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CLASS NOTES

INTERPRETATION OF STATUTES

UNIT-V - Principles of Interpretation of Constitution

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LL.B. - 3 yrs. II Sem. & B.A. LL.B. - 5 yrs. IV Sem. Course Module

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Course Content:

A. Doctrine of Harmonious Construction

B. Doctrine of Pith & Substance

C. Doctrine of Colourable Legislation

D. Doctrine of Ancillary Powers

E. Doctrine of Residuary Power

F. Doctrine of Repugnancy

INTRODUCTION

These class notes are aimed at providing students the working knowledge and understanding of Law being interpreted by the Courts where the language used in legislation is vague, doubtful and ambiguous. But every statute does not carry the same objective and each law has different purpose to serve. Keeping this in mind the courts have developed different approaches to statutory construction.

Unit - V details the various rules that have emerged in the interpretation of Constitution which the Courts apply while finding meanings of constitutional provisions so to maximise its efficacy and minimise its negative impact on people. Over time these rules have crystallised into the following:

(a) Doctrine of Harmonious Construction
(b) Doctrine of Pith & Substance
(c) Doctrine of Colourable Legislation
(d) Doctrine of Ancillary Powers
(e) Doctrine of Residuary Power
(f) Doctrine of Repugnancy

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A. Doctrine of Harmonious Construction:

Harmonious construction is a principle of statutory interpretation used in the Indian legal system. It holds that when two provisions of a legal text seem to conflict, they should be interpreted so that each has a separate effect and neither is redundant or nullified. When there is a conflict between two or more statues or two or more parts of a statute then the rule of harmonious construction needs to be adopted. The rule follows a very simple premise that every statute has a purpose and intent as per law and should be read as a whole. The interpretation consistent of all the provisions of the statute should be adopted. In the case in which it shall be impossible to harmonize both the provisions, the court's decision regarding the provision shall prevail. The rule of harmonious construction is the thumb rule to interpretation of any statute. An interpretation which makes the enactment a consistent whole, should be the aim of the Courts and a construction which avoids inconsistency or repugnancy between the various sections or parts of the statute should be adopted. The Courts should avoid "a head on clash", in the words of the Apex Court, between the different parts of an enactment and conflict between the various provisions should be sought to be harmonized. The normal presumption should be consistency and it should not be assumed that what is given with one hand by the legislature is sought to be taken away by the other. The rule of harmonious construction has been tersely explained by the Supreme Court thus,

"When there are, in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted, that if possible, effect should be given to both. A construction which makes one portion of the enactment a dead letter should be avoided since harmonization is not equivalent to destruction."

Harmonious Construction should be applied to statutory rules and courts should avoid absurd or unintended results. It should be resorted to making

the provision meaningful in the context. It should be in consonance with the intention of Rule makers. Rule of Harmonious construction is applicable to subordinate legislature also.

The Supreme Court laid down five principles of rule of Harmonious Construction in the landmark case of ***CIT v. Hindustan Bulk Carriers, (2003) 3 SCC 57, p. 74***:

(1) The courts must avoid a head on clash of seemingly contradicting provisions and they must construe the contradictory provisions so as to harmonize them.

(2) The provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its effort, is unable to find a way to reconcile their differences.

(3) When it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such as way so that effect is given to both the provisions as much as possible.

(4) Courts must also keep in mind that interpretation that reduces one provision to a useless number or dead is not harmonious construction.

(5) To harmonize is not to destroy any statutory provision or to render it fruitless.

A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one so as to exclude the more specific. The question as to the relative nature of the provisions, general or special, has to be determined with reference to the area and extent of their application either generally or specially in particular situations. This principle is expressed in the maxims *Generalia specialibus non derogant*, and *Generalia specialibus derogant*. The former means that general things do not derogate from special things and the latter means that special things derogate from general things.

The rule of harmonious construction can also be used for resolving a conflict between a provision in the Act and a rule made under the Act. Further this principle is also used to resolve a conflict between two different Acts and in the making of statutory rules and statutory orders. But in case there are two remedies for a situation, one general and one specific, and both are inconsistent with each other, they continue to hold good for the concerned person to choose from, until he elects one of them.

