.

18. *The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).*
19. *Chapter III–A of the Industries (Development and Regulation) Act. 1951 (Act LXV of 1951), as inserted by section 13 of the Industries Development and (Regulation) Amendment Act, 1953 (Act XXVI of 1953).*
20. *The West Bengal Land Development and Planning Act, 1948, (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951."*
[4][21. *The Andhra Pradesh Ceiling on Agricultural Holding Act, 1961 (Andhra Pradesh Act X of 1961).*
22. *The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands (Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).*
23. *The Andhra Pradesh (Telangana Area) Ijara and Kowli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 (Andhra Pradesh Act XXXVI of 1961).*
24. *The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).*[5]
25. *The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).*
26. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except section 28 of this Act).*
27. *The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act I of 1955).*
28. *The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).*
29. *The Bombay Inams (Kutch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).*
30. *The Bombay Tenancy and Agriculturql Lands (Gujarat Amendment Act, 1960 (Gujarat Act XVI of 1960).*
31. *The Gujarat. Agricultural Lands Ceiling Act, 1960 (Gujarat Act XXVII of 1961).*
32. *The Sagbara and Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation I of 1962).*
33. *The Gujarat Surviving Alienations Abolition Act. 1963).*

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5. *Cf. Jivan v. State of Assam*, A. 1966 A. & N. 51 (54).

34. *The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act. XXVII of 1961).*
35. *The Hyderabad Tenancy and Agricultural Lands (Reenactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act, XI.V of 1961).*[6]
36 *The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).*
37. *The Jenmikaram Payment (Abolition) Act, 1960 (Kerala Act III of 1961)*
38. *The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).*
39. *The Kerala Land Reforms Act, 1963 (Kerala Act I of 1964).*
40. *The Madhya Pradesh Land Revenue Code, 1959 (Madhya Pradesh Act XX of 1959).*
41. *The Madhya Pradesh Ceiling on Agricultural Holding Act, 1960 (Madhya Pradesh Act XX of 1960).*
42. *The Madras Cultiviting Tenants Protection Act, 1955 (Madras Act XXV of 1955).*
43. *The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act XXIV of 1956).*
44. *The Madras Occupants of Kudiyiruppu (Protection from Eviction) Act, 1961 (Madras Act XXXVIII of 1961).*
45. *The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 Madras Act LVII of 1961).*
46. *The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).*[7]
47. *The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1972).*
48. *The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).*
49. *The Mysore Village Offices Abolition Act, 1961 (Mysore Act XIV of 1961).*
50. *The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).*
51. *The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).*
52. *The Orissa and Land Reforms Act, 1960 (Orissa Act XVI of 1960).*[8]
53. *The Orissa Merged Territories (Village Office Abolition) Act, 1963 (Orissa Act X of 1963).*
54. *The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).*

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6. *Cf. Venkatrao* v. *State of Bombay,* A. 1970 S.C.126 (*128*).
7. *Cf. Krishnaraju* v. *A. O. Land Reforms,* A. 1967 Mad. 352.
8. *Nityananda* v. *State,* A. 1983 Or. 54 (para. 16a) F.B.

55. *The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).*
56. *The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act, VIII of 1959).*
57. *The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).*
58. *The Uttar Prsdesh Imposition of Ceiling on Land Holding Act, 1960 (Uttar Prsdesh Act I of 1961).*
59. *The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954).*
60. *The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956).*
61. *The Delhi Land Reforms Act, 1954 (Delhi Act VII of 1954).*
62. *The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).*
63. *The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).*
64. *The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).*[3]
[9][65. *The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).*
66. *The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).*[9]
[10]67. *The Andhra Pradesh Land Reforms (Celing on Agricultural Holdings) Act, 1973 (Andhra Pradesh Act I of 1973).*
68. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of surplus Land) (Amendment) Act, 1972 (Bihar Act I of 1973).*
69. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1973 (Bihar Act IX of 1973).*
70. *The Bihar Land Reforms (Amendment) Act, 1972 (Bihar Act V of 1972).*
71. *The Gujarat Agricultural Lands Ceiling (Amendment) Act, 1972 (Gujarat Act of 1974).*[10]
72. *The Haryana Ceiling on Land Holdings Act, 1972 (Haryana Act 26 of 1972).*
73. *The Himachal Pradesh Ceiling on Land Holding Act, 1972 (Himachal Pradesh Act 19 of 1973).*

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9. Entries 65-66 added by the Constitution (29th Amendment) Act, 1972.
10. Entries 67-86 added by the Constitution (34th Amendment) Act, 1974.

