

RESIDUARY POWERS: A WEAPON TO DOMINATE THE STATES

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ABSTRACT

“Indian constitution is federal in nature” and whenever it comes to law making, we can ascertain the fact that India has two tier governance I.e, the central government and state government . The main aim is to give autonomy to states and centre when it comes to exercise powers on certain subject matters by adopting the approach of power demarcation. The main objective behind separation of powers is to preserve the federal structure of the constitution. The doctrine of separation of power is an anachronic concept having its origin in the 16th century . “It was propounded by Charles De Montesquieu In his book Esprit des lois argued that the liberty of institutions can be assured through the separation of power as it can restrict the arbitrary actions of the government .”ⁱ

“According to Aristotle every state needs 3 authorize which perform 3 different functions namely

To deliberate ,To execute and To implement laws in there respective zones.”

“According to John Locke the separation of power doctrine works on the element of extent of liberty and supremacy of the authority . His idea was limited of powers between king and parliament.”

Indian constitution imbibes within its sphere a three fold distribution of subject matters between the parliament and the state legislature into three lists provided in the seventh schedule of the constitution. The 3 lists are the union list, state list and concurrent list.

“With the passage of time society became progressive due to expansion of the technology and governance. One cannot avoid the occurrence of the possible situations where the subject

matters under any piece of legislation can give rise to the question on framing of new laws. So there can be situations where the subject matters cannot be contemplated at a point in time by the constitution drafters .” So the evolution of society and law within the society needs to be regulated by framing new laws on new subject matters that arise with the time. There exist a possibility that any complex matter may arise with time and such matter may not fall in any of the list so the parliament gets authoritative power to administer such case. Part I discusses about the evolution of “Article 248 referring to CAD, GOI Act of 1935 and Sarkaria Commission 1983.” Part II discusses about the interpretation of “Article 248” through judicial pronouncements. Part III analysis the application of “Article 248” during covid referring to the “Disaster Management Act of 2005” and “The Epidemic Diseases Act of 1897”

Keywords: Residuary Powers, 9th Schedule, 7th Schedule, Constitution, List, Section, States, Power

STATEMENT OF PROBLEM

India is a federal nation where the doctrine of separation of power divides and separate the functions between different institutes at both state and central level. But the exercise of residuary powers by the parliament tries to encroach and infringe states law making power under article 246 r/w schedule VII ,List II. So the constitution provisions itself get violated.

OBJECTIVE

1. The paper seeks to understand the evolution of article 248 in the Indian Constitution.
2. The paper aims to determine the scope of residuary powers through judicial pronouncements.
3. The paper tries seeks to understand the application of residuary powers during COVID-19.

RESEARCH QUESTIONS

1. Whether the residuary powers of parliament extend to the subject matters given under list II and List III.
2. What is the scope of exercise of residuary powers during the pandemic.

METHODOLOGY

The methodology adopted in the paper is doctrinal in nature. It relied on the constitutional provisions, articles , journals, case laws to analyse the scope of residuary powers in India.

EVOLUTION OF “ARTICLE 248ⁱⁱ” (HISTORY)

□ Constitutional Assembly Debates :-

“The constitution framers were of the view that the matters of national concern should be placed within the union list whereas the matters of purely state and local significance should be placed under the state list. Additionally they were of the view that some subject matters involving common interest of both centre and state should be placed in the concurrent list .”

The objective behind the creation of concurrent list was to ensure the that there exists uniformity in legislation with due regard of the Indian diversity. “The former proposal during the drafting of the constitution in respect to residuary powers was that such power must be given to the states and the centre will have limited powers.”

“The draft article 233 was debated in the parliament on 13th June 1949. 223[1] of the draft article clearly provided that the parliament is vested with the residuary powers to make laws on the subject matters which are not provided in the state and concurrent list.”

“Further the parliament’s power to make any law in respect to taxation which is not exclusively mentioned under the state and concurrent list will be inclusive and within the scope of the residuary powers exercised by the parliament.ⁱⁱⁱ”

But later on the view of the constituent assembly got changed. It was of the view that the time when the country got independent there was a drastic communal partition and a dominant centre was required for good governance and nation strengthening and nation building.

