

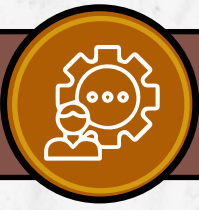
SEVENTH SCHEDULE OF THE INDIAN CONSTITUTION- DOES IT NEED A RELOOK?



Introduction and present context

- The Constitution of India, being **federal in structure, divides powers** (legislative, executive, and financial) between the Centre and the states. However, there is **no division of judicial power** as the Constitution has established an integrated judicial system to enforce both the Central laws as well as state laws.
- Although the **Centre and the states are supreme in their respective domains**, harmony and coordination between them is essential for the effective operation of the federal system. Hence, the **Constitution contains elaborate provisions** to regulate the various dimensions of the relations between the Centre and the states. **One such provision is the Seventh Schedule of the Indian Constitution.**
- The Seventh Schedule contains a **three-fold distribution of legislative subjects** between the Centre and the states, viz., List-I (the Union List), List-II (the State List) and List-III (the Concurrent List).
- However, the **dealings with the recent COVID pandemic has highlighted the issues** with the distribution of subjects between the centre and states. The fragmented manner in which the laws have been invoked highlighted a **lack of clarity in how the Centre and States have interpreted their roles** under the Constitution as it stands.
- For example, the current COVID pandemic is primarily a **health and public order issue (State subjects)**. Various states imposed lockdown by invoking Epidemic Disease Act, 1897. However, given the highly communicable nature of the disease and to ensure consistency in the application and implementation of various measures across the country, the central government invoked Disaster Management Act, 2005 (DM Act) to impose a blanket lockdown across the country.
 - ◆ Disaster Management Act being **highly centralised** in its nature, restricts the space for states to manoeuvre its options in accordance with prevalent local conditions.

In this context, going forward we need to understand what seventh schedule is and how did it evolve over the period of time? Further, why there is a need to relook the present structure of the schedule and if we have to revise the schedule to suit the current needs and requirements, what the process of revision would entail? We will also look into various judicial precedents in dealing with the overlapping of power between the center and states thus ensuring a healthy functioning of our Constitution.



What is Seventh Schedule of the Constitution?

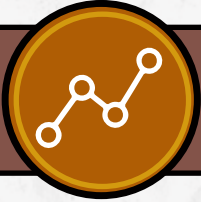
- The Constitution provides a scheme for demarcation of powers through three 'lists' in the Seventh Schedule under Article 246. It states
 - ◆ Parliament has exclusive competence to make laws on any matter listed in **List I or the Union List**. E.g. defence, foreign affairs, railways, banking, etc.
 - ◆ The State Legislatures have exclusive competence over **List II or the State List**. E.g. Public order, police, public health and sanitation, hospitals and dispensaries, betting and gambling etc.
 - ◆ Both the Parliament and the State Legislatures have competence over **List III or the Concurrent List**. E.g. Education, population control and family planning, criminal law, prevention of cruelty to animals, protection of wildlife and animals, forests etc.
 - ◆ Broadly, entries that are related to **national importance** were **allocated to the Union** and entries of **local concern** were **allocated to the States**.
 - ◆ **Concurrent list** mostly serves as a device to **loosen the excessive rigidity** of the two-fold distribution. It is reckoned as the twilight zone of the Constitution as it allows the legislative power to vary from state legislature to Parliament based on the importance of the matter. As per Sarkaria Commission, concurrent list subjects are neither exclusively of national concern nor of local concern and hence occupy a constitutional 'grey' area.
 - ◆ The Seventh Schedule **is thus indicative of the spirit of cooperation between the Union and the States**. Also, it represents a **limitation to powers** of both Centre and States. Such a limitation is essential to ensure that the different institutional layers in a federation are able to function autonomously in their respective spheres of influence.



Federal Scheme of the Indian Constitution

Unlike classical federations, India is a 'holding-together' federation i.e. the units did not come together to pool in their sovereignty; instead sovereignty was derived from a written constitution imposed from above.

