Lec19Centre State Relations in India

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Week 05: Legislative Relations: Interpretation of Lists, Pith and Substance, Territorial Nexus and Related Areas

Lecture 19: Doctrine of Doctrines of Pith and Substance, Incidental and Ancillary Power

Greetings to all of you. We have been discussing legislative relations and in that we have understood that how Articles 245, 246 and provisions related to repugnancy they are dealing on the subject matters between the Centre and the States. As we know that attempts are always been made to give a very precise language to the law but still there is a limitation with the language and therefore the limitation leads to conflict between the two enactments and thus a role of judiciary comes in to interpret the enactments in order to validate both the enactments or to look into the competencies of the Legislature and to validate one and declare the other one invalid. So moving further today we will be discussing different rules of interpretation evolved by the judiciary, accepted by the judiciary while interpreting the laws which are there on the matter of Centre and State. So we will discuss what is the doctrine of territorial nexus, doctrine of colorable legislation, doctrine of pith and substance and doctrine of incidental and ancillary power.

Now to start with doctrine of territorial nexus this doctrine goes to the very root of sovereign power of the Legislature or Parliament. We know very well that the Legislature or Parliament has been given sweeping power to make the law and there shall not be any territorial limitation with regard to the applicability of law. But then in a federal system we know very well that there is a requirement of giving a limitation to the applicability of the law when such law is made by the State Legislature and in India we find that in the Government of India Act 1935 reference of this territorial limitation was there with regard to the law made by the provinces and when it

comes to the law to be made by the Federal Legislature then such territorial limitation was not there. So, the idea of extra territorial operation of law it traces, it connects with the Government of India Act 1935 wherein what you find is that the Section 99 and Section 100 of the Government of India Act 1935 was dealing on the issue of extra territorial operation of law on a line which I have just said that if the law is made by the provinces then that law has to have a kind of applicability only within that province whereas, the Federal Legislature can make a law and such law can have an extra territorial operation as well.

And that is what Privy Council, which was the highest appellate court before independence, in British Columbia Electric Railway Co. Ltd. v. Kin it was explained that a Legislature which passes a law having extra territorial operation may find that what it has enacted cannot be directly enforced, but the Act per say is not invalid on that account. So, extra territorial operation of law cannot be a reason for declaring the enactment unconstitutional or invalid. Obviously there may be a difficulty in giving effect to that law there may be difficulty in operationalizing that law that is what the Privy Council said in this case. So when you look at the scheme which is given under Article 245 which talks about territorial nexus you find that under Article 245 it says that the Union Legislature or Parliament can legislate for the entire country whereas, the States can legislate only for their own respective territory. So States are not allowed to make a law which does not fall within their territory.

So States are not allowed to have extra territorial laws. Thus it is to be said that State Legislature makes a law which are territorial in application territorial in operation. But at the same time situation may arise when cause of action may arise in the State, but then the parties may be residing outside the State in such a situation the applicability of the law is very much there and necessary action can be taken as per the State law. So that is why in order to understand and examine that what could be such kind of situations where the State made laws can be made applicable for those individuals who are not residing in the State. Those actions which are happening in the State, but has got a connect outside the State can be very well with brought within the ambit of the law.

For this doctrine of territorial nexus has been evolved. This doctrine of territorial nexus is an important doctrine to examine that whether the law made by the State Legislature shall have the

applicability on a given case or not. So this doctrine of territorial nexus is primarily based on the *maxim extra territorium jus dicenti impune non paretur* which says that laws of a nation apply to all its subjects and to all things and acts within its territories. So in a way this Latin maxim also acknowledges the doctrine of sovereignty whatever is made by the sovereign legislature shall have the applicability on all its subjects. There should not be any doubt, there should be any apprehension, there should not be any question raised on those matters. But at the same time when it talk about federal structure where you have a Centre and the States both drawing legitimacy from the Constitution it is to be noted that State Legislature cannot have a legislative competence to make laws which are going to give effect in other jurisdictions which are going to become operational in other jurisdictions. So therefore, what is to be examined is whether such laws which are made by the State Legislature it has got any connect with the territory or not. If it has got no connect with the territory then such law shall be declared unconstitutional on the ground of extra territoriality. So this is what you find territorial nexus and connect between the Constitution of India.