□ “Government Of India Act, 1935 :-”

“Residuary power is a special power retained by the governmental authority after certain powers are delegated to the other authorities. These powers are entrusted by the constitution to the union government which implies that the parliament has been vested with powers to make laws with respect to any matter which is not provided explicitly or any matter which is part of concurrent list or state list.”

“The government of India act, 1935 divided powers between central, provincial and concurrent lists. The central and the provincial unit had their separate sphere when it came to law making power and both the units had the power to make laws under the concurrent list. Any law passed by the federal government at first instance in respect to subject matters listed in concurrent list becomes the governing law and any subsequent law passed by the provincial government in respect to the same subject matter will not become the governing law.”^{iv}

“Section 105 of the GOI Act, 1935” did not vested the residuary powers in the ambit of centre and province but clearly provided that the governor general has the sole discretion to decide in relation to allocation of such power to the centre or the province.

The major argument here is even if we ignore the need of list I consisting of union subject matters it would be sufficient if exclusive powers and concurrent powers have been provided to the centre it can exercise residuary powers as sole authority. The constitution provides for the separation of power between states and centre. The only change we can see in the current scenario is that the parliament is strong and it can use residuary powers in required circumstances or on its discretion.

“Article 248 r/w entry 97 of list I clearly removed the old practice of discretion to exercise residuary powers on the discretion of the governor general. But in current scenario it has become exclusive power vested in the hands of the parliament.

Residuary powers are subjected to “Article 246 A of the constitution” which provides about the special provisions with respect to goods and services. Residuary powers are not ordinary in nature and they do not have perpetual existence. We took the idea of residuary Powers from the Canadian constitution.

NOTE: The separation of powers is exhaustive in Canada as there exists no federal domination in Canada.

□ **“Sarkaria commission**

- Year of creation:- 1983
- Authority who created:- central government
- Headed by:- Justice R.S Sarkaria
- Number of members appointed:- 3
- Objective behind creation:- to examine and review the working arrangements between central and state level in all dimensions.
- Year of Report submission:- 1988
- Suggestion given:-No structural changes are required at central and state level in the existing constitution.
- Number of recommendations:- 247

Few recommendations of the commission in respect to residuary powers are as follows:-

1. The residuary powers with respect to taxation should be vested in the parliament to avoid double taxation and such tax should be used to raise resources and regulate economic affairs.

2. The other residuary powers apart from taxation must be placed in the concurrent list.
3. “Entry 97 of union list” must be transferred to the concurrent list. Though union will be supreme when it comes to exercising residuary powers . the union will be supreme and such supremacy can be exercised under “Article 246[dealing with the subject matters of law made by parliament and by state legislature]”^v and “Article 254 [clearly provides that during inconsistency in laws made by parliament and state on same subject matter then the law made by parliament will prevail and the extent of inconsistency of state law in relation to the parliament law will be declared void] of the constitution.”^{vi}

INTERPRETATION OF “ARTICLE 248” REFERRING TO JUDICIAL PRONOUNCEMENTS TO DETERMINE THE SCOPE OF RESIDUARY POWER IN INDIA

The judiciary plays a pivotal role when it comes to determine whether the exercise of the residuary powers is constitutionally valid or not. So it decides whether the subject matter on which the parliament exercised its power falls under the ambit of residuary Powers or not. The judiciary always adopted the approach of liberal interpretation when it comes to interpret constitutional provisions. The list of cases to determine the scope of residuary Powers is as follows:-

1. “IC Golaknath Vs State of Punjab [1967]”^{vii}
 - “The court was of the view that the parliament has power to amend the constitution in accordance to the exclusive law making power Vested In the the parliament under “Article 248 read with Entry 97 of the union list” mentioned under “Schedule Seven of the constitution”. So , the constitution can be amended in accordance to the procedure mentioned under “article 368”.
 - The court was also of the view that the power of parliament under “Article 368” is not absolute .
 - The majority in this case were of the opinion that the parliament is trying to exercise is power under “Article 368” which is in practicality dealing with the procedure of the

amendment. So when it comes to exercise of exclusive power to amend the constitution then it can be done under the purview of article 248 of the Indian constitution.”

