Constitutional Law I Unit III

Dr.Syed Asima Refayi

RELATIONS BETWEEN THE UNION AND THE STATES

Distribution of Legislative Powers

Article245. Extent of laws made by Parliament and by the Legislatures of States.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. Subject-matter of laws made by Parliament and by the Legislatures of States.—

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List"').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Articles 245–255 on Distribution of Legislative Powers

The Constitution provides for 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) in the Seventh Schedule: (i) The Parliament have exclusive powers to make laws with respect to any of the matters enumerated in the Union List. This list has at present 100 subjects (originally 97 subjects) like defence, banking, foreign affairs, currency, atomic energy, insurance, communication, inter-state trade and commerce, census, audit and so on. (ii) The state legislature has "in normal circumstances" exclusive powers to make laws with respect to any of the matters enumerated in the State List. This has at present 61 subjects (originally 662 subjects) like public order, police, public health and sanitation, agriculture, prisons, local government, fisheries, markets, theaters, gambling and so on. (iii) Both, the Parliament and state legislature can make laws with respect to any of the matters enumerated in the Concurrent List. This list has at present 52 subjects (originally 473 subjects) like criminal law and procedure, civil procedure, marriage and divorce, population control and family planning, electricity, labour wel-fare, economic and social planning, drugs, newspapers, books and printing press, and others. The 42nd Amendment Act of 1976 transferred five subjects to Concurrent List from State List, that is, (a) education, (b) forests, (c) weights and measures, (d) protection of wild animals and birds, and (e) administration of justice; constitution and organisation of all courts except the Supreme Court and the high courts. The power to make laws with respect to residuary subjects (i.e., the matters which are not enumerated in any of the three lists) is vested in the Parliament. This residuary power of legislation includes the power to levy residuary taxes. From the above scheme, it is clear that the matters of national importance and the matters which requires uniformity of legislation nationwide are included in the Union List. The matters of regional and local importance and the matters which permit diversity of interest are specified in the State List. The matters on which uniformity of legislation throughout the country is desirable but not essential are enumerated in the concurrent list. Thus, it permits diversity along with uniformity.

In US, only the powers of the Federal Government are enumerated in the Constitution and the residuary powers are left to the states. The Australian Constitution followed the American pattern of single enumeration of powers. In Canada, on the other hand, there is a double enumeration—Federal and Provincial, and the residuary powers are vested in the Centre. The Government of India Act of 1935 provided for a three-fold enumeration, viz., federal, provincial and concurrent. The present Constitution follows the scheme of this act but with one difference, that is, under this act, the residuary powers were given neither to the federal legislature nor to the provincial legislature but to the governor-general of India. In this respect, India follows the Canadian precedent. The Constitution expressly secures the predominance of the Union List over the State List and the Concurrent List and that of the Concurrent List over the State List. Thus, in case of overlapping between the Union List and the State List, the former should prevail. In case of overlapping between the Union List and the Concurrent List, it is again the former which should prevail. Where there is a conflict between the Concurrent List and the State List, it is the former that should prevail. In case of a conflict between the Central law and the state law on a subject enumerated in the Concurrent List, the Central law prevails over the state law. But, there is an exception. If the state law has been reserved for the consideration of the president and has received his assent, then the state law prevails in that state. But, it would still be competent for the Parliament to override such a law by subsequently making a law on the same matter. '

3. Parliamentary Legislation in the State Field' The above scheme of distribution of legislative powers between the Centre and the states is to be maintained in normal times. But, in abnormal times, the scheme of distribution is either modified or suspended. In other words, the Constitution empowers the Parliament to make laws on any matter enumerated in the State List under the following five extraordinary circumstances: When Rajya Sabha Passes a Resolution If the Rajya Sabha declares that it is necessary in the national interest that Parliament should make laws on a matter in the State List, then the Parliament becomes competent to make laws on that matter. Such a resolution must be supported by two-thirds of the members present and voting. The resolution remains in force for one year; it can be renewed any number of times but not exceeding one year at a time. The laws cease to have effect on the expiration of six months after the resolution has ceased to be in force. This provision does not restrict the power of a state legislature to make laws on the same matter. But, in case of inconsistency between a state law