Article 245(1) categorically says that a State shall make a law for their respective territory and Article 246 talks about the subject matters on which the States and the Centre can make law. If you read the language of Article 245, Article 245 categorically says that Parliament can make a law for the entire country or for any part of the country whereas, the State is mandated to make a law only for the State or part of the State. Article 246 talks about subject matters which are there given in the Seventh Schedule List I, List II and List III on which either the State Legislature or Parliament they have got a jurisdiction to make laws. So this is how it says now when you look at Article 245(2) says that parliamentary laws can have extra territorial application by the same time if the laws are being made such challenge cannot be made that laws are to be declared unconstitutional because of extra territorial operation. So therefore, this is something which cannot become a point of contention and it has to be presumed that Parliament can make a law on the subjects. So the State Legislatures are not allowed to make a law having extra territorial operation whereas, Parliament has been given the necessary legislative power to make a law which can have extra territorial application and that comes from this Latin maxim which says *expressio unius est exclusio alterius* which says ‘an express mention of one thing implies the exclusion of another’ is embodied in Article 245(2).

Now this doctrine of territorial nexus is a well-established doctrine which the court has time and again applied for examining the competence of the Legislature to make a law. The court has time and again applied to look into the validity of the law. It is to be seen that whether Legislature has got a competence to make a law or not or whether while examining the competence, the court also examines that whether the applicability of law is not within the defined boundary under the Constitution and it is affecting the subject matter affecting the object not falling within the territory of the State unless and until there is some nexus laid down. So, this is an important point to look at it. For example, in the case of Governor General v. Raleigh Investment Co., the Privy Council has made this important point that a company which is registered in the in the United Kingdom having substantial business interest in India and if tax law is being applied and according to the tax law if the company has been asked to pay the tax what is to be seen is that whether the company though registered in United Kingdom drawing any income from the Indian territory or not. If answer is yes, then there is a case of territorial nexus and such levying of tax can be held constitutional. The Supreme Court has also applied the case of State of Bombay v. RMD Chamarbaugwalla, a very well-known case where in the question was with regard to the again imposing of taxes on an activity which has its origin in Karnataka by the same time significant number of individuals from State of Bombay they are participating in this price competition and it was done through the paper published and having a wide circulation in the State of Bombay. So, question was raised that whether State of Bombay can levy a tax on such activities. The court applied this doctrine of territorial nexus and court said that individuals are in Bombay and they are participating in the price competition. Though the company is there in the other State, but then because of this territorial nexus government has got a necessary legislative competence to regulate such transactions. So, it has been stated that while examining the territorial nexus is essential to see that whether the connect is real and not illusory because it is important to see that the connect between the alleged law and the subject must be concrete must be substantial and it is just not for the sake of building a connect it has been done.

So, how do we do that? It says that whether liabilities thought to be imposed is pertinent to that connection or not whether law is talking about the liability, law is talking about putting certain obligation whether the same is having a concrete connect or not that is how the doctrine of territorial nexus has to be applied in a given case. This one is an interesting case GVK Industries

v. Union of India, wherein question was raised with regard to the Central law and question was raised that whether Central law can be declared unconstitutional on the ground of extra territorial application of law. This is an interesting case because in this case there were certain services which were being availed by GVK Industries from and foreign firm and the kind of services were not falling within the ambit of the income tax law, but still the income tax authorities have revived taxes. Therefore, GVK Industries have raised the question that whether such kind of laws can be considered to be a valid law in India when the when the law made by Parliament has no connect with India, can such law be taken up. So, that's what the question which the court took up in this case - is Parliament constitutionally restricted from enacting legislation with respect to extra territorial aspects or causes that do not have nor are expected to have any direct or indirect tangible or intangible impacts on or effects in or consequences of territory of India or any part of India, the interest of or welfare or the well-being of security of inhabitants or of India and Indians. So, that is what the court looks into the question that when we say that Parliament can make a law with extra territorial application is there any limitation on such power of the Parliament.

So, that is what the court has taken up this matter and in this constitutional bench decision the court has said that the Parliament is having restriction. Parliament cannot make a law unless and until there is some connect with Indians. Only because some benefit is been suggested that cannot become a rational or that cannot become a justification of validating the law. So, court has also said that Parliament does not have any power to make a law to legislate for a foreign territory because in this case services were being given by the company which is registered in the foreign country and there was no connect between the services rendered and the law which were there in this country. It was connected with that Income Tax Act only for the purpose of levying the tax and in this case GVK Industries applied for no objection certificate from the company authority to give it to the service provider which was denied. It was denied on the ground that there is a liability arising in this case. So, the court has clarified that Parliament's competence to legislate with regard to extra-territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have a significant or sufficient impact on or effect or consequence for India. If it is not for having an effect or consequence for India then it would amount to as if the Parliament is making a law for the foreign country or the foreign territory.

There is nothing which connects with the parliamentary competence to make a law under the Constitution. So, the court says that in this case because of no territorial nexus, one has to look into the applicability of the law and one has to look into the vires of the provisions or constitutionality of the provisions.

