ANALYSIS OF INDIA'S POSITION ON REPUGNANCY AND INCONSISTENCY OF LEGISLATIONS

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ABSTRACT

India is known to follow a federalist form of government, where there is a distinction between the Centre and the State thereby creating a distinction in terms of the laws for the same. Though this separation between the Centre and the State exists, there are certain scenarios when disputes arise between them in respect of the laws framed by each of them. This paper highlights the application of the Doctrine of Repugnancy on the Indian legislations in addition to this, it is also compared to the Australian's take on repugnancy of its legislations.

Keywords: Doctrine of Repugnancy, Doctrine of Pith and Substance, Australian Constitution, Constitution of India, Repugnancy, Inconsistency of legislation

INTRODUCTION

The Doctrine of Separation of Powers was propounded in 1748 by the renowned French Philosopher, Montesquieu in his book 'Espirit des Lois' (The Spirit of the Laws). According to this Doctrine, there should exist a clear distinction or rather a 'separation' with regard to the formulating and exercising of powers of the Legislature, the Executive and the Judiciary, respectively, failing which there would arise arbitrariness in the formulation and the execution of the laws so made.[1] In the Indian context, the framers of the Constitution of India (hereinafter referred to as "Constitution") have inculcated the essence of this Doctrine under Article 245 of the Constitution which talks about the extent of the laws made by the Parliament and by the Legislature of the States; and under Article 246 of the Constitution which talks about the subject-matter of the laws that can be made by the Parliament and by the State Legislatures. The subject matter thus referred to is listed under Schedule VII of the Constitution which is divided into three lists namely – List I – Union List, where Parliament has exclusive rights to make laws with respect to the matters in this list;[2] List II – State List, where the Legislature of any State has exclusive power to make laws with respect to the matters mentioned in this list;[3] List III – Concurrent List, where both the Parliament and the Legislature of any State have the power to make laws with regard to the subject-matter mentioned in this list.[4] The separation of powers between the three organs of the government i.e., the Legislative, the Executive and the Judiciary in India is of paramount interest because it forms a part of the basic structure of the Indian Constitution.

In the case of **Kartar Singh v State of Punjab**[5], Justice K. Ramaswamy stated, "It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution." In the case of **Golak Nath v State of Punjab**[6], Chief Justice Subba Rao observed that, "The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their

[1] Charles de Secondat Montesquieu, *The Spirit of the Laws* (New York, Hafner Pub Co, 1948).
[2] Constitution of India, Art. 246(1)
[3] Constitution of India, Art. 246(3)
[4] Constitution of India, Art. 246(2)
[5] Kartar Singh v State of Punjab, 1961 AIR 1787
[6] Golak Nath v State of Punjab, 1967 AIR 1643

respective powers without overstepping their limits. They should function within the spheres allotted to them."

Though there is an agreement for the most part, the debacle arising from the contradictory views on this Doctrine of Separation of Powers has existed since time immemorial, as a dispute may arise pertaining to the extent of the subject matter where one organ of the State may exceed the boundaries that are assigned to it under the Constitution.[7] The landmark judgement in this respect is the **Keshavananda Bharati v State of Kerala[8]**, where the Hon'ble Supreme Court considered the power of the State Legislature to amend the Constitution and was held that the 'basic structure' of the Constitution could not be altered by neither the Legislature of any State nor by the act of the Parliament.[9] Though there seems to be a separation of powers, the overlapping of these powers may occur at some point of time and is inevitable and pertaining to these issues, two doctrines can be utilized in order to arrive at an appropriate solution in order to understand as to which law shall prevail, these doctrines are – The Doctrine of Pith and Substance and The Doctrine of Repugnancy.

THE DOCTRINE OF PITH AND SUBSTANCE

To under this Doctrine, the meaning of the term Pith and Substance should be understood, 'Pith' refers to the 'true nature' or 'essence of something' and 'Substance' on the other hand, refers to the 'most important or essential part of something'.[10] Collectively, the doctrine would mean 'true nature and substance'. This doctrine was first used in Canada in the case of **Cushing v Dupuy[11]** that was decided by the Judicial Committee of the Privy Council, and later it was used for the first time in India in the leading case, **State of Bombay & Anr. v F.N. Balsara[12]** where the Supreme Court upheld the Doctrine of Pith and Substance and observed that it was important to ascertain the true spirit and character of an enactment so as determine the list under which the subject-matter is listed.