- **Article 248** confers residuary powers on the Parliament while **Article 254** also resolves issues of repugnancy in favour of the Parliament.
- **Article 249** gives the Parliament the power to enter the legislative domain of states if it is necessary or expedient in national interest.
- Under **Article 250**, during an emergency, Parliament has the power to legislate with respect to any matter in the State List.
- **Article 252** enables the Parliament to legislate for two or more States by consent, with the law applying to such States and to any other State by which it is adopted afterwards by resolution.
- **Article 253** recognises the power of the Parliament to make law for giving effect to international agreements.



How did evolution of Seventh Schedule take place?

The provisions relating to power-sharing can be linked to historical antecedents, colonial legislations as well as the socio-political context at the time of drafting of Indian Constitution. The measures undertaken by the British Crown, after it took over from the East India Company post-1857, formally institutionalised many aspects of the federal principle.

- The **Indian Councils Act, 1861** brought about provincial legislative councils which had substantial Indian representation and Lord Ripon's 1882 resolution introduced elected municipal councils and rural district boards.
- The **Government of India (GoI) Act, 1909** further empowered the provincial councils, enabling more Indian representation.
- However, the **GoI Act, 1919** was more significant. It **relaxed the central control over the provinces** by demarcating and separating the **central and provincial subjects**.
- The trend of granting greater provincial autonomy culminated in the enactment of the **GoI Act, 1935**. For the first time, provinces were legally recognised as exercising legislative and executive powers in their own spheres, which is a basic feature of a federation. Further, it laid down the scheme of **distribution of legislative powers into three lists**, which has been retained in the Indian Constitution.
- Post-Independence, the **Constituent Assembly opted for a centralised constitutional structure** based on the GoI Act, 1935 as opposed to a purely federal one. This was mainly due to following reasons:
 - ◆ Following the partition and related violence, it was thought that a strong central government is needed to handle the **communal frenzy** and manage the increasingly **complex administrative problems** faced by the new nation.
 - ◆ Most of the **princely states** which had to be integrated did not have any effective governance systems in place and many were hostile to the idea of cooperating with the newly formed Government of India.
 - ◆ Ensuring **unity and integrity and balanced economic development** were the predominant considerations in the Constituent Assembly debates.
- **Rationale behind the list system contained in the Seventh Schedule**
 - ◆ The **Joint Committee Report of 1934 ('JCR')** that preceded the enactment of the 1935 Act explains the rationale for distribution of legislative powers as "an essential feature of Provincial Autonomy and as being itself the means of defining its ambit". For this purpose, an unprecedented, exhaustive statutory allocation was considered necessary.
 - ◆ Further, it was also felt that such a scheme would **reduce disputes over the scope of Centre-State jurisdiction**. However, the distribution of legislative powers reflects the dominance of the Parliament over the State Legislatures.





Why is there a need to relook and revise the Seventh Schedule?

Constitution provides primacy to Laws made on Union List over State list or Concurrent list. Similarly, laws made by Parliament on Concurrent list will prevail over those made by State on the same subject. This makes it clear that **States are not as autonomous as they should be** according to the Seventh schedule.

The question of division of powers and responsibilities between the centre and the states has cropped up in several legislative proposals. For example,

- This issue has been raised in Parliament during the debate on the Lokpal and Lokayuktas Bill in 2012 (includes State government officials), Land Acquisition and Rehabilitation and Resettlement Bill (Land is a state subject) and National Food Security Bill etc.
- More recently, **Chhattisgarh had filed a suit in Supreme Court** under Article 131 against the National Investigation Agency (NIA) Act. Chhattisgarh argued that the Act is beyond the legislative competence of the Parliament.
 - ◆ **Police is a State subject** under the Seventh Schedule. However, NIA Act takes away the state's power to investigate offences categorised as scheduled offences under the Act though they were within the state's jurisdiction.

Relooking the Seventh Schedule is thus justified in light of constitutional intent, taking into consideration the historical background of the current scheme of distribution of powers, and also owing to developments in the decades following its adoption.