2. “*UOI Vs H.S Dhillon* [1971]”^{viii}

Facts of the case:-

- “The parliament enacted wealth Tax act 1957 under which tax was imposed on the capital value of the net worth of every individual, HUF and company.
- The tax excluded agricultural land from its ambit.
- Later on the act was amended under finance act, 1957 which brought the agricultural land under the ambit of wealth tax.
- The aggrieved (landlord) challenged the validity of the tax on agricultural land.”

Issues involved :-

The issues arising in this particular case revolved around the fact that if the state fails to make or does not make any law with respect to the subject matter under “List II of the seventh schedule”, then in such case

1. Can the parliament exercise the residuary powers to fill the void and can such exercise of power be challenged in the court of law or the parliament holds the competence to enact and impose the wealth tax act On agricultural land under “entry 86 of the union list” or under “Article 248?
2. Whether if the legislation challenged falls under “List I and List III” entries can give authority to parliament to exercise residuary powers or can wealth tax be imposed on agricultural land under “List III , Entry 49” by state and not by the parliament?

Decision of the Punjab and Haryana High Court:-

- The court clearly stated that the residuary powers can only be exercised if the legislation or the laws framed did not fall under the scope of any of the three lists provided under “Seventh Schedule.”

- In case if the subject matter falls under the “State List (List II)” and there is no pre-existing law or not to govern the same, whatever the situation can be but only state has competence to make laws in the state list .
- court further stated that the act in question was ultra vires i.e, it was beyond the parliamentary competence. Further the case was appealed before the supreme court.

Decision of the Supreme Court :-

- The court stated that the state cannot make law under “entry 49 of the concurrent list because the subject matter here is taxes on lands and buildings”^{ix} which does not include wealth tax on agricultural land in its scope. Whereas the parliament cannot make such law under “entry 86 of the union list”^x because it is clearly excluding agricultural land from its scope.

Issue :-Now the question is to determine whether the parliament can make law under “Article 248” or not?

- The court was of the opinion that if the “Entry 86 of List I” is excluding parliament to make laws on the agricultural land then what is prohibited in the constitution cannot be done in any other subsequent manner. So parliament can’t exercise residuary powers on subjects which are already prohibited by the statute.
- The court stated that when the legislation in question falls under the ambit of “List I and List III” , then the exercise of the residuary powers by parliament is unnecessary.
- The law making power of parliament under “Entry 97 in the List I should be exercised only when there is no other option available I.e, it shall be exercised at the last resort.”
- If the subject matter is already under the union law making power then law can be made on such subject matter but this won’t grant parliament exclusive power to use residuary powers as such powers can be exercised only when there is a subject matter which is not found in any of the three lists provided under seventh schedule.
- Court clearly stated that only in situations where the subject matter falls under “List II and List III the parliament can’t exercise the residuary power as the power to make law under List II is vested in the hands of the state.”

- Additionally , the court was of the view that if the subject matter falls in “List I and List III” then the parliament can’t exercise it’s power under “Article 248”, but if the parliament want to exercise such power then it can take the recourse of the residuary power or it can be combined with any other entry provided under “ List I” . So the imposition of Wealth tax was justified under “entry 97 of the List I.”

Judgement:-

The court with 4:3 ratio gave different judgement later on. The reasoning behind the same is that article 248 is giving wider scope to parliament in terms of law making power .”

3. “Attorney General for India Vs. Amratlal Prajivandas:-”^{xi}

List and Entries involved

“List I, Entry 9 which deals with preventive detention for reasons connected with defence, foreign affairs , or the security of India ; persons subjected to such detention”.^{xii}

“List III, Entry 3 which deals with 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.”^{xiii}

This is a case on constitutional exclusion.

Legislation in question

- “COFEPOSA ACT ,1974”^{xiv} and “SAFEMA ACT ,1976”^{xv}

Objective of the Act

“The main objective behind the COFEPOSA Act is to restrict the persons indulging in any sort of illegal activities screen the illegally acquired property in the name of their relatives and other associates.”

Whereas “the main objective behind the SAFEMA Act is to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto.”