[7] Karan Tyagi, 'The Doctrine Of Separation Of Powers And Its Relevance In Time Of Coalition Politics.' (2008) <http://www.jstor.org/stable/41856450> accessed on 12 April 2022.
[8] Keshavananda Bharati v State of Kerala, AIR 1997 SC 1125
[9] See n 7
[10] Sanika Javdekar, 'Doctrine of Pith and Substance' <https://www.legalserviceindia.com/legal/article-6766-doctrine-of-pith-and-substance.html> accessed 13 April 2022.
[11] Cushing v Dupuy, 1880 UKPC 22
[12] State of Bombay & Anr. v F.N. Balsara ,1951 AIR 318.

This doctrine is utilized by the Courts of Law when there is a conflict that arises regarding the power of a level of government to make law on a particular matter. In questions of conflict that arise due to overlapping or encroachment, this Doctrine gives clarity with regard to the subject-matter and in which list the subject matter belongs to. It is utilized to provide an ease to the rigid federal structure of the Government, which distributes the powers between the Union and the State Government.

THE DOCTRINE OF REPUGNANCY

'Repugnancy' in a general sense means 'inconsistency' or 'incompatibility of ideas or statements.' This term when used in the common law sense and as defined in the Black Law's dictionary means "Inconsistency or contradiction between two or more parts of a legal instrument." The concept of Repugnancy in the Indian context is enshrined under Article 254 of the Constitution of India. Article 254 of the Indian Constitution talks about Inconsistency between laws made by the Parliament and by the Legislature of the States. If a law made by the Legislature of a State is repugnant to any provision of a law made by the Parliament with respect to any of the matters given in the Concurrent List, then the law made by the Parliament, whether passed before or after the law made by the Legislature of such State, the existing law made by the Parliament shall prevail and the law made by the Legislature of such State, to the extent of repugnancy be void.[13] In continuation to this, when a law is made by the Legislature of a State with respect to any of the matters listed in the Concurrent List and contains any provision that is repugnant to the provisions of an existing law or an earlier law made by the Parliament, then the law made by the Legislature of such State will prevail if it receives the consent of the President.[14] However, it is to be noted that despite the grant of the Presidential assent, the Parliament will have the power to enact a law regarding the same subject-matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.[15]

DOCTRINE OF REPUGNANCY IN RELATION TO THE AUSTRALIAN CONSTITUTION

Section 109 of the Australian Constitution talks about 'Inconsistency of Laws', it states that,

[13] Constitution of India, Art. 254(1)
[14] Constitution of India, Art. 254(2)
[15] Constitution of India, Art. 254 proviso

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." Section 109 of the Australian Constitution was modelled in relation to the Federal Council of Australia Act, 1885, Section 22 of this Act, states, "If in any case the provisions of any Act of the Council shall be repugnant to, or inconsistent with, the law of any colony affected thereby, the former shall prevail, and the latter shall, so far as such repugnance or inconsistency extends, have no operation."[16] This was done so with two variations – (i) The word 'Repugnant' was not used; and (ii) Section 109 of the Australian Constitution substituted "have no operation" to "be invalid".[17] The Doctrine of Repugnancy in Australia is not used to invalidate inconsistent State laws but their role is to suspend their operation so long as the inconsistent Commonwealth law, which is federal in nature, is in operation.[18] The courts at present have come up with three major tests to test the inconsistency of the law under Section 109 of the Australian Constitution and they are – (i) Impossibility of concurrent obedience; (ii) Denial or qualification of rights (powers, privileges, immunities) ; (iii) Covering the field. These three tests are of grave importance in the Indian context too as courts use these tests as aid in order to come to an appropriate conclusion.

JUDICIAL INTERPRETATION OF THE DOCTRINE OF REPUGNANCY

There is a long list of precedents that has been developed on the concept of repugnancy under Article 254 of Constitution of India. There are three tests that have been enunciated by the Hon'ble Supreme Court in **Forum for People's Collective Efforts (FPCE) & Anr. v State of West Bengal & Anr.**[19], which is the latest landmark judgment in which the question of repugnancy had arisen between the Centre's Real Estate Regulation Authority (RERA) and West Bengal Housing Industry Regulation Act (WB-HIRA). They are as follows:

1. A direct inconsistency between the statutes or a conflict between the terms of the statutes may be present.
2. Even when there is no direct conflict, if Parliament has enacted an exhaustive or complete code with the intention to occupy the entire field then the State law, in the same field, would be repugnant and inoperative.