In ***Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255*** the Supreme Court applied the rule of harmonious construction in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution and it was held that the right of every religious denomination or any section thereof to manage its own affairs in matters of religion [Article 26(b)] is subject to a law made by a State providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)(b)].

Similarly, in ***Calcutta Gas Company Pvt. Limited v State of West Bengal, AIR 1962 SC 1044,*** the Legislative Assembly of West Bengal passed the Oriental Gas Company Act in 1960. The respondent sought to take over the management of the Gas Company under this Act. The appellant challenged the validity of this act by holding that the state Legislative Assembly had no power to pass such an under Entries 24 and 25 of the State List because the Parliament had already enacted the Industries (Development and Regulation) Act, 1951 under Entry 52 of the Central List dealing with industries. It was observed by the Supreme Court that there are so many subjects in three lists in the Constitution that there is bound to be some overlapping and it is the duty of the courts in such situation is to yet to harmonise them, if possible, so the effect can be given to each of them. Entry 24 of the State List covers entire Industries in the State. Entry 25 is only limited to the Gas industry. Therefore Entry 24 covers every industry barring the Gas Industries because it has been

specifically covered under Entry 25. Corresponding to Entry 24 of the State List, there is Entry 52 in the Union List. Therefore, by harmonious construction it became clear that gas industry was exclusively covered by Entry 25 of the State List over which the state has full control. Therefore, the state was fully competent to make laws in this regard.

In another case of ***Commissioner of Sales Tax, MP v Radha Krishna, 1979 SCC (2) 249*** under section 46 (1) c of the Madhya Pradesh General Sales Tax Act, 1958, criminal prosecution of the respondent partners was sanctioned in this case by the Commissioner when even after repeated demands the assesse did not pay the sales tax. The respondent challenged this provision on the ground that there were two separate provisions under the Act, namely, section 22 (4 – A) and section 46 (1) (c) under which two different procedures were prescribed to realize the amount due but there was no provision of law which could tell that which provision should be applied in which case. According to the Supreme Court, the provision prescribed u/s 46 (1) c was more drastic. It was held that by harmonious construction of these two provisions, the conclusion drawn is that the Commissioner had a judicial discretion to decide as to which procedure to be followed in which case. Whenever the Commissioner will fail to act judicially, the court will have the right to intervene. However, in this case, the Commissioner had correctly decided that the more drastic procedure under section 46 (1) c deserved to be followed because of the failure of the assesse firm in paying sales tax despite the repeated demands by the sales tax officer.

An interesting question arose in ***Sirsilk Ltd. v Govt. of Andhra Pradesh, AIR 1960 AP 373, (1960) ILLJ 614*** relating to a conflict between two equally mandatory provisions, viz., Ss. 17(1) and 18(1) of the Industrial Disputes Act, 1947, is a good illustration of the importance of the principle that every effort should be made to give effect to all the provisions of an act by harmonizing any apparent conflict between two or more of its provisions. Section 17(1) of

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the Act requires the government to publish every award of a Labour Tribunal within thirty days of its receipt and by sub – section (2) of section 17 the award on its publication becomes final. Section 18(1) of the Act provides that a settlement between employer and workmen shall be binding on the parties to the agreement. In a case where a settlement was arrived at after the receipt of the award of a Labour Tribunal by the Government but before its publication, the question was whether the Government was still required u/s 17(1) to publish the award. In construing these two equally mandatory provisions, the Supreme Court held that the only way to resolve the conflict was to hold that by the settlement, which becomes effective from the date of signing, the industrial dispute comes to an end and the award becomes infructuous and the Government cannot publish it.

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B. Doctrine of Pith & Substance

This doctrine comes into picture when there is a conflict between the different subjects in different lists. There is an interpretation of List - I and List - II of the Constitution of India. There can be a situation when a subject of one list touches the subject of another List. Hence this doctrine is applied then. Pith and Substance means the true nature of law. The real subject matter is challenged and not its incidental effect on another field. 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 the adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed. It was applied by the Supreme Court in the case ***State of Bombay v. F.N Balasara***.