and a parliamentary law, the latter is to prevail. During a National Emergency, the Parliament acquires the power to legislate with respect to matters in the State List, while a proclamation of national emergency is in operation. The laws become inoperative on the expiration of six months after the emergency has ceased to operate. Here also, the power of a state legislature to make laws on the same matter is not restricted. But, in case of repugnancy between a state law and a parliamentary law, the latter is to prevail. When States Make a Request When the legislatures of two or more states pass resolutions requesting the Parliament to enact laws on a matter in the State List, then the Parliament can make laws for regulating that matter. A law so enacted applies only to those states which have passed the resolutions. However, any other state may adopt it afterwards by passing a resolution to that effect in its legislature. Such a law can be amended or repealed only by the Parliament and not by the legislatures of the concerned states. The effect of passing a resolution under the above provision is that the Parliament becomes entitled to legislate with respect to a matter for which it has no power to make a law. On the other hand, the state legislature ceases to have the power to make a law with respect to that matter. The resolution operates as abdication or surrender of the power of the state legislature with respect to that matter and it is placed entirely in the hands of Parliament which alone can then legislate with respect to it. Some examples of laws passed under the above provision are Prize Competition Act, 1955; Wild Life (Protection) Act, 1972; Water (Prevention and Control of Pollution) Act, 1974; Urban Land (Ceiling and Regulation) Act, 1976; and Transplantation of Human Organs Act, 1994. To Implement International Agreements The Parliament can make laws on any matter in the State List for implementing the international treaties, agreements or conventions. This provision enables the Central government to fulfil its international obligations and commitments. Some examples of laws enacted under the above provision are United Nations (Privileges and Immunities) Act, 1947; Geneva Convention Act, 1960; Anti-Hijacking Act, 1982 and legislations relating to environment and TRIPS. During President's Rule When the President's rule is imposed in a state, the Parliament becomes empowered to make laws with respect to any matter in the State List in relation to that state. A law made so by the Parliament continues to be operative even after the president's rule. This means that the period for which such a law remains in force is not co-terminus with the duration of the President's rule. But, such a law can be repealed or altered or re-enacted by the state legislature. 4. Centre's Control over State Legislation besides the Parliament's power to legislate directly on the state subjects under the

exceptional situations, the Constitution empowers the Centre to exercise control over the state's legislative matters in the following ways:

(i) the governor can reserve certain types of bills passed by the state legislature for the consideration of the President. The president enjoys absolute veto over them.

(ii) Bills on certain matters enumerated in the State List can be introduced in the state legislature only with the previous sanction of the president. (For example, the bills imposing restrictions on the freedom of trade and commerce).

(iii) The President can direct the states to reserve money bills and other financial bills passed by the state legislature for his consideration during a financial emergency.

From the above, it is clear that the Constitution has assigned a position of superiority to the Centre in the legislative sphere. In this context, the Sarkaria Commission on Centre–State Relations (1983–87) observed: "The rule of federal supremacy is a technique to avoid absurdity, resolve conflict and ensure harmony between the Union and state laws. If this principle of union supremacy is excluded, it is not difficult to imagine its deleterious results. There will be every possibility of our two-tier political system being stultified by interference, strife, legal chaos and confusion caused by a host of conflicting laws, much to the bewilderment of the common citizen. Integrated legislative policy and uniformity on basic issues of common Union–state concern will be stymied. The federal principle of unity in diversity will be very much a casualty. This rule of federal supremacy, therefore, is indispensable for the successful functioning of the federal system".

Doctrine of Colourable Legislation

Introduction

Doctrine of Colorable Legislation like any other constitutional law doctrine is a tool devised and applied by the Supreme Court of India to interpret various Constitutional Provisions. It is a guiding principle of immense utility while construing provisions relating to legislative competence.

Before knowing what this doctrine is and how it is applied in India, let us first understand the genesis of Doctrine of Colorable Legislation.

Doctrine of Colorable Legislation is built upon the founding stones of the Doctrine of Separation of Power. Separation of Power mandates that a balance of power is to be struck between the different components of the State i.e. between the Legislature, the Executive and the Judiciary. The Primary Function of the legislature is to make laws. Whenever, Legislature tries to shift this balance of power towards itself then the Doctrine of Colorable Legislation is attracted to take care of Legislative Accountability.