[16] Geoffrey Sawyer, 'Repugnancy and Inconsistency of Legislation' (1980) 11 Cambrian L Rev 101
[17] ibid
[18] See n 16
[19] FPCE & Anr. v State of West Bengal & Anr., (2021) 8 SCC 599

3. There is possibility of conflict arising where the State Legislature has exercised its power in the same legislation as the Parliament.

The Hon'ble Supreme Court held that WB-HIRA was repugnant to the Centre's RERA under Article 254(1) of the Constitution since they both occupied the same field and the intention of the central law were to provide uniformity and is an exhaustive law on real estate regulation.

In order to understand the position of the Judiciary on topic of Repugnancy, we should study the leading judicial precedents that have been decided by the Hon'ble Supreme Court. The below mentioned judicial precedents are the landmark cases which have now formulated the law of repugnancy in India. Indian jurisprudence on repugnancy has been majorly decided with the help of Australian decisions on the same and thereafter through the judicial case laws.

In **Zaverbhai Amaldas v State of Bombay**[20], the state had contended that on account of amendments in 1948,1949 and 1959 in the Essential Supplies (Temporary Powers), 1946, Section 2 of the Bombay Act, 1947 had become inoperative. In the present case, the Hon'ble Supreme Court held that, when the Centre as well as the State enact a legislation covering the same field, the law of the Centre should prevail over that of the State. Further, the principle of Implied Repeal rests on the question that if subject-matter of the later legislation is identical or similar to that of the earlier such that the two cannot co-exist, then the earlier legislation is repealed by the later enactment. This would be equally applicable when deciding a question on repugnancy between the parliament and state legislation.

Another leading judgment is of the Constitution Bench in **Tika Ramji v State of Uttar Pradesh**[21] wherein the concept of repugnancy arising due to the legislation of parliament and state occupying the same field was explained. Justice N.H. Bhagwati adopted the three tests of repugnancy of inconsistency as given by Nicholas Avery on the Australian Constitution:

"27. Nicholas in his Australian Constitution, 2nd Ed., p. 303, refers to three tests of inconsistency or repugnancy: —

(1) There may be inconsistency in the actual terms of the competing statutes **(R. v. Brisbane Licensing Court, [1920] 28 CLR 23).**

[20] Zaverbhai Amaldas v State of Bombay, (1955) 1 SCR 799
[21] Tika Ramji v State of UP, 1956 SCR 393

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code **(Clyde Engineering Co. Ltd. v. Cowburn, [1926] 37 CLR 466).**

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter **(Victoria v. Commonwealth, [1937] 58 CLR 618; Wenn v. Attorney-General (Vict.), [1948] 77 CLR 84)**."

From the aforementioned extract, we can see that Indian Judiciary relies on the Australian jurisprudence on doctrine of repugnancy to understand and decide the Indian cases. The three tests which have been set out in the Australian cases essentially lay down that the question of repugnancy arises when there is inconsistency between terms of competing statutes or when the State law occupies the same field as the Commonwealth law or court, then the latter would prevail over the State law. Majority of the cases decided were in employment matters in the aforementioned test. Australia follows a federal system of government and the inconsistency between legislation problems are decided by following two steps. Firstly, to determine the validity of the Commonwealth Act and the State legislation independently and secondly, to question the inconsistency which has arisen between the two. [22]

The Constitution Bench in **Deep Chand v State of Uttar Pradesh**[23], *inter alia* dealt with whether the provisions of Uttar Pradesh Transport Service (Development) Act, 1955 were repugnant to the subsequent law of the Parliament i.e., Motor Vehicles (Amendment) Act, 1956. The constitution bench recorded the acceptance of the three rules in Tika Ramji which were formulated as per Australian jurisprudence. The Hon'ble Supreme Court noted a comparison between the Uttar Pradesh Act and the Motor Vehicles (Amendment) Act, 1956 indicated that the intentions behind the legislation were the same and both operated in the same field. It was noted that the un-amended Motor Vehicles Act, 1939 did not make any separate provisions for nationalization of transport vehicles that were later introduced by the State Act. Thereafter, with an intention to introduce a common law throughout country, the Parliament amended the Motor Vehicle Act, 1956 and inserted Chapter IV A in the Act. The Court held that the object of the Parliament would be frustrated if both the acts are allowed to co-exist.