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. Dupuy [1880] 5 A.C. 409***. In this case the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had 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

ground 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. Bank of Commerce Ltd., AIR 1947 PC 60***, succinctly explained the situation in which a State Legislature dealing with any matter may incidentally affect any Item 32 in the Union List. The court held:

> *"...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 legislation. Some of the prominent judgments of the Supreme Court of India that have resorted to this doctrine are as follows:

- ***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.

- **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”.

- **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."*

C. Doctrine of Colourable Legislation:

The doctrine of colourable legislation refers to the question of competency of the legislature while enacting a provision of law. My project has two different parts, the part one of my work deal with the doctrine of colourable legislation and part two deals with legislative accountability. It is worthy to be mention that my whole research work is doctrinal in nature.

Legislature of a federal state is accountable to its people and the legislation has different power which is vested upon it by the constitution. So the question is what would be the extent and context of legislative accountability with reference to the power conferred upon it in the light of doctrine of colourable legislation in Indian scenario?

To get a satisfactory answer of this above question first we have to deal with the doctrine of colourable legislation. If a legislature is prohibited from doing something, it may not permitted to do this under the guide or pretence of doing something while acting within its lawful jurisdiction and this prohibition is an implied result of the maxim "what cannot be done directly, cannot be done indirectly" and this doctrine is based on the maxim 'what cannot be done directly, cannot also be done indirectly. It is applicable when the legislature intends to do something indirectly which cannot be done directly. . Later on I deal with the legislative accountability, which means excessive secrecy or open abuse of the public trust vested upon legislative assembly is not tolerable. They are bound to do justice towards the public aspirations which led them to their seats. These two parts are discussed in a broad manner respectively with the help of constitutional provisions and judicial decisions.

Colourable Legislation in India:

In India 'the doctrine of colourable legislation' signifies only a limitation of the law making power of the legislature. It comes into picture while the legislature purporting to act within its power but in reality it has transgressed those

powers. So the doctrine becomes applicable whenever legislation seeks to do in an indirect manner what it cannot do directly. If the impugned legislation falls within the competence of legislature, the question of doing something indirectly which cannot be done directly does not arise.

In India legislative powers of Parliament and State Legislatures are conferred by **Art. 246** and distributed by Lists I, II and III in the seventh schedule of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters in List II. Parliament and State Legislatures have both powers to make laws with respect matters in List III which is also known as concurrent list. Residuary power of legislation is vested in Parliament by virtue of **Art. 248** and Entry 97 in list I. the power of State Legislatures to make laws is subject to the power of Parliament to make laws with respect to matters in List I and III. While examining the legislative competence of Parliament to make a law all that is required to be seen is whether the subject matter falls in List II which Parliament cannot enter for in view of the residuary power vesting in Parliament other matters are not outside the legislative competence of Parliament. Legislative competency is an issue that relates to how legislative power must be shared between the centre and states. It focuses only on the relation between the two.

The question whether the Legislature has kept itself within the jurisdiction assigned to it or has encroached upon a forbidden field is determined by finding out the true nature and character or pith and substance of the legislation. The main point is that the legislature having restrictive power cannot step over the field of competency. It is termed as the "fraud on the constitution"

The Supreme Court in the case of ***K.C. Gajapti v. State of Orissa*** while explaining the doctrine held:

> *"...if the constitution of a state distributes the legislative 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 in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of the constitutional power or not. Such transgression may be patent, manifest and direct, but may also be distinguished, covered and indirect and it is the latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements."

The Supreme Court of India in different judicial pronouncements has laid down the certain tests in order to determine the true nature of the legislation impeached as colourable:

(1) The court must look to the substance of the impugned law, as distinguished from its form or the label which the legislature has given it.

For the purpose of determining the substance of an enactment, the court will examine two things:

(a) Effect of the legislature and the

(b) Object and the purpose of the act

(2) The doctrine of colourable legislation has nothing to do with the motive of the legislation, it is in the essence a question of vires or power of the legislature to enact the law in question.