Definition

Black's Law Dictionary defines 'Colorable' as:

1. Appearing to be true, valid or right.
2. Intended to deceive; counterfeit.
3. 'Color' has been defined to mean 'Appearance, guise or semblance'.

The literal meaning of Colorable Legislation is that under the 'color' or 'guise' of power conferred for one particular purpose, the legislature cannot seek to achieve some other purpose which it is otherwise not competent to legislate on.

This Doctrine also traces its origin to a Latin Maxim:

"Quando aliquid prohibetur ex directo, prohibetur et per obliquum"

This maxim implies that "when anything is prohibited directly, it is also prohibited indirectly". In common parlance, it is meant to be understood as "Whatever legislature can't do directly, it can't do indirectly".

In our Constitution, this doctrine is usually applied to Article 246 which has demarcated the Legislative Competence of the Parliament and the State Legislative Assemblies by outlining the different subjects under List I for the Union, List II for the States and List III for both, as mentioned in the Seventh Schedule.

This doctrine comes into play when a Legislature does not possess the power to make law upon a particular subject but nonetheless indirectly makes one. By applying this principle the fate of the Impugned Legislation is decided.

Supreme Court on Colorable Legislation

One of the most cogent and lucid explanations relating to this doctrine was given in the case of *K.C. Gajapati Narayana Deo And Other v. The State Of Orissa.*

"If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers.

Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'Colorable Legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise."

This Doctrine is also called as "Fraud on the Constitution". The failure to comply with a Constitutional condition for the exercise of legislative power may be overt or it may be covert. When it is overt, we say the law is obviously bad for non- compliance with the requirements of the Constitution, that is to say, the law is *ultra vires*. When, however, the non-compliance is covert, we say that it is a 'fraud on the Constitution'; the fraud complained of being that the Legislature pretends to act within its power while in fact it is not so doing. Therefore, the charge of 'fraud on the Constitution' is, on ultimate analysis, nothing but a picturesque and epigrammatic way of expressing the idea of non-compliance with the terms of the Constitution.

Limitations on the Application of Doctrine of Colorable Legislation

1. The doctrine has no application where the powers of a Legislature are not fettered by any Constitutional limitation.

2. The doctrine is also not applicable to Subordinate Legislation.

3. The doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. The whole doctrine resolves itself into the, question of competency of a particular legislature to enact a particular law.

If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power.

4. A logical corollary of the above-mentioned point is that the Legislature does not act on Extraneous Considerations. There is always a Presumption of Constitutionality in favour of the Statute. The principle of Presumption of Constitutionality was succinctly enunciated by a Constitutional Bench in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.*

"That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

There is a very famous rule of interpretation as well that explains why the courts strongly lean against a construction which reduces the statute to a futility. The Latin Maxim "*construction ut res magis valeat quam pereat"* implies that a statute or any enacting provision therein must be so construed as to make it effective and operative. The courts prefer construction which keeps the statute within the competence of the legislature.

5. When a Legislature has the Power to make Law with respect to a particular subject, it also has all the ancillary and incidental power to make that law an effective one.

6. As already discussed above that the transgression of Constitutional Power by Legislature may be patent, manifest or direct, but may also be disguised, covert and indirect and it is only to this latter class of cases that the expression "Colorable Legislation" is being applied.

Doctrine of Pith and substance

Introduction

In the last post, we discussed the Doctrine of Colorable Legislation. We saw how Colorable Legislation doctrine dealt with the issue of Legislative Competence. We also understood that when anything is prohibited directly, it is also prohibited indirectly. The legislature cannot seek to achieve a purpose on which it is otherwise not competent to legislate on.

This post is concerned with a doctrine of similar sorts called as 'Doctrine of Pith and Substance'. The basic purpose of this doctrine is to determine under which head of power or field i.e. under which list (given in the Seventh Schedule) a given piece of legislation falls.

Pith means 'true nature' or 'essence of something' and Substance means 'the most important or essential part of something'.

Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, then the incidental encroachment by the law on the State List does not make it invalid.

This is essentially a Canadian Doctrine now firmly entrenched in the Indian Constitutional Jurisprudence. This doctrine found its place first in the case of *Cushing v. Dupey*. In this case the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was *intra vires*, regard must be to its pith and substance.