While the Constitution of India has been amended multiple times since its enactment, the **Seventh Schedule has never been comprehensively reviewed**. At the same time, the practical experience of federalism may make us reconsider the appropriateness of allocation of particular legislative powers. This necessitates a revision of Seventh Schedule for the following reasons:

- **The needs of governance are not static** and are bound to change over time. A subject that was vital for legislative allocation in 1950 may no longer be relevant in the present. Chairman of the 15th Finance Commission also called for a relook at the 7th Schedule of the Indian Constitution in order to strengthen the fiscal federalism.
- **Concerns with residuary powers:** Entry 97 of List I read with **Article 248** of the Constitution grant residuary powers to the Parliament. Constituent Assembly's conferral of residuary powers on the Parliament was only **to account for unforeseeable areas of exercise of legislative powers** and cannot be extended to imply an infinite legislative domain for the Union.

Centre's response to state's demands:

Responding to the demands, the **Centre appointed various Commissions** to look into the question of centre-state Relations.

- **Commission under the chairmanship of Justice R.S. Sarkaria** in 1983 was appointed to review the existing arrangement between the Centre and the States with respect to powers, functions and responsibilities in all spheres. **It however did not recommend any major structural overhaul.**
- Its **major recommendations were threefold:**
 - ◆ First, that **residuary powers be transferred from the Union List to the Concurrent List**, except for the residuary power to impose taxes which should be retained in the Union List.



- ◆ However, **Sarkaria Commission** had identified **nine central laws as having been passed solely under the residuary power of Parliament**, as determined in Supreme Court and High Court cases. This practice indicates that use of residuary powers has been at the cost of states' autonomy.
- **Demands of various states:** There have been multiple demands made by various States over the years, usually **calling for greater powers** to be vested in them or **even a complete restructuring** of the Seventh Schedule.
 - ◆ For example, - **Rajamannar Committee in Tamil Nadu, 1969** and the **Anandpur Sahib Resolution in Punjab in 1973** recommended transferring several entries to the State List, both from the Union and Concurrent Lists, and vesting residuary powers in the States.
 - ◆ The State of **West Bengal** in 1977 adopted a memorandum affording greater control over industries to States and also transferring residuary powers. **Orissa** particularly desired more State autonomy and decentralisation in the matter of finance.
- ◆ Second, that the **States should be consulted by the Centre** before the latter exercises its power over Concurrent List entries.
- ◆ Third, that the **Centre should limit the field it occupies with respect to Concurrent List** entries to only as much as is necessary for ensuring uniformity in basic issues of national policy, with the details being left for State action.
- The **National Commission to Review the working of the Constitution (Venkatachaliah Commission, 2002)** and the **Puncchi Commission (2010)** also reiterated the need for consultation and restraint by the Central Government when occupying a field in the Concurrent List.
- These Commissions however delved into Centre-state relations by typically focussing on other matters (such as Article 356), and treating the Seventh Schedule only in passing.



Seventh Schedule and Judiciary



- Despite the listed division of power, a mechanical application of the division of powers is not possible. They are bound to overlap from time to time. Court has utilised various principles such as **Doctrine of Pith and Substance** and **Doctrine of Colourable Legislation** in the interpretation of the legislative powers assigned both to the Centre and the State.

Doctrine of Pith and Substance

- Supreme Court on various occasions [Calcutta Gas Company case (1962), India Cement Ltd Vs. State of Tamil Nadu (1990), Jilubhai Nanbhai Khachar case (1994)] referred to the principle of Pith and Substance.