74. *The Kerala Land Reforms (Amendment) Act, 1972 (Kerala Act 17 of 1972).*
75. *The Madhya Pradesh Ceiling on Agricultural Holding (Amendment Act, 1972 (Madhya Pradesh Act 12 of 1974).*
76. *The Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1972 (Madhya Pradesh Act 13 of 1974).*
77. *The Myosre Land Reforms (Amendment) Act, 1973(Karnataka Act I of 1974).*
78. *The Punjab Land Reforms Act, 1972 (Punjab Act 10 of 1973).*[11]
79. *The Rajasthan Imposition of Ceiling on Agricultural Holding Act, 1973 (Rajasthan Act. II of 1973).*
80. *The Gudalur Janmam Estate (Abolition and Conversion into Ryotwari) Act. 1969 (Tamil Nadu Act 24 of 1969).*
81. *The West Bengal Land Reforms (Amendment) Act, 1972 (West Bengal Act XII of 1972).*
82. *The West Bengal Estates Acquistion (Amendment) Act, 1964 (West Bengal Act XXII of 1964).*
83. *The West Bengal Estates Acquisition (Second Amendment) Act, 1973 (West Bengal Act XXXIII of 1973).*
84. *The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1972 (Gujarat Act 5 of 1973).*
85. *The Orissa Land Reforms (Amendment) Act, 1974 (Orissa Act 9 of 1974).*
86. *The Tripura Land Revenue and Land Reforms (Second Amendment) Act, 1974 (Tripura Act 7 of 1974)]*[11].

[12][87. *Omitted by the 44th Amendment Act, 1976.]*

88. *The Industries (Development and Regulation) Act, 1951 (Central Act 65 of 1951)*
89. *The Requisitioning and Acquisition of Immovable Property Act, 1952 (Central Act 30 of 1952).*
90. *The Mines and Minerals (Regulation and Development) Act, 1957 (Central Act 66 of 1957).*
91. *The Monopolies and Restrictive Trade Practices Act, 1969 (Central Act 54 of 1969).*
92. *Omitted by the Constitution (44th Amendment) Act, 1978.*
93. *The Coking Coal Mines (Emergency Provisions) Act, 1971 (Central Act 64 of 1971).*

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11. *Nandlal v. State of Haryana*, A. 1980 S.C. 2097; *Dattatraya v . State of Maharashtra*, A. 1977 S.C.915.
12. Entries 87 to 124 added by the C onstitution (39th Amendment) Act, 1975, w.e.f. 10.8.1975.

94. *The Coking Coal Mines (Nationalisation) Act, 1972 (Central Act 36 of 1972).*
95. *The General Insurance Business (Nationalisation) Act, 1972 (Central Act 57 of 1972).*
96. *The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972 (Central Act 58 of 1972).*
97. *The Sick Textile Undertakings (Taking Over of Management) Act, 1972 (Central Act 72 of 1972).*[13]
98. *The Coal Mines (Taking Over of Management) Act. 1973 (Central Act 15 of 1973).*
99. *The Coal Mines (Nationalisation) Act. 1973 (Central Act 26 of 1973).*
100. *The Foreign Exchange Regulation Act, 1973 (Central Act 46 of 1973).*
101. *The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973 (Central Act 56 of 1973).*
102. *The Coal Mines (Conservation and Development) Act, 1974 (Central Act 28 of 1974).*
103. *The Additional Emoluments (Compulsory Deposit) Act, 1974 (Central Act 37 of 1974).*
104. *The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974).*
105. *The Sick Textile Undertakings (Nationalisation) Act, 1974 (Central Act 57 of 1974).*[13]
106. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1964 (Maharashtra Act XVI of 1965).*
107. *The Maharashtra Agricultural Lnads (Ceiling on Holdings) (Amendment) Act, 1965 (Maharashtra Act XXXII of 1965).*
108. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1968 (Maharashtra Act XVI of 1968).*
109. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Second Amendment Act, 1968) (Maharashtra Act XXXIII of 1968).*
110. *The Maharashtra Agritural Lands (Ceiling on Holdings) (Amendment) Act, 1969 (Maharashtra Act XXXVII of 1969).*
111. *The Maharashtra Agricultural Lands (Ceiling on Holdings) Second Amendment) Act, 1969 (Maharashtra Act XXXVIII of 1969).*

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13. *K.S.Mills* v. *Union of India* A. 1989 S.C. 1331 (para-5); *P.W.G. Mills* v. *Union of India*, A. 1986 SC 2082 ; *Minerva Mills* v. *Union of India*, A. 1986 S.C. 2030.

112. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1970 (Maharashtra Act XXVII of 1970).*
113. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1972 (Maharastra Act XIII of 1972).*
114. *The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1973 (Maharashtra Act L of 1973).*
115. *The Orissa Land Reforms (Amendment) Act, 1965 (Orissa Act 13 of 1965).*
116. *The Orissa Land Reforms (Amendment Act, 1966 (Orissa Act 8 of 1967).*
117. *The Orissa Land Reforms (Amendment) Act, 1967 (Orissa Act 13 of 1967).*
118. *The Orissa Land Reforms (Amendment) Act, 1969 (Orissa Act 13 of 1969).*
119. *The Orissa Land Reforms (Amendment) Act, 1970 (Orissa Act 18 of 1970).*
120. *The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (Uttar Pradesh Act 18 of 1973).*
121. *The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendent) Act, 1974 (Uttar Pradesh Act 2 of 1975).*
122. *The Tripura Land Revenue and Land Reforms (Third Amendment) Act. 1975 (Tripura Act 3 of 1975).*
123. *The Dadra and Nagar Haveli Land Reforms Regulation, 1971 (3 of 1971).*
124. *The Dadra and Nagar Haveli Land Reforms (Amendment) Regulation, 1973 (5 of 1973)*[12].

[12][*125. Section 66A and chapter IV-A of the Motor Vehicles Act, 1939 (Central Act 4 of 1973).*

126. *The Essential Commodities Act, 1955 (Central Act 10 of 1955).*
127. *The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Central Act 13 of 1976).*
128. *The Bonded Labour System (Abolition) Act, 1976 (Central Act 19 of 1976).*
129. *The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976 (Central Act 20 of 1976).*
130. *Omitted by the 44th Amendment Act, 1976.*
131. *The Levy Sugar Price Equalization Fund Act, 1976 (Central Act 31 of 1976).*

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14. Items 125 to 188 added by the Constitution (40th Amendment) Act, 1976.

132. *The Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976).*[15]
133. *The Departmentalization of Union Accounts (Transfer of Personnel Act, 1976 (Central Act 59 of 1976).*
134. *The Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act 1 of 1957).*
135. *The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act. 1958 (Bombay Act XCIX of 1958).*
136. *The Gujarat Private Forests (Acquisition) Act, 1972 (Gujarat Act 14 of 1973).*
137. *The Haryana Ceiling on Land Holdings (Amendment) Act, 1976 (Haryana Act 17 of 1976).*
138. *The Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Himachal Pradesh Act 8 of 1974).*
139. *The Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 (Himachal Pradesh Act 18 of 1974).*
140. *The Karnataka Land Reforms (Second Amendment and Miscellaneous Provisions) Act, 1974 (Karnataka Act 31 of 1974).*
141. *The Karnataka Land Reforms (Second Amendment) Act, 1976 (Karnataka Act 27 of 1976).*
142. *The Karala Prevention of Eviction Act, 1966 (Kerala Act 12 of 1966).*
143. *The Thiruppuvaram Payment (Abolition) Act, 1969 (Kerala Act 19 of 1969).*
144. *The Sreepadam Lands Enfranchisement Act, 1969 (Kerala Act 20 of 1969).*
145. *The Sree Pandaravaka Lands (Vesting and Enfranchisement) Act, 1971 (Kerala Act 20 of 1971).*
146. *The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Kerala Act, 26 of 1971).*
147. *The Kerala Agricultural Workers Act, 1974 (Kerala Act 18 of 1974).*
148. *The Kerala Cashew Factories (Acquisition) Act, 1974 (Kerala Act 29 of 1974).*
149. *The Kerala Chitties Act, 1975 (Kerala Act 23 of 1975).*

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15. *Maharao* v. *Union of India*, A. 1985 S.C. 1650; *Dattatraya* v. *State of Maharashtra*, A. 1989 S.C. 1796; *Union of India* v. *Valluri*, A. 1979 S.C. 1415; *State of Gujarat* v. *Parshottamdas*, A. 1988 S.C. 220.