Need for the Doctrine of Pith and Substance in the Indian Context

The doctrine has been applied in India also to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation was to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

"It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is

any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude."

Incidental or Ancillary Encroachment

The case of *Prafulla Kumar Mukherjee v. The Bank of Commerce,* succinctly explained the situation in which a State Legislature dealing with any matter may incidentally affect any Item in the Union List. The court held that whatever may be the ancillary or incidental effects of a Statute enacted by a State Legislature, such a matter must be attributed to the Appropriate List according to its true nature and character.

Thus, we see that if the encroachment by the State Legislature is only incidental in nature, it will not affect the Competence of the State Legislature to enact the law in question. Also, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid.

However, the situation relating to Pith and Substance is a bit different with respect to the Concurrent List. If a Law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law.

Important Supreme Court Judgments on the Doctrine of Pith and Substance

There are hundreds of judgments that have applied this doctrine to ascertain the true nature of a legislation. In the present post, I will discuss some of the prominent judgments of the Supreme Court of India that have resorted to this doctrine.

1. *The State of Bombay And Another vs F.N. Balsara* - This is the first important judgment of the Supreme Court that took recourse to the Doctrine of Pith and Substance. The court upheld the Doctrine of Pith and Substance and said that it is important to ascertain the true nature and character of a legislation for the purpose of determining the List under which it falls.

2. *Mt. Atiqa Begam And Anr. v. Abdul Maghni Khan And Ors.* – The court held that in order to decide whether the impugned Act falls under which entry, one has to ascertain the true nature and character of the enactment i.e. its 'pith and substance'. The court further said that *"it is the result of this investigation, not the form alone which the statute may have assumed under the*

hand of the draughtsman, that will determine within which of the Legislative Lists the legislation falls and for this purpose the legislation must be scrutinized in its entirety".

3. *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Ors.*– Pith and Substance has been beautifully explained in this case:

"*This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme.*

This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List."

Doctrine of Repugnancy

Introduction

It is Article 254 of the Constitution of India that firmly entrenches the Doctrine of Repugnancy in India. According to Black's Law Dictionary, Repugnancy could be defined as *"an inconsistency or contradiction between two or more parts of a legal instrument (such as a statute or a contract)"*. Before understanding the Doctrine of Repugnancy, let us first understand a bit about the legislative scheme envisaged in our Constitution.

Article 245 states that Parliament may make laws for whole or any part of India and the Legislature of a State may make laws for whole or any part of the State. It further states that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 also talks about Legislative power of the Parliament and the Legislature of a State. It states that:

1. The Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I or the Union List in the Seventh Schedule.

2. The Legislature of any State has exclusive power to make laws for such state with respect to any of the matters enumerated in List II or the State List in the Seventh Schedule.

3. The Parliament and the Legislature of any State have power to make laws with respect to any of the matters enumerated in the List III or Concurrent List in the Seventh Schedule.

4. Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

The Legislative Scheme in our Constitution is both complex and lengthy. In the present post, I will confine myself only to Repugnancy and its niceties. I will not deal not with any other provisions relating to the Legislative Scheme of our Constitution. The only articles that I will be touching in this respect are article 245, article 246 and article 254.

Supreme Court's Interpretation of Doctrine of Repugnancy

Article 254 has been beautifully summarized by the Supreme Court in *M. Karunanidhi v. Union of India*. The court said that:

"1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the

repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List, the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only.

Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

Now, the conditions which must be satisfied before any repugnancy could arise are as follows:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

Thereafter, the court laid down following propositions in this respect:

"1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

Further in the case of *Govt. of A.P. v. J.B. Educational Society*[3], the court held that:

"1. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non obstante clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

2. With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict."

The Court also said that:
1. Where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1).

2. Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation.

In the case of National Engg. Industries Ltd. v. Shri Kishan Bhageria, it was held that "the best test of repugnancy is that if one prevails, the other cannot prevail". All the above mentioned cases have been upheld by the Supreme Court in Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra.

Thus, we see that Doctrine of Repugnancy is firmly entrenched in our constitutional scheme and is here to stay for a long time to come. In the subsequent posts, I will try to discuss doctrines like Pith and Substance, Colourable Legislation, Legislative Competence, Doctrine of Eclipse etc.