The doctrine does not involve any question of bonafides or malafides intention on the part of the legislature. If the legislature is competent enough to enact a particular law, then whatever motive which impelled it to act are irrelevant. On the other hand, it was observed by the Apex court that "the motive of the legislature in passing a statute is beyond the scrutiny of the courts" so the court has no power to scrutinize the policy which led to an enactment of a law falling within the ambit of the legislature concerned.

There is hardly any instance where a law has been declared by the court as invalid on the ground of competency of the legislature. The only instance is in

the case where a state law dealing with the abolition of landlord system, provided for payment of compensation on the basis of income accruing to the landlord by way of rent. Arrears of rent due to the landlord prior to the date of acquisition were to vest in the state and half of these arrears were to be given to the landlord as compensation. The provision was held to be a piece of colourable legislation and hence void on the basis of the following grounds:-

That it was not within the competence of Bihar state legislature to enact the impugned act.

That the acquisitions of the estates not being for public purpose, the act was unconstitutional.

That the legislative power in various sections of the act has been abducted in favour of the executive and such abdication of power was unconstitutional.

That the act was a fraud on the constitution and that certain parts of the act were unenforceable on account of vagueness and indefiniteness.

There is always a presumption that the legislature that the legislature does not exceed its jurisdiction ***(ut res magis, valet quam pareat)*** and the burden of establishing that an act is not within the competence of the legislature or that it has transgressed other constitutional mandates as is always on the person who challenges its vires.

So the ultimate analysis is that colourable legislation indicates that while making the law the legislature transgressed the limits of its power. But the question may be raised that whether or not parliament can do something indirectly, which it cannot do directly, may depend upon why it cannot do directly. There are so many examples in law as well as life where something can be done indirectly, although not directly. So the true principle of colourable legislation is "it is not permissible to do indirectly, what is prohibited directly."

Legislative Accountability in India:

In India, legislature moulds the laws whenever they transgressed their limits. Actually in colloquial language we can safely say, the Indian legislature make it a habit to do rewind, fast forward, pause; everything they wish whenever they found any inconvenience. They just bring the majority in the house and pass laws whatever they need. They never give due regard to the public aspirations which actually is the source of their power. For that reason we need legislative accountability. To understand legislative accountability first we have to know what is accountability? Generally, it indicates the process of holding persons or institutions responsible for the performance as objectively as possible. Accountability is the mechanism by which the concern authority is explicable for account of his conduct. The accountability is better if extracted by the authority from himself or rather say by his inner consciousness and not by legal means. It requires responsibility. Responsibility refers the authority to act, the power to control and the freedom to decide.

Over the past half century India has been a complex experiment in institutionalising democratic accountability through parliamentary institution. Parliament is the agency through which the govt is accountable. In Indian constitution there is no direct contemplation of legislative accountability. But in India where a parliamentary democracy prevails, the legislature has a vital role to make administration accountable. The members of the parliament and legislative assemblies in different states are elected by the people of India so the parliament is accountable to the people. The indication of legislative accountability can only be traced through the provision of Comptroller and Auditor General of India as enumerated in **Article 148 and 149** of the Indian constitution.

The framers of the Indian constitution being inspired by the then freedom movement and emotions with it would have opinion that the ministers would always think for the people so to make legislature accountable to some extent the above mentioned provisions are made. Under **Article 148** the Comptroller

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and Auditor General of India is the most important officer of the Govt. of India who by exercising his power and discharging duties make the legislature accountable to some extent. Under the **Article 149** the duties and powers of the Comptroller and General of India is to enhance accountability of the executive to the parliament and the state legislatures, by carrying out audits in public sector and providing accounting services in the states in accordance with the Constitution of India and laws as well as best international practices. To maintain the accountability being a high independent statutory authority the comptroller and auditor general has a double role to perform. **Firstly,** to function as an agency on behalf of the legislature to ensure that the executive complies with the various laws passed by the legislature in letter and spirit and **secondly** on behalf of the executive to ensure compliance by subordinate authorities with the rules and orders issued by it.