History behind the Enactment of COFEPOSA Act and SAFEMA Act

“Post independence there was rise in smuggling activities. The smugglers and the manipulators were importing prohibited unessential items in foreign exchange. The parliament enacted various legislations as a response to such illegal acts. “The legislations enacted were as follows: □

- Antiquated Sea Customs Act, 1878
- Foreign Exchange Regulation Act, 1947
- Imports and Exports Control act, 1947
- Imports Control Order, 1955
- Customs Act, 1962
- Foreign Exchange Regulation Act, 1973”

All these acts were passed one after the other by the parliament to regulate the menace of smuggling and foreign exchange violations which were rising Post Independence but the purpose behind the above acts got frustrated due to the rise in economic crimes against the state.

The parliament then came up with the “COFEPOSA Act, 1974” which provided for preventive detention of these antisocial elements. The act had gone through some modifications in form of amendments came into effect in 1975. section 12A was inserted in the act as an outcome of the national emergency declared in 1975 by the president under “Article 352[1].” previously the rule was that whenever a person is detained under “COFEPOSA Act” he must be informed about the grounds of detention. Also the appropriate government must refer the case within 5 weeks to advisory board which determine whether the person needs to be kept in detention or

not due to the criteria set under “Article 22[4]’^{xvi}”, but after the insertion of “section 12-A” in the act this requirement was done away with. Further “SAFEMA Act, 1976” was enacted which applied to the convicts under the aforementioned acts . “Section 6 of the SAFEMA act the authority can issue notice to the detenus, their relatives and associates to show the cause as to why the property in question should not be declared illegal.’”

Role of Central Government under the COFEPOSA Act and SAFEMA Act:-

“The government tries to regulate the illegal properties acquired by the convict, detenu or transferred by such person to their known ones.”

Restriction imposed by the government on transferee under COFEPOSA Act and SAFEMA Act

- i. “The transferee cannot claim such property even though it is transferred as benami or name lender or as bonafide transferee. So such transferee won’t get the title and ownership of the property.
- ii. The receiver needs to surrender such property before the state under this act and even if you have documents of the property you can’t argue for retaining such property.”

SCHEDULE IX, COFEPOSA ACT AND SAFEMA ACT

The “COFEPOSA Act” was passed before national emergency and was included in the “Schedule 9th of the constitution” . The “SAFEMA Act” was enacted after the national emergency . “The act were valid even though it was not the part of the constitution but the schedule holds validity which is derived from the intent and thought of the parliament behind including the “9th schedule in the constitution”^{xvii} which gives exclusive power to parliament when it comes to law making under schedule 9.

Such act gets reviewed by court to determine the compatibility of the act with the subject matter .’”

Issue involved

“Whether the parliament has competence to pass the laws relating to preventive detention under schedule 9 by exercising its residuary powers under article 248 read with entry 97 of the Union List”.

Observations made by the Supreme Court

- “The supreme court stated that residuary powers cant be exercised if the matter exclusively falls under the state list. The court also provided the test for legislative competence of the parliament.
- First we need to determine whether the impugned legislation falls under the subject matters provided in List II or not :- if it falls in the state list then residuary powers cannot be exercised.
- If it does not fall under List II then ; the parliament is competent to enact the legislation by the virtue of List I and List III. OR It can exercise residuary power under article 248 read with List I [entry 97]”

FINAL JUDGEMENT

“The court tried to state that the parliament is supreme and the centre holds dominant position when it’s comes to law making power. So the acts are constitutionally valid . The acts in the Ninth schedule are enacted time and again to address the issues involving national interest and security.”

COVID 19 AND ARTICLE 248: MISUSE OF POWER

Background:

COVID 19 pandemic affected the world at large to the extent that the nation’s started to collapse due to inadequate resources. The countries throughout the globe tried to adopt to preventive measures to control the rise in covid cases and subsequently invested in health care , food supply, unemployment allowances etc .

The government had put restrictions on travel for a substantial period of time by suspending international flights , railways, etc.

“The Nationwide lockdown was imposed by the government of India without any prior consultation and approval from the states and union Territories. The lockdown was declared under section 6(2)(i) of the Disaster management act, 2005”.^{xviii} It imposed restrictions and passed the closure order for the different institutions, worship places, tourism ,etc. Only ration shops, medical shops were functioning. The country faced economic losses , businesses collapsed . The worst case scenario can be seen in the marginalized and other middle class people who earned a minimal income to run the family.