150. *The Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975 (Kerala Act 31 of 1975).*
151. *The Kerala Land Reforms (Amendment) Act, 1976 (Kerala Act 15 of 1976).*
152. *The Kanam Tenancy Act, 1976 (Kerala Act 16 of 1976).*
153. *The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 (Madhya Pradesh Act 20 of 1974).*
154. *The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1975 (Madhya Pradesh Act 2 of 1975).*
155. *The West Khandesh Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1961 (Maharashtra Regulation I of 1962).*
156. *The Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (Maharashtra Act XIV of 1975).*
157. *The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 (Maharashtra Act XXI of 1975).*
158. *The Maharashtra Private Forests (Acquisition) Act, 1975 (Maharashtra Act XXXIX of 1975).*
159. *The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1975 (Maharashtra Act XLVII of 1975).*
160. *The Maharashtra Agricultural Lands (Ceiling on Holdings) and (Amendment) Act, 1975 (Maharashtra Act II of 1976).*
161. *The Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952).*
162. *The Rajasthan Colonization Act, 1954 (Rajasthan Act XXVII of 1954).*
163. *The Rajasthan Land reforms and Acquisition of Land-owners' Estates Act, 1963 (Rajasthan Act II of 1964).*
164. *The Rajasthan Imposition of Ceiling on Agricultural Holdings (Amendment) Act, 1976 (Rajasthan Act 8 of 1976).*
165. *The Rajasthan Tenancy (Amendment) Act, 1976.*
166. *The Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act, 1970 (Tamil Nadu Act 17 of 1970).*
167. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1971 (Tamil Nadu Act 41 of 1971).*
168. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1972 (Tamil Nadu Act 10 of 1972).*
169. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1972 (Tamil Nadu Act 20 of 1972).*

170. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1972 (Tamil Nadu Act 37 of 1972).*
171. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fourth Amendment Act, 1972 (Tamil Nadu Act 39 of 1972).*
172. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Sixth Amendment Act, 1972 (Tamil Nadu Act 7 of 1974).*
173. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fifth Amendment Act, 1972 (Tamil Nadu Act 10 of 1974).*
174. *The Tamil Nadu Land Reforms (Fixation of Ceilng on Land) Amendment Act, 1974 (Tamil Nadu Act 15 of 1974).*
175. *The Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1974 (Tamil Nadi Act 30 of 1974).*
176. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1974 (Tamil Nadu Act 32 of 1974).*
177. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) AmendmentAct, 1975 (Tamil Nadu Act II of 1975).*
178. *The Tamil Nadu land REforms (Fixatin of Ceiling on Land) Second Amendment Act, 1975 (Tamil Nadu Act 21 of 1975).*
179. *Amendments made to the Uttar Pradesh Zamindari Abolition and Land reform Act, 1950 (Uttar Pradesh Act 1 of 1951) by the Uttar Pradesh Land Laws (Amendment) Act, 1971 (Uttar Pradesh Act 21 of 1971) and the Uttar Pradesh Land Laws (Amendment) Act, 1974 (Uttar Pradesh Act 34 of 1974).*
180. *The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (Uttar Pradesh Act 20 of 1976).*
181. *The West Bengal Land Reforms (Second Amendment) Act, 1972 (West Bengal Act XXVIII of 1972).*
182. *The West Bengal Restoration of Alienated Land Act, 1973 (West Bengal Act XXIII of 1973).*
183. *The West Bengal Land Reforms (Amendment) Act, 1974 (West Bengal Act XXXIII of 1974).*
184. *The West Bengal Land Reforms (Amendment) Act, 1975 (West Bengal Act XXIII of 1975).*
185. *The West Bengal Land Reforms (Amendment) Act, 1976 (West Bengal Act XII of 1976).*
186. *The Delhi Land Holdings (Ceiling) Amendment Act, 1976 (Central Act 15 of 1976).*
187. *The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Goa, Daman and Diu Act 1 of 1976).*

188. *The Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 (Pondicherry Act 9 of 1974).*[14]

[16]189. *The Assam (Temporarily Settled Areas) Tenancy Act, 1971 (Assam Act XXIII of 1971).*

190. *The Assam (Temporarily Settled Areas) Tenancy (Amendment) Act, 1974 (Assam Act XVIII of 1974).*

191. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) (Amending) Act, 1974 (Bihar Act 13 of 1975).*

192. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1976 Bihar Act 22 of 1976).*

193. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1978 (Bihar Act VII of 1978).*

194. *The Land Acquisition (Bihar Amendment) Act, 1979 (Bihar Act 2 of 1980.*

195. *The Haryana Ceiling on Land Holdings (Amendment) Act, 1977 (Haryana Act 14 of 1977).*

196. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1978 (Tamil Nadu Act 25 of 1978).*

197. *The Tamil Nadu Land reforms (Fixation of Ceiling on Land) Amendment Act, 1979 (Tamil Nadu Act 11 of 1979).*