[22] Geoffrey Sawyer, 'Repugnancy and Inconsistency of Legislations' (1980) 11 Cambrian L Rev 101
[23] Deep Chand v State of Uttar Pradesh, (1959) Supp (2) SCR 8

From the below mentioned judicial precedents we can understand that the question of repugnancy comes into play when there is an overlap of laws made by the Centre and State in the Concurrent List. Article 254(1) operates in the entries of the concurrent list on which both the Centre and State can make laws. The initial part of clause 1 lays down that the State Legislature will be repugnant to a law enacted by the Parliament, which it is competent to enact and to an existing law. If that has happened only then will the State Act be void to the extent of repugnancy.

The concept of repugnancy was revisited in **M Karunanidhi v Union of India**[24] with respect to Tamil Nadu Public Men (Criminal Misconduct) Act, 1973. While the state act was later repealed however at the time that it was in force, it was challenged that the Act was repugnant to the provisions of Indian Penal Code, the Prevention of Corruption Act and Criminal Law (Amendment) Act, 1952. It was contended that on account of the fact that the State Act had received the assent of the President under Article 254(2), therefore, the Central Acts were repealed and could not be revived even after State Act was repealed. Justice S. Murtaza Fazal Ali discussed the principles of doctrine of repugnancy:

1. A direct inconsistency between central and state act.
2. Where assent of President has been taken under Art. 254(2) and State Law comes into collision with Parliament Legislation on an entry in concurrent list then in that case State Law shall prevail to the extent of repugnancy and provisions of Central Act shall become void. The State Law will prevail only in that particular state.
3. Where a law passed by the state legislature substantially falls under the entries of the state list, entrenches upon the entries of the central list then in that case, the constitutionality can be upheld by using the doctrine of pith and substance.

The Constitution Bench held that while the features criminal misconduct under Prevention of Corruption Act were substantially the same in the State Act and the Central Act, the punishments given varied. Therefore, the Court held that the State Act was not repugnant to the provisions of Central Act but it was a complimentary Act, which runs pari passu the Central Act. This was on account of the fact that the State Act laid down distinct offences with different ingredients and punishments.

[24] M Karunanidhi v Union of India, (1979)3 SCC 431

In **Hoechst Pharmaceuticals Ltd. v State of Bihar**[25] considered the validity of Section 5(1) of Bihar Finance Act, 1981 which had received the assent of the President. The state had made laws, which were relatable to Entry 54 of List - II and the appellant was contending that the same were under List - III. The contention of the appellant was rejected and the court held that the question of repugnancy under Article 254(1) arises only when the legislations occupy the same field under the concurrent list and a direct conflict exists. There is no application of Article 254(1) in cases where overlapping laws are found between List - II and List - III. In such cases the State Law will not fail because of Doctrine of Repugnancy.

CONCLUSION

The authors are of the opinion that there is a clear separation of powers between the Parliament and the Legislature of any State as well as a clear distinction between the matters in which both can enact laws. However, this frigid distinction in many cases does not prove to be desirable nor feasible. [26] The question of repugnancy arises when there is a direct conflict between the State Act and the Central Act. This arises when both the Acts in relation to the Centre laws and State laws, occupy the same field and are enacted on Entries listed under the Concurrent List of Schedule VII of the Constitution. This weakens the authority of the Parliament as well as that of the State. On one hand, it weakens the authority of the parliament to enact a uniform and exhaustive law that should be applicable throughout the country. [27] On the other hand, there can be chances of politically inclined push to the parliament to make laws in an arbitrary manner, which would prevail over the State Act, if a question of repugnancy arises. Therefore, to answer the question of repugnancy, the courts should relax the stringent test under Article 254 of Constitution of India and look at the question in hand on a case-to-case basis. This would allow the courts to assess the question in hand and opt for the appropriate law for the particular State in question. In pursuance of this, the matters under the Concurrent List should not be used to determine the field which the laws have covered. [28]

[25] Hoechst Pharmaceuticals Ltd. v State of Bihar, (1983) 4 SCC 45
[26] See n 7
[27] S. Ashwin Vardarajan, Ashutosh Panchbai, Richa Dwivedi, 'Interpretation Of Doctrine Of Repugnancy Under The Indian Constitution' (2021) 10 International Journal of Modern Agriculture <http://modern-journals.com/index.php/ijma/article/view/758/654> accessed 12 April 2022.
[28] ibid