So, this is an interesting case to look at that how the court has given a kind of meaningful interpretation to Article 245(2) and how the court has even drawn a boundary even with regard to the legislative power of Parliament. This is another case which is a quite old case on Bengal Immunity Co. Ltd. v. State of Bihar, again in this case the State of Bihar has levied certain taxes on a company which was a registered company in the State of West Bengal. It was involved in manufacturing and selling of medical products and it has a presence in the market in India and abroad also. So, the question was raised that can State of Bihar levy a tax with regard to transactions taking place in the State of Bihar. The company certainly contested that because it has no connect with the Bihar and it is not a company incorporated in Bihar and no business activities is happening in State of Bihar and therefore, State of Bihar cannot collect any tax. The court in this case has validated law enacted by the state of Bihar on the very ground that there is a clear connect between the law enacted by the State of Bihar and the transaction which is taking place between the residents of Bihar and the company and therefore, the very argument of having extra territorial application does not stand here. It categorically says that if there is a territorial nexus between the persons or property subject matter of the Act and the State seeking to comply with the presence of the Act then such law cannot be declared to be unconstitutional on the ground of extra territorial operation. So, you can very well look at it that what the court in this kind of cases trying to bring in is the cause of action. Whether there is any cause of action whether there is any connect between the law and the State which has enacted the law if that is the case then law cannot be declared as unconstitutional.

Let us move to another doctrine which is doctrine of colourable legislation. Colourable legislation is about identifying the competence of the Legislature that whether the Legislature has got a competence to make a law or not. It is based on this maxima of *Quando aliquid prohibetur ex directo, prohibetur et per obliquum,* which means whatever the government is unable to do directly, it cannot do indirectly. So, colourable legislation applies when the law is being made by the Legislature which otherwise it is not competent to make so. So, colourable

legislation is a tool or doctrine through which camouflaging is addressed where if the Legislature tries to undertake certain law making exercise under the guise of that it has got a competence colourable legislation can very well stop that.

We need to understand that this doctrine of colourable legislation is primarily the doctrine to be made applicable for examining the competence. It has nothing to do with mala fide or bona fide intention of the law maker. It does not matter that whether the law has been brought in with malafide intent or with an ill intent or there is a good intent. What it addresses is that whether there is a jurisdiction to make law or not whether there is a competence to make law or not. If there is no competence to make law this doctrine categorically testifies that it is it amounts to fraud on the Constitution.

That's what the prominent member of the Constitutional Assembly Alladi Krishnaswami Ayyar made a very clear point that a reference to the colourable legislation during the Assembly debates stating that if the legislature Contravenes to outstep the limits of the legislative power in a fraudulent excise of the power the court may pronounce the legislation to be invalid or ultra vires. So, colourable legislation basically applies in a situation to control the legislative power of the Legislature what is otherwise prohibited within the Constitution. They shall not be any other method or any alternate route to escape that prohibition and to make a law. This case KC Gajapati Narayan Deo v. State of Orissa, has generally been cited which is a case related to evolution of State made by the Government of Orissa. So, the Supreme Court has categorically said that what is to be looked at while examining the issue of competence in the context of colourable legislation is that that whether the case of breaching the boundary is direct or indirect is to be seen. If it is a direct one there is a no problem that can be easily made a subject matter of unconstitutionality, but at the same time when you look at an attempt made by the Legislature to indirectly breach the competence then this doctrine comes into play and then this doctrine categorically makes it a point that in no scenario such laws can be validated.

So, it is the substance of the law which is important and what is to be seen is not merely the form or the outward appearance because what may appear to be a good law, the outcome of the law may give kind of valid proposition, but at the same time if there is a no competence to make law

there is no jurisdiction to make law, such law cannot be declared to be constitutional, otherwise it would amount to doing something which has not been authorized to undertaking.

So, this is the test which has been laid down. Canadian cases are being cited here in order to strengthen the arguments of applicability of colourable legislation by the Indian Supreme Court because we know very well that our federal structure is somewhere also been drawn from the Canadian references though we have experimented based on our requirement, but then comparative law comes into picture for identifying the similarities and for identifying the gaps. So, in this case of Attorney-General for Ontario v. Reciprocal Insurers, it has been said that the question which we need to take up is what is the true nature and character of the alleged legislation and if it has been found that on substance that legislation is been enacted without any jurisdiction and nothing to do with the form then such law shall be declared as unconstitutional on the ground of want of legislative authority. Another case of Attorney-General for Alberla v. Attorney-General for Canada where the court again says that court can suddenly examine the effect of legislation and take into consideration its object purpose and design in order to understand that what exactly is been aimed for and what it tries to address whether that subject matter has been entrusted to that Legislature or not. So, this is what the court has given the test with regard to colourable legislation. The court has said that these are the relevant factors to be looked at and then what is to be seen is that what exactly is the object of the law, what exactly is the effect of the law and it is irrelevant that with what intent law has been made.