198. *The Uttar Pradesh Zamindari Abolition Laws (Amendment) Act, 1978 (Uttar Pradesh Act 15 of 1978).*

199. *The West Bengal Restoration of Alienated Land (Amendment) Act, 1978 (West Bengal Act XXIV of 1978).*

200. *The West Bengal Restoration of Alienated Land (Amendment) Act, 1980 (West Bengal Act LVI of 1980).*

201. *The Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Goa, Daman and Diu Act 7 of 1964).*

202. *The Goa, Daman and Diu Agricultural Tenancy (Fifth Amendmen) Act, 1976 (Goa, Daman and Diu Act 17 of 1976).*[16]

[17]203. *The Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 (Andhra Pradesh Regulation 1 of 1959).*

204. *The Andhra Pradesh Scheduled Areas Laws (Extension and Amendment) Regulation, 1963 (Andhra Pradesh Regulation 2 of 1963).*

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16. Item 189 to 202 added by the Constitution (47th Amendment) Act, 1984.
17. Items 203–257 inserted by the Constitution (66th Amendment) Act, 1990.

205. *The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation. 1970 (Andhra Pradesh Regulation 1 of 1970).*
206. *The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1971 (Andhra Pradesh Regulation 1 of 1971).*
207. *The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1978 (Andhra Pradesh Regulation 1 of 1978).*
208. *The Bihar Tenancy Act, 1885 (Bihar Act 8 of 1885) (Chapter VII–A – sections 49–AA to 49Q).*
209. *The Chotanagpur Tenancy Act, 1908 (Bengal Act 6 of (1908) (Chapter VIII – sections 46, 47, 48, 48A and 49; Chapter X – sections 71 71A and 71B; and Chapter XVIII – sections 240, 241 and 242).*
210. *The Santhal Parganas Tenancy Act, 1908 (Bengal Act 6 of 1908) Chapter VIII – section 46, 47, 48, 48A and 49; Chapter X – sections 71, 71A and 71B; and Chapter XVIII – section 240, 241 and 242).*
211. *The Bihar Scheduled Areas Regulation, 1969 (Bihar Regulation 1 of 1969).*
212. *The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982 (Bihar Act 55 of 1982).*
213. *The Gujarat Devasthan Inams Abolition Act, 1969 (Gujarat, Act 16 of 1969).*
214. *The Gujarat Tenancy Laws (Amendment) Act, 1976 (Gujarat Act 37 of 1976).*
215. *The Gujarat Agricultural Land Ceiling (Amendment) Act, 1976 (Act 43 of 1976).*
216. *The Gujarat Devasthan Inams Abolition (Amendment) Act, 1977 (Gujarat Act 27 of 1977).*
217. *The Gujarat Tenancy Laws (Amendment) Act, 1977 (Gujarat Act 30 of 1977).*
218. *The Bombay Land Revenue (Gujarat Second Amendment) Act, 1980 (Gujarat Act 37 of 1980).*
219. *The Bombay Land REvenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, 1982 (Gujarat Act 8 of 1982).*
220. *The Himachal Pradesh Transfer of Land (Regulation) Act, 1968 (Himachal Pradesh Act 15 of 1969).*

221. *The Himachal Pradesh Transfer of Land (Regulation) (Amendment) Act, 1986 (Himachal Pradesh Act 16 of 1986).*
222. *The Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of certain Lands) Act, 1978 (Karnataka Act 2 of 1979).*
223. *The Kerala Land Reforms (Amendment) Act, 1978 (Kerala Act 13 of 1978).*
224. *The Kerala Land Reforms (Amendment) Act, 1981 (Kerala Act 19 of 1981).*
225. *The Madhya Pradesh Land Revenue Code (Third Amendment) Act, 1976 (Madhya Pradesh Act 15 of 1980).*
227. *The Madhya Pradesh Akrishik Jot Uchchatam Seema Adhiniyam, 1981 (Madhya Pradesh Act 11 of 1981).*
228. *The Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1976 (Madhya Pradesh Act 1 of 1984).*
229. *The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment Act, 1984 (Madhya Pradesh Act 14 of 1984).*
230. *The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1989 (Madhya Pradesh Act 8 of 1989).*
231. *The Maharashtra Land Revenue Code, 1966 (Mahrashtra Act 41 of 1966), sections 36, 36A and 36B.*
232. *The Maharashtra Land Revenue Code and the Maharashtra Restoration of Lands to Scheduled Tribes (Second Amendment) Act, 1976 (Maharashtra Act 30 of 1977).*
233. *The Maharashtra Abolition of Subsisting Proprietary Rights to Mines and Minerals in certain Lands Act, 1985 (Maharashtra Act 16 of 1985).*
234. *The Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (Orissa Regulation 2 of 1956).*
235. *The Orissa Land Reforms (Second Amendment) Act, 1975 (Orissa Act 29 of 1976).*
236. *The Orissa Land Reforms (Amendment) Act, 1976 (Orissa Act 30 of 1976).*
237. *The Orissa Land Reforms (Second Amendment) Act, 1976 (Orissa Act 44 of 1976).*
238. *The Rajasthan Colonisation (Amendment) Act, 1984 (Rajasthan Act 12 of 1984).*
239. *The Rajasthan Tenancy (Amendment) Act, 1984 (Rajasthan Act 13 of 1984).*