“Article 1 of the Constitution clearly declares India as Bharat which shall be union of states where the centre as well the state have their respective autonomy”^{xix}. The imposition of lockdown during pandemic curtailed the states to form laws in respect to subject matters falling under List II of the seventh schedule. “The central government made laws on matter related to public health, hospitals, health care, hygiene , dispensaries which falls under the domain of state government. Secondly the central government imposed restrictions on trade and commerce which is the subject matter of the state government.”^{xx}

The uniform restrictions on the states which have non uniform population, varied areas, categorisation in terms of resources, development, etc impacted the economy of each and every state. “The state did not get opportunity to make laws to govern their territory also all the preventive measures were imposed by the central government on the states . The PM care fund and CM relief funds were created where the PM Fund took into consideration the CSR, but the CM fund could not get the similar benefit. The sale of liquor which falls under state list was also governed by central government laws and restrictions were imposed on liquor sale which is a source of revenue generation in state.”^{xxi}

The centre’s sudden imposition of nationwide lockdown did not give reasonable time to state to come up with measures to tackle the menace . The “DM Act” is central legislation which infringes the powers of the state legislature. The act of parliament violates the vested constitutional prerogatives of the states. In cases of biological pandemic the centre can come up with uniform measures and directives but such directives should not have impact on social-economic condition of the state.

“Disaster Management Act 2005:-”

“Section 2[d] of the act defines disaster as

- a catastrophe, mishap, calamity, or grave occurrence in any area,
- arising from natural or man-made causes or by accident or negligence,
- Which results in substantial loss of life or human suffering or damage or destruction of the property and environment degradation
- The magnitude is such which is beyond the capacity of the community of the affected area.^{xxii}

Objective behind the act:

It was framed to tackle the problem of reoccurring disasters leading to loss of life, or damage to the property or environment degradation.

In what situations is it applicable:

It applies in cases of natural and man-made occurrence that lead to calamity, catastrophe.

The state government relied on the “Epidemic Diseases Act, 1897 which is state legislation which gives power to state to exercise its authority during the outbreak of any epidemic”. The “List II of the seventh schedule” gives exclusive power to the states to make laws related to public health. “The reason behind the same is that the ground level functionaries are well versed with the local situations so they have the capacity to determine what all necessary approaches are needed to be taken for effective response to the cause. Also when it comes to spreading of disease from person to person we cannot ignore lifestyle, culture, job opportunities as the factors which lead to wider impact on the state territory.”^{xxiii} so if the state makes law it can come up with effective measures to tackle the widespread disease. subsequently it can determine the expenses taking subsequently growth and development of resources on the other way round.

The parliament sourced the DMA under “entry 23 of the concurrent list which deals with social security and social insurance; employment and unemployment”^{xxiv}

Critique: The directives issued by the central government in respect to biological pandemic under the DMA is unconstitutional because “Entry 6 of list II gives the state legislative

competence when it comes to exercising the law making power with respect to matters relating to public health, sanitation; hospitals and dispensaries.”^{xxv}

“The Epidemic Diseases Act ,1897:-”^{xxvi}

“SECTION 2 of the act gives power to the state to take measures and prescribe regulations as to dangerous epidemic disease.

Under Section 2[1] The state government can make laws during outbreak of the dangerous epidemic.

Under section2[2][b] the state government may take measures and prescribe regulations for inspection of persons travelling by railways or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of persons suspected by the inspecting officer of being infected with such disease”^{xxvii}

Objective behind the act:-

To create the temporary provisions or regulations to tackle or prevent the outbreak of the disease .

In what situations is it applicable:

“It applies in cases of biological disaster which include disease which can lead to loss of life , lead to injury, severe illness and any other impact on the health . These biological disasters can be termed as epidemic or pandemic in accordance to its impact in geographical terms .”

Subject matters on which the parliament exercised its law making power during “COVID 19” can be understood through Part III of the paper.

Part III Checking the Validity of parliamentary competence in sourcing the DMA under List I and List III of the Seventh schedule using the test of parliamentary competence given in UOI vs. HS Dhillon case

UNION LIST:-

“Entry 28, 81 and 97 of List I”

“Entry 28:- Port quarantine, including hospitals connected therewith:-”^{xxviii}

- The power under DMA can be sourced to this entry but the scope is limited to quarantine at ports because huge number of vehicles can be seen over there taking into account diplomatic relations .