Another important doctrine is the doctrine of pith and substance which is again a doctrine for examining the legislative competence and also to see that whether the law has been made on the subject matter on which competence has been entrusted and whether it is a case of slight encroachment on the other subjects. So, the doctrine of pith and substance is an important doctrine to examine the legislative competence. This is important to note that these are the doctrines which are there for examining the jurisdictions examining and the legislative competence. So, what is to be seen here is that whether enactment is been made squarely on a subject which has been entrusted to that Legislature. If the answer is yes then even if there is some kind of incidental encroachment, which is not significant, that should not be taken up with seriousness by the court and that law has to be validated. The rational is that that if law has been enacted and the major focus of the law is on the subject matter which is there within the

competence then such law shall be declared to be a valid one that is what the court says in a very famous case of Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.

It says that there is an apparent overlapping between the two entries in that situation what is to be done is that this doctrine has to be applied in order to understand that law is exactly made with regard to which entry. And if by looking at the law the true character has been found then it would be seen that whether with regard to other entry it is only an incidental encroachment then that law has to be declared unconstitutional. If it has been found that there is substantial encroachment then the law has to be declared unconstitutional. This is a State of Bombay v. F.N. Balsara, case is again a case related to importing of intoxicating liquor, sale and consumption of liquor in the State of Bombay when it was prohibited. So, the court has looked into it and court on this subject matter has said that only because it is incidentally looking at it because in this case State of Bombay has made a law prohibiting sale and consumption of foreign brand liquor. It was challenged that it is unconstitutional because that power lies with the Centre because Centre has got a necessary jurisdiction to make a law on imported liquor. The court has said that the State Legislature has made a law on consumption and sale of foreign brand liquor and it incidentally only talks about foreign liquor, but on content it is about the subject matter which is there with the State under List II and therefore, it is a valid law. It only touches upon the issue of imported liquor and that should not be a reason for declaring the law unconstitutional. So, the court says that what is to be looked into is that what is the true nature and character of the law for determining that the law is been enacted in relation to which subject.

And this is again the court has said also in case of State of Rajasthan v. G. Chawla case which is an interesting case where in State govt. has made a law on regulating the sound amplifier and it was contested that the law is dealing on the matter of broadcast which is a subject matter of the Union List. Whereas State of Rajasthan has contended that the law to regulate sound amplifier was done for regulating several subject matters which falls within the State jurisdiction, for example, health, hospital and all. Going by that the court has validated the law made by the State of Rajasthan. The court has said that though amplifiers are an important instrument for broadcasting, but in this case the laws are not made on broadcasting laws are being made on the issues which are there in the State List on health and hospitals and therefore, such laws are to be

declared valid one. It only amounts to incidental encroachment. So, how do we determine that it is a case of pith and substance?

The court says that what we need to look at is the entire law, what are the scope and the object. It is to be seen is that whether the invasion with another law is by substance or by degree. If it is only by degree then something which has to be reconciled and there should not be an attempt made to declare it unconstitutional because of the very idea that when laws are being made laws are being made with this idea of presumption of constitutionality and the Legislature is aware about the competence and that is how the law is been made. So, unless and until reconciliability and giving a constitutionality to both the laws is not possible, it is not desirable to declare the cases of incidental encroachment unconstitutional. So, what is to be seen is substantial nature of the law and only references or mere crossing the boundary should not be seen as a serious matter under this doctrine. So, it is advisable to not to compartmentalize the laws in different baskets. It is to be seen that what exactly the entire scheme of the law suggests and accordingly it has to be seen that whether the entire law is on the subject matter which has been given to the Legislature to make a law or not. So, it is not the consequence which has to be looked at it, what is to be looked at is that that whether the object is addressing is on the subject matter which is there given in the List I, List II or List III or not. So, these are the doctrines where the legislative competence are been examined by the court.

Coming to the last doctrine of incidental and ancillary power, it says is that when laws are been made as we as I have already said that it is very difficult to give a kind of mathematical detailing of the List and having a very perfect scheme where there cannot be any overreaching or slight digression from the scheme of the law. Therefore, this ancillary and incidental power doctrine says that when there is kind of exercise of interpretation is undertaken if the law is addressing the ancillary subject matter then that should not become a reason to declare the law unconstitutional. So, what is to be seen is that that the expression used in the law is used in a very general sense and it has a possible impact of bringing within it is ambit ancillary or subsidiary matter as well.

This is what the court has said that it is not suggested to read the subject matters in a narrower sense or restricted sense. It has to be seen that that ancillary matter or incidental matter is well

included within the understanding of the law. So, these are the references for this lecture. Thank you very much.