240. *The Rajasthan Tenancy (Amendment) Act, 1987 (Rajasthan Act 13 of 1987).*
241. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1979 (Tamil Nadu Act 8 of 1980).*
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244. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1983 (Tamil Nadu Act 2 of 1984).*
245. *The Uttar Pradesh Land Laws (Amendment) Act, 1982 (Uttar Pradesh Act 20 of 1982).*
246. *The West Bengal Act 18 of 1965).*
247. *The West Bengal Land Reforms (Amendment) Act, 1966 (West Bengal Act 11 of 1966).*
248. *The West Bengal Land Reforms (Second Amendment) Act, 1977 (West Bengal Act 23 of 1977).*
250. *The West Bengal Land Holding Revenue Act, 1979 (West Bengal Act 44 of 1979).*
251. *The West Bengal Land Reforms (Amendment) Act, 1980 (West Bengal Act 41 of 1980).*
252. *The West Bengal Land Holding Revenue (Amendment) Act, 1981 (West Bengal Act 33 of 1981).*
254. *The West Bengal Land Holding Revenue (Amendment) Act, 1982 (West Bengal Act 23 of 1982).*
255. *The Calcutta Thikka Tenancy (Acquisition and Regulation) (Amendment) Act, 1984 (West Bengal Act 41 of 1984).*
256. *The Mahe Land Reforms Act, 1968 (Pondicherry Act 1 of 1968).*
257. *The Mahe Land Reforms (Amendment) Act, 1980 (Pondicherry Act 1 of 1981).*[17]

[18]*[Explanation. Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955), in contravention of the second proviso to clause (1) of article 31A, shall, to the extent of the contravention, be void.]*[18]

I. Statement of Objects and Reasons of the 17th Amendment Act. 1. "Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 4, article 19 or article 31. The protection of this article is available only in respect of such tenures as were estates on the 26th January, 1950, when the Constitution came into force. The

18. Added by the Constitution (17th Amendment) Act, 1964.

expression "estate" has been defined differently in different States, and as a result of the transfer of land fron one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19 and 31 of the Constitution and that the protection or article 31A was not available to them. It is, therefore, proposed to amend the definition of "estate" in article 31A of the Constitution by including therein lands held under *ryotwari* settlement and also other lands in respect of which provisions are normally made in land reform enactments. It is further proposed to provide that where any law makes a provision for the acquisition by the State of any estate and where any land comprised there in is held by a person under his personl cultivation, it shall not be lawful for the State to acquire any such land as is within the ceiling limit applicable to him under any law for time being in force or any building or structure standing thereon or appurtreant thereto, unless the law relating to the acquisition of such land, building or structure provides for payment of compensation at a rate not less than the market value thereof.

2. It is also proposed to amend the Ninth Schedule by including therein certain State enactments relating to land reform in order to remove any uncertainty or doubt that may arise in regard to their validity."

II. Statements of Objects and Reasons of the 66th Amendment Bill,1990. "1. Article 31B of the Constitution confers on the enactments included in the Ninth Schedule to the Constitution immunity from legal challenge on the ground that they violate the fundamental rights enshrined in Part III of the Constitution.

2. In the past, whenever it was found that progressive legislation, conceived in the interest of the public was imperilled by litigation, recourse was taken to the Ninth Schedule. Several Satae enactments relating to land reforms and ceiling on agricultural land holdings have already been included in the Ninth Schedule. Since the Government is committed to give importance to land reforms, it is decided to include *all* land reform laws in the Ninth Schedule so that they are not challenged before the courts. The State Governments of Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, Uttar Pradesh, West Bengal, Tamil Nadu and administration of the Union territory of Pondicherry have suggested the inclusion of some of their Acts relating to land reforms in the Ninth Schedule.