The Comptroller and Auditor General of India generally empowered to perform certain duties among which he has a duty to take account of accounts of the union and of the states. On the basis of which he prepares a report regarding the expenditures and money spent by the union and the state. Under **Article 149**, it is the responsibility of the CAG to audit all expenditures and receipts of the Govt. of India, the state Govt. and Union territories. It has played a vital role to maintain the balance in the govt. finances. The system mechanism should be user friendly so that the public can acquainted with the financial management of the Govt.

The primary duty of the legislature is to make laws. The primary accountability is accountability for law made means what law should be made by the Legislature? As **Article 246** of the Constitution speak about the Distribution of Legislative powers between Centre and State, and power to make laws. Thus, it is important for the legislature to take account of the fact that what laws should be framed and how it should legislate. Whether on the areas identified in the Constitution under Schedule VII, which means Legislature can make

legislations on only 97+66+47 = 210 areas/fields or according to the need of the people, need of the country. The answer to this question is simple that Legislature is accountable to frame legislations according to the need of the hour and entries identified under **Schedule VII.** So it is necessary for the legislature to take account of the fact that what laws should be framed and how it should be legislate. But unfortunately, there is no specific provision in this regard.

Relation between Colourable Legislation and Legislative Accountability:

It is very clear that the legislature can only make laws within its legislative competence. If a statute is found to be invalid on the ground of legislative competence it does not permanently inhibit the legislature from re-enacting the same if the power to do so is properly traced and established. In such a situation, it cannot be said that the subsequent legislation is merely a colourable legislation or a camouflage or to re-enact the invalidate previous legislation.

So the doctrine does not signify the colour of the legislation but it signifies whether the legislation while enacting a provision has act according to its authorized power or usurping its power to make a law. The legislature is morally as well as legally accountable to the common people. The doctrine has no application where the power of the legislature is not fettered by any constitutional limitations. So, any law made by disguise where there is a prohibitions for making that law it will be deemed as colourable exercise of legislative power. In this manner the doctrine of colourable legislation is related to legislative accountability.

D. Doctrine of Ancillary Powers:

Doctrine of Ancillary Powers has been developed in addition to the doctrine of pith and substance. It helps to resolve the conflict of legislative powers between the Central and the State Governments. It may be procedural or substantive. It gets invoked to aid the main legislation in question.

Ancillary or incidental powers mean those powers that support the powers that are expressly conferred. There are some express powers given to both the Central and State Governments through the three lists specified in the Seventh Schedule. The doctrine of ancillary or incidental powers means that these express powers to legislate on a matter also consist of the power to legislate on an incidental or ancillary matter.

Such a power is essential for the proper exercise of the expressly conferred legislative powers. For example, the power to legislate on banking would also include all the related powers to legislate on matters like functions of banks, the composition of their boards, relationship with RBI, etc. Similarly, the power to legislate on an entry dealing with forests would include the power of afforestation, deforestation, planning and management of forest as ancillary matters.

Its evolution:

In Common Law System:

The doctrine of ancillary/implied powers has developed through the well-known case of ***R. v Waterfield, (1963) 3 All ER 659***. In this case, the appellants were driving dangerously and two constables approached them to gather evidence for the same. The appellants drove the car in question at the constables to avoid them. They were thus convicted for dangerous driving as well as an assault on police officers. The question before the Court was whether the police constables were acting in the due execution of their duty within the meaning of **Section 38** of the **Offences against the Person Act,**

1861. To determine whether the powers of the constables' conduct was prima facie an unlawful interference with a person's liberty or property, the Court laid down the following test:

> *"It is relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty."*

When applied to this case, it was clear that even though in the general scheme of things the police constables had the duty to bring the offender to justice but this right became limited when it interfered with the person or property. This test is also known as the Waterfield test or ancillary powers test.

In India:

The doctrine of incidental or ancillary powers developed as one of the interpretive techniques used to help determine the scope of the powers of the different levels of government. This doctrine has not been specifically developed in India. However, its traces can be found in various judgments.

In the case of ***United Provinces v Atiqa Begum & Others, AIR 1941 FC 16,*** the principal question was whether the regularization of the Remission Act, 1938, an Act of the Uttar Pradesh legislature was valid. The Court held that this Act was covered "within the meaning of entry no. 21 of List II".