- It states- "Whenever a question arises as to determination of whether a particular law relates to a particular subject (which might be mentioned either in one list or another) the courts mainly looks at the **substance of the matter**. Thus, for instance, if the substance falls in the union list then the **incidental encroachment** by the law on the State list does not make it invalid".
 - ◆ **Pith** means 'true nature' or 'essence of something' and Substance means 'the most important or essential part of something'.
- Court held that
 - ◆ The Lists are designed to define and delimit the respective areas of competence of the Union and the States. They **neither impose any implied restriction** on the legislative power conferred by Article 246 of the Constitution, **nor prescribe any duty** to exercise that legislative power in any particular manner.
 - ◆ Hence, the **language of the Entries should be given widest scope** to find out which of the meaning is fairly capable in the setup of the machinery of the government.
 - ◆ Each general word should be held to **extend to all ancillary or subsidiary matters** which can fairly and reasonably be comprehended in it.
- The Supreme Court in **Premchand Jain v. R.K Chhabra case (1984)** held that any enactment which substantially falls within the powers expressly conferred by the Constitution upon the Legislature enacting it, cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature.
- Recently, the Supreme Court invoked these doctrines to uphold the competence of Parliament to legislate upon matters related to banking activities of Cooperatives under Entry 45 of Union List. This is despite cooperatives being listed under Entry 32 of the State List.



Doctrine of colourable Legislation

- It is based on the maxim that **what cannot be done directly cannot also be done indirectly**. This doctrine is applied when a Legislature does not have the right to make law upon a particular subject but indirectly makes one
- In a series of verdicts [e.g. K.C. **Gajapati Narayan Deo v. State of Orissa**, **R.S Joshi v. Ajit Mills etc.**], the Court has laid down certain tests for discovering whether any particular Act constitutes colourable legislation
 - ◆ The court must not look into its form or the label but the **substance of the law** which the legislature has given it.
 - ◆ The court must look at the **object as well as the effect of the law**.
 - ◆ If the legislature proceeds under a legislative plan the court must read all the statutes constituting that plan and determine the combined effect.



What would entail revising the Seventh Schedule?

- **Removing entries** that are now obsolete due to their substantive content or obsolete due to the form of the entry. Examples of such entries are:
 - ◆ **Entry 27, List III: 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:** The entry has outlived the reason for its inclusion, i.e. the partition of India in 1947.

- ◆ **Entry 34, List I: Courts of Wards for the estates of Rulers of Indian States:** It is antiquated now since this form of land holding under princely states does not exist in India anymore.
- ◆ **Entry 37, List III: Boilers:** Given the advances in technology, it is safe to say that boilers do not warrant a dedicated entry anymore. The larger question of industrial safety can easily be covered by the existing entries.
- **Adding entries** bearing in mind the present day needs of governance and also to reduce the legislative domain for residuary powers to a minimum. Examples are:
 - ◆ **Disaster Management:** As there is no specific entry on 'Disaster Management', Parliament enacted the Disaster Management Act, 2005 to tackle COVID pandemic by invoking entry 23, List III, that is 'Social security and social insurance; employment and unemployment'. Therefore, functionally, disaster management has been operating as a concurrent subject. But this dispersed basis of competence leads to confusion regarding allocation of legislative responsibility and hence resources as we have seen in the present case of COVID outbreak.
 - ◆ **Consumer Protection:** The Consumer Protection Act, passed by Parliament in 2019, enforces the rights of consumers and provides for redressal of complaints. Presently, power to legislate over this subject is not clearly discernible as it is scattered across several entries in a piecemeal manner as there is no specific entry on this.
 - ◆ **Emerging Technologies** which are now well-established and widespread still do not find mention in the Seventh Schedule. Examples include Artificial Intelligence (AI), Blockchain and Gene editing.
 - ◆ **Environmental Protection:** In the absence of a unified entry expressly recognising environmental protection in the Seventh Schedule, legislative competence for enacting some of the major environmental laws had to be derived from elsewhere. For instance, the Water (Prevention and Control of Pollution) Act, 1974 was enacted by Parliament through Article 252, which enables it to make laws on State subjects for those States whose legislatures have consented to central legislation.
 - ◆ **Terrorism:** Given the nature of the problem and how terrorism is likely to remain relevant in the foreseeable future, it is necessary to add a new entry dedicated to the different aspects of terrorism.
- **Appropriate placement of the existing entries or new entries under the three legislative lists:** Vidhi Centre for Legal Policy, in its report to 15th Finance Commission, suggested a novel framework based on the four principles to inform the determination of federal relations in India. It consists of two older principles derived from the Constituent Assembly Debates, as well as two new principles that have emerged from India's postindependence experience.
 - ◆ **The old principles that favour the allocation of legislative power to the Union Government are**
 - Ensuring the unity and integrity of India.
 - Achieving balanced economic development