3. Since the amendment of Acts which are already placed in the Ninth Schedule are not automatically immunized from legal challenge, some *amending* Acts are also proposed to be included in the Ninth Schedule. The Acts which are proposed to be included in the Ninth Schedule have been examined. In order to ensure that implementation of these Acts is not adversely affected by litigation, it is proposed to include them in the Ninth Schedule.

4. The Bill seeks to achieve the above object."

Effects of inclusion of an Act in the 9th Schedule. 1. See under Art. 31B, *ante*. In view of Art. 31B, the inclusion of an Act in the 9th Schedule validates it with retrospective effect from the date of its enactment, irrespective of its inconsistency with any fundamental right and of any declaration of unconstitutionality by any Court on such ground.[18a-19]

2. In the result the constitutionality of such protected Act cannot be challenged except on the ground of want of legislative competence.[19]

3. But also to Acts included in the 9th Schedule by Amendments made *on or after 24-4-1973*, the foregoing proposition is to be read subject to the decision in *Kesavananda's case*.[20] By the judgement delivered on that date, in that case,[20] it was laid down that any amendment of the Constitution which sought to destroy or damage the basic features or the basic structure of the Constitution would be unconstitutional and void. Hence, any amendment of the Constitution made after

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18a *Jagannath* v. *Authorised Officer*, A. 1972 S.C. 425 (435).

19. *Sasanka* v. *Union of India*, A. 1981 S.C. 522 (paras. 31, 34-35); *Dathatraya* v. *State of Maharashtra*, A. 1989 S.C. 1976 (para.3).

20. *Kesavananda* v. *State of Kerala*, A. 1973 S.C. 1461.

24-4-1973 would be open to challenge on the ground that the Amendment Act destroyed or damaged the basic features of the Constitution.[21] If that challenge succeeds, the inclusion of the offending Act in the 9th Sch. would be void and it would be open to the further challenge of violation of Arts. 14, 19 [and 31], unless saved by Art. 31A or 31C (as it stood prior to its amendment by the 42nd Amendment Act).[21] In short, Acts added to the 9th Sch. on or after 24-4-1973 will not receive the protection of Art. 31B.[18] They will be valid only if they do not damage or destroy the basic structure of the Constitution.[21] It may be pointed out, in this context, that all the Acts specified in Entries 67 onwards (by 34th Amendment Act, 1974, the 39th Amendment Act, 1975 and the 40th Amendment Act, 1976) are all additions subsequent to 24-4-1973.

4. But additions to the 9th Sch. made prior to 24-4-1973 will not be hit by the doctrine of 'basic features' and would, therefore, be completely protected by Art. 31B.[22]

5. The inclusion of an Act would not retrospectively affect any right which accrued prior to the inclusion of the Act in the 9th Schedule.[23]

6. The protective umbrella of Art. 31A cannot be extended to orders and notifications issued under the Act included in the 9th Schedule, prior to its inclusion.[24]

TENTH SCHEDULE[1]

[Articles 102(2) and 19(2)]

PROVISIONS AS TO DISQUALIFICATION ON GROUND OF DEFECTION

1.Interpretation. In this Schedule, unless the context otherwise requires,–

(a) "House" means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State;

(b) "Legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or, as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

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21. *Waman* v. *Union of India*, A. 1981 S.C. 271 (paras. 52, 54, 56).
22. *Kalimata Thakurani* v. *Union of India*, A. 1981 S.C. 1030 (paras. 1, 11).
23. *Ajay* v. *Union of India*, A. 1984 S.C. 1130 (para. 43).
24. *Prag Mills* v. *Union of India*, A. 1978 S.C. 1296.

(c) "Original political party", in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2;

(d) "paragraph" means a paragraph of this Schedule.

2. Disqualification on ground of defection. *(1) subject to the provisions of paragraph 3, 4, and 5, a member of a House belonging to any political party shall be disqualifed for being a member of the House –*

(a) if he has voluntarily given up his membership of such political party;

or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority, and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation. For the purposes of this sub-paragraph, –

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member,

(b) a nominated member of a House shall, –

(i) Where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other cuse, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

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1. 10th Sch. added by the Constitution (52nd Amendment) Act, 1985 (vide Arts. 101, 102, 190, 191, *ante*).