Gwyer C. J. observed:

> *"The subjects dealt with in the three legislative lists are not always set out with a scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list[…] In the case of some of these categories[…] the general word is amplified and explained… while the inclusion of others might not be so obvious. […] I think*

however that none of the items in the Lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.”

This case laid down the way for the doctrine of ancillary or incidental powers in the Indian legal system. It clarifies that a legislature has the power to make law on matters which are ancillary or incidental to the main matters of legislation and thus, are essential to fulfil the object of the law.

Constitutional provisions:

The following provisions of the Constitution reflect the power to make law on incidental matters:

Article 4 provides the power to make law on matters supplemental, incidental, and consequential to the law providing for adding of states under Article 2 and 3.

Article 110 and 199 define money bill for both the Union and the States. It includes “any matter incidental to any of the matters specified in sub-clauses (a) to (f)” of the respective articles.

Article 145 provides the power to the Supreme Court to make “rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein”.

Article 169 provides for the abolition or creation of Legislative Councils in States. This article includes the power to make rules “as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary”.

Article 239AAB empowers the President to suspend any provision of Article 239AA and related provisions. It also empowers him to “make such incidental and consequential provisions as may appear necessary”.

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Article 244A provides for the formation of an autonomous State comprising certain tribal areas in Assam and the creation of local Legislature or Council of Ministers or both. It empowers the Parliament to make any "such supplemental, incidental and consequential provisions as may be deemed necessary."

Article 289 provides for the exemption of property and income of a State from Union taxation. It empowers the Parliament to exempt trade "incidental" to the functioning of the Government.

Article 315 provides for the establishment of Public Service Commissions for the Union and the States. It provides for the law to contain "any such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law".

Article 323A talks about Administrative Tribunals. It provides that any law made under clause (1) of this article may include "such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals".

Article 323B talks of Tribunals for other matters. It empowers the appropriate Legislature to make law on "any matter incidental to any of the matters specified in sub-clauses (a) to (i)" of this article.

Article 339 provides for the control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. It empowers the President to include in his order "such incidental or ancillary provisions" as he deems necessary.

Article 356 provides for the provisions in case of failure of constitutional machinery in States. It empowers the President by Proclamation to make "such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation."

Article 371D provides special provisions for the State of Andhra Pradesh or Telangana. It empowers the President to make an order for the constitution of an Administrative Tribunal for the above-mentioned states containing “such supplemental, incidental and consequential provisions” as he may deem necessary.

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E. Doctrine of Residuary Power:

The framers of the Constitution had placed matters of national concern in the Union List and those of purely State or local significance in the State List. Matters that are of common interest to the States and the Union were placed in the Concurrent List, in order to ensure uniformity in legislation with due regard to the country's diversity.

Parliament and the State legislatures have exclusive powers to legislate on items in the Union List and the State List respectively. Both can legislate on items in the Concurrent List. However, foreseeing the possibility of a situation in which legislation might be required on matters that are not mentioned in any of the three Lists, the Founding Fathers made residuary provisions in Article 248 of the Constitution and Entry 97 of the Union List. The residuary powers of legislation are vested in Parliament.

Article 248 (2) of the Constitution of India says that the Parliament has exclusive power to make any law with respect to any matter not enumerated in list II and III. Such power shall include the power of making any law imposing a tax not mentioned in either of those lists.

The entry 97 of Union List also lays down that parliament has exclusive power to make laws with respect to any matter not enumerated in list II or III.

Thus, Article 248 and Entry 97 of the Union List of Constitution of India assign the residuary powers of legislation exclusively to the union If no entry in any of the three lists covers a piece of legislation, it must be regarded as a matter not enumerated in any of the three lists, and belonging exclusively to parliament under entry 97, list I by virtue of Art. 248. In other words, the scope and extent of Article 248 is identified with that of entry 97, list I.