Critique: The entry cannot be extended to the mean quarantine which as a subject matters falls under biological pandemic where the states have power to make laws under entry 6 of the list II.

“Entry 81:- Interstate quarantine”^{’xxix}

- covid 19 was a widespread pandemic affecting all the states and union territories.so seeing the impact of covid in the Indian states the government can source DMA under this entry which falls under legislative competence.

Critique : But the exercise of overarching powers by the parliament under DMA cannot in all aspects regulate the biological pandemic.

“Entry 97 :- Any other matter not enumerated in list II or List III including any tax not mentioned in either of those lists”^{’xxx}

- The entry codifies the exclusive residuary powers vested in the parliament when it comes to law making in respect to the subject matters not mentioned under List II and List III in seventh schedule.

Critique :- The state list under entry 6 regulates the matters of public health so encroachment of the parliament in the legislative competency of state is not a justified cause when it comes to exercise of residuary power under article 248 read with entry 97 of the union list.

“Concurrent List”:

“Entry 23 and 29 of List III”

“Entry 23:- Social security and social insurance; employment and unemployment.”^{’xxxi}

- Indian constitution revolves around the idea of welfare state so state must take such measures which tries to ensure social-economic welfare of citizens. Preventing and addressing all issues affecting society be in terms of social security and social insurance

due to rise in deaths during covid 19 ,the laws related to employment and unemployment o its citizens the centre and state can make laws under this entry

Critique :- All the disaster management aspects cannot be sourced through this entry which the central government tried to source.

“Entry 29:- Prevention of the extension from one state to another of infectious or contagious diseases or pests affecting men, animals or plants”^{xxxii}

- It applies in the current scenario because of the impact of covid on the entire Indian territory so to prevent the extension of infectious and contagious disease from one state to another the parliament sourced the DMA under this entry.

State List

Entry 1,2,6 of List II

“Entry 1:- Public order”^{xxxiii}

- State is competent to make laws related to public security. The ambit of such law is broad as it includes laws ensuring legal and physical freedom, security, peace of mind, or any other laws ensuring public order.

NOTE:- The state had the capacity and competence to make laws relating to public security within its state as the widespread of the pandemic created havoc and the freedom of people was to be restricted as a result of rise in cases and increase in mortality rates.

“Entry 2:- Police”^{xxxiv}

- The principle responsibility of the state is to prevent, detect, investigate and prosecute the criminals so police becomes an important administrative department of the state government.

NOTE:- The police personnel are the front line workers enshrined with the duties to implement the orders and directives issue by the government so they have powers to maintain law and order which got disturbed due to pandemic .

“Entry 6:- Public health and sanitation; hospitals and dispensaries:-”^{xxxv}

- The public health gives competency to states to adopt such policy measures which provide safety , protects the health of the communities by providing access to the health-care , building medical workforce. So providing treatment measures to the communities is one such objective behind the public health .

NOTE:- It is the prerogative of the state to issue such orders and directives essential to maintain public health and other components like sanitation, hygiene, etc which revolve around the health itself.

SUGGESTIONS AND CONCLUSION

The challenge with respect to the residuary powers is in striking a balance between the state and centre autonomy within their legislative domain. It is often apprehended by the state that the exercise of residuary power by the parliament under “Article 248” is encroaching upon the legislative competence of the state I respect to the subject matters provided under “List II of the seventh schedule of the constitution.”

The supremacy of the parliament due to exclusive law making power under “Article 248” ensures the fact that the parliament is dominant and supreme. But due to this absolute power with the parliament there can be instances where the laws made by the parliament can prevent state from making laws which fall under its competence. “Entry 97 of the List I” gives power to parliament to legislate on the matters not provided in “List II and List III of the seventh schedule.”

The absolute dominance of parliament can be seen during “COVID -19” in all spheres which depicts that parliament is supreme and can make laws ignoring the competence of the state legislature. This fails the EXISTENCE of federal structure of Indian constitution. So the best approach here can be that the centre and state should work in cooperation with each other so that the laws can work effectively and good governance can be achieved through collaborative efforts.

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