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**PUBLIC LAW BULLETIN IS AN INITIATIVE OF
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MESSAGE FROM THE EDITOR(S)

Date: September 05, 2018
Wednesday

Dear All,

"When we think we know, we cease to learn."
- *Dr. S. Radhakrishnan*

We are happy to present the third volume of the Public Law Bulletin on the auspicious occasion of Teachers' Day. We are also elated to observe the expansion and sharing of responsibilities amongst the student peers in bringing out this volume of the bulletin. Maintaining our tradition of introducing innovation, this volume contains a cartoon drawn by one of our students. Moreover, like the last volume, this bulletin also contains a jumbled word puzzle to entertain and engage the students.

On behalf of CPL, ILS Law College editorial team wishes a Happy Teachers' Day to all the faculties and expresses the confidence that the coming volumes would be more innovative and intellectual stimulation.

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(A.) PUBLIC LAW IN THE NEWS

1) SUPREME COURT

1. **WhatsApp and the compliance dilemma:** In case of CASC v. Union of India**,** a notice was issued to the Centre in a plea filed complaining that WhatsApp was in violation of various Indian laws and has not appointed a 'grievance officer' as mandated by law. The notice to the Centre was regarding the legitimacy of imposing a restrain order on WhatsApp from payment systems till it complies with its mandatory obligations under laws, rules and regulations.

2. **Live streaming of Supreme Court cases; the K.K. Venugopal Guidelines**: Pursuant to the Supreme Court's