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(4) Notwithstanding anything cantained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifth-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,–

(i) where he was a member of a political party immediately before such commencement, be deemed , for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such other wise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

Para. 2(1): Defection. The insertion of the 10th Schedule presupposes the existence of the party system in the parliamentary form of government in India.[2] This Schedule sets out the circumstances when a member of the Legislature would be deemed to have 'defected' from the political party as a member of which he had been elected to the Legislature. Upon such defection he would be disqualified to remain a member of the Legislature and would lose his seat according to the decision of the Speaker or Chairman of the House to which he belonged.

3. Disqualification on ground of defection not to apply in case of split. *Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a spilt in his original political party and such group consists of not less than one-third of the members of such legislature party,–*

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2. *Kanhiya v. Trivedi*, A. 1986 S.C. 111.

(a) he shall not disqualified under sub-paragraph (1) of paragraph 2 on the ground –

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such faction such split, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

4. Disqualification on ground of defection not to apply in case of merger. *(1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party –*

(a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or

(b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.

5. Exemption. *Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule,—*

(a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

6. Decision on questions as to disqualification on ground of defection. *(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final;*

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House may as the House elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212.

Scope of sub-para. (1). 1. This sub-para. vests final power in the Speaker (or Chairman, as the case may be), to determine any question as to the disqulification of a Member of the House, under the 10th Sch.

2. Para. 8 (1)(d) empowers the Speaker (or Chairman) to make Rules to prescribe the procedure to be followed for deciding any question arising under para. 6 (1), as aforesaid. But the power of the Speaker (or Chairman) to decide the question is absolute and is not dependent upon the framing of Rules under para. 8.[3]

Scope of sub-para. (2). 1. By this sub-para., a proceeding for determination of a question of disqualification under sub-para. (1) shall be deemed to be a 'proceeding' in Parliament (or the State Legislature), within the meaning of Art. 122 (or Art. 212), as the case may be.

2. The result of this is that a Court has no jurisdiction to question the validity of such proceeding, which is within the special jurisdiction of the Legislature itself,[4] on any ground of irregularity of procedure, e.g., that the petition raising the question of disqualification was addressed to the Secretary of the House; or that the Speaker referred the matter to the Committee of Privileges, instead of following the procedure laid down in the Rules.[3]

3. The provision in Art. 123 (2) [or Art. 212 (2)] also becomes applicable, immunising from juridiction of the Court an officer or member of the Legislature in whom powers to regulate the procedure has been vested in this context.

4. A proceeding for determination of the question under Para. 6(1) starts with the presentation of the Petition raising the question as to disqualification of the member concerned, and since then the deeming provision under Para. 6 (2) would operate, until the Speaker gives his final decision.[3]

5. The bar under para. 6(2), as to the jurisdiction of the Courts, including the jurisdiction of the High Court to issue a writ under Art. 226, is in addition to the overall bar under Para. 7, below.

7. Bar of jurisdiction of courts. *Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.*

Constitutionality of Para.7. A Full Bench of the Punjab and Haryana High Court has held[5] that Para. 7 of this Schedule is invalid on the ground that, though it sought to take away the jurisdiction of the Supreme Court and High Court to decide the question of disqualification of a member of the Legislature, it was not got ratified by the State Legislatures as required by the Proviso to Cl. (2) of Art. 368.

In the result, the decision of the Speaker under Para. 6(1) would be open to judicial review under Arts. 226, 136 of the Constitution, on such grounds as preversity, *mala fides* and the like.[6]

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3. *Bhajaman* v. *Speaker*, A. 1990 Or. 18 (paras. 3. 4, 11) F.B.
4. *Cf. Sharma* v. *Shree Krishna*, A. 1960 S.C. 1186 (para.10).
5. *Prakesh Singh* v. *Union of India*, A. 1987 P. & H. 263 (paras. 13-15, 95, 102, 108) F.B. [Appeals from this election as well as the decisions of other High Courts as to the constitutional validity of the 10th Sch. are pending before the Suprime Court.]
6. *Union of India* v. *Jyoti Prakash*, A. 1971 S.C. 1093 (para. 31); *Durgashankar* v. *Raghuraj*, A. 1954 S.C.520 (para. 4).

8. Rules. *(1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in particular, and and without prejudice to the generality of the foregoing, such rules may provide for –*

(a) the maintenance of registers or other records as to the political parties, if any, to which different members of the House belong;

(b) the report which the leader of a legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any member of the House and the officer of the House to whom such reports shall be furnished; and

(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

(2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect.

(3) The Chairman or the Speaker of a House may, without prejudice to the provisions of article 105 or, as the case may be article 194, and to any other power which he may have under this Constitution direct that any wilful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House.

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