But the scope of the residuary powers is restricted. This is because the three lists viz Union, State and Concurrent cover all possible subjects. Then, the court can also decide whether a subject matter falls under the residuary

power or not. The rationale behind the residual power is to enable the parliament to legislate on any subject, which has escaped the scrutiny of the house, and the subject which is not recognizable at present. But, the framers of constitution intended that recourse to residuary powers should be the last resort, and not the first step.

Sarkaria Commission:

In past, several states have demanded that the residuary powers, including those of taxation, should be vested in the States. In defence of its decision to transfer the residuary powers to the Concurrent List rather than to the States List, the Centre pointed to the strong unitary bias of the country's federal structure.

The Sarkaria Commission on Centre-State relations, which submitted its report in 1988, had also rejected the suggestion that the residuary powers should be vested in the States, even though it endorsed the Supreme Court's interpretation that these powers cannot be so expansively interpreted as to whittle down the power of the State legislatures. The Commission, however, backed the suggestion to transfer Entry 97 from the Union List to the Concurrent List.

The Sarkaria Commission recommended that the residuary power of legislation in regard to taxation remain with Parliament because, it said, the Constitution-makers did not include any entry relating to taxation in the Concurrent List so as to avoid Union-State frictions, double taxation and frustrating litigation. The Commission said that the power to tax might be used not only to raise resources but also to regulate economic activity, and warned that there might be situations in which a State, in the garb of introducing a new subject of taxation, may legislate in a manner prejudicial to national interest. But it justified the transfer of other residuary powers to the Concurrent List because, it felt, the exercise of such power by the States would be subject to the rules of Union supremacy that have been built into the scheme of the Constitution, particularly Articles 246 and 254.

F. Doctrine of Repugnancy:

The doctrine of Repugnancy essentially deals with the conflict between the laws of Centre and State. India adopts a federal structure of governance, therefore the extent of legislative powers is distributed between the Centre and the States in VII Schedule of the Constitution. As per Article 245, Parliament may make laws for whole or any part of India and the The legislature of a State may make laws for whole or any part of the State and Article 246 clearly mentions the extent of legislative powers of the Parliament and State governments.

The Centre has the exclusive power to legislate over the topics mentioned in List I and similarly, the State governments have the exclusive authority to legislate on the subject-matters included in List II. List III or Concurrent list included those items which can be legislated upon by both the Centre and the States, thus leading to a possibility of collusion and conflict.

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). In case of Indian Constitution which rests the power to legislate on both the Centre and the States, inconsistency can arise between the laws made by the Central Government and the State governments. The Constitution, however, clearly mentions in Article 254 that any law made by the State legislature on subject-matter enlisted in List III would be valid only in the absence of any contrary law passed by the Centre government. Through this Article, the Constitution developed the Doctrine of Repugnancy. Article 254 was included as a mechanism to resolve this repugnancy between the powers of the Parliament and State legislatures.

The Parliament and the State legislature have the power to make laws on several subject matters which cover the same field. In such a situation, there could be a collision between the laws made by the Parliament and the State

Legislature. In a situation, the primacy of the laws made by the Centre would prevail over the laws made by the State Legislature.

The Doctrine of Repugnancy deals with the distribution of powers between the Central and State legislatures. This doctrine reflects the quasi-federal structure of the Constitution. It has clearly laid down the powers of the Parliament and State legislature to avoid inconsistencies and conflicts.

A very prominent and authoritative judgment in relation to the doctrine of repugnancy is ***M. Karunanidhi v. Union of India***. The court said that -

> *"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.*
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> *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.*
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> *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.*
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> *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."

In ***National Engg. Industries Ltd. v. Shri KishanBhageria***, it was held that the best test of repugnancy is that if one prevails, the other cannot prevail. In this way the Court summarised the test for determining repugnancy and developed the doctrine of Repugnancy.

"There is no doubt that both the Centre and State legislatures are equally powerful and enjoy absolute authority when legislating on their respective fields. But there are some fields (subject-matters) where the powers and interest of both the governments collide and a proper and logical mechanism to counter any inconsistency or conflict needs to be in place to ensure the efficiency of governance. Doctrine of repugnancy thus provides for an effective mechanism to deal with any such inconsistencies."

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