- ◆ **The new principles that favour the allocation of legislative power to the State Governments are**
 - Promoting cultural autonomy and diversity.
 - Enabling responsive governance.
- ◆ **However, in case of a tie between the centre list and state list, a concurrence analysis is required to be performed considering the following principles:**
 - Interests of uniformity
 - Encouraging state effort for innovation
 - Matters that may have an impact outside the State
 - If any entry meets any of the above three criteria, the entry will be placed under the Concurrent List otherwise it will remain in the State List.



Case Study - Public order and Police: Should they be in the State List or the Concurrent List?

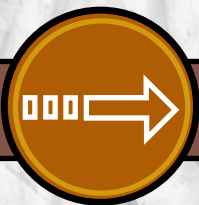
- **NITI Aayog has suggested moving police as well as public order to the Concurrent List.**
 - ◆ The think tank has pointed out that by including "public order" in the Concurrent List, **the central government can play a more proactive role** in curbing violation of public order at a nascent stage.
 - ◆ Another reason supporting the shift of public order to the Concurrent List is the **rapid increase in inter-state crimes**. Tackling these in the present framework is slightly challenging since all states have varied legal and administrative framework.
 - ◆ Also, in light of the rapid growth in internet, communication and mobile technologies, organized crimes and terrorism can be **best tackled through a unified legal, administrative and operational framework** for the police forces across the nation.
- **However, as per the Vidhi Centre, Entry 2 under List II i.e. Police (including railway and village police) should remain under State List.** Following reasons have been put forward for the same
 - ◆ Police should be equipped to respond to local needs and maintain law and order in the area within their jurisdiction. This is a **decentralised task and seeking nation-wide uniformity in this regard may not be desirable.**
 - ◆ **Concerns of efficiency with regard to inter-state policing must be dealt with a suitable entry on federal crimes** rather than encroaching on the domain of the local police.





Procedure for amending Seventh schedule

- The Seventh schedule can be amended as provided under Article 368 in Part XX of the Constitution.
- It requires a **special majority of the Parliament** and also the consent of half of the state legislatures by a simple majority.
- The other provisions that can be amended in such manner are as follow:
 - ◆ Election of the President and its manner.
 - ◆ Extent of the executive power of the Union and the states.
 - ◆ Supreme Court and high courts.
 - ◆ Representation of states in Parliament.
 - ◆ Power of Parliament to amend the Constitution and its procedure (Article 368 itself).
- As on today-
 - ◆ Union List – 100 numbered items (originally 97)
 - ◆ State List – 61 numbered items (originally 66)
 - ◆ Concurrent List – 52 numbered items (originally 47)



Way Forward

- The exercise of relooking and reforming the seventh schedule can be thought of as a **cleaning of constitutional cobwebs** which is necessary to ensure the healthy functioning of our Constitution.
- There is a need for conducting **periodic review of the Seventh Schedule** to ensure continuing exhaustiveness by removing outdated entries, adding new and emerging entries and appropriate placement of existing entries after consulting all the relevant stakeholders.
- **Residuary powers should be used sparingly**, only as a last resort and not as the primary means for completing the exhaustiveness of lists.

- **Article 254 of the Constitution should be amended to reverse the rule of repugnancy** (between a central law and a state law), such that state laws override central laws in case of repugnancy. Further, the exception to the rule of repugnancy contained in Article 254(2) should also be reversed such that a central law on a Concurrent List entry which conflicts with an existing state law should only be applicable to that state with the state's consent.

The Seventh Schedule determines the level of government at which public intervention and public expenditure occur. The delivery of public goods is at stake here. Depending on the nature of a given public good, it is optimally delivered at a certain level of government—Union or State, and after 1992, at local level. Greater flexibility to states in relation to subjects in the state list and 'transferred items' in the concurrent list opens a window to achieve this optimality. In turn, mastering this optimality is the key for achieving better Centre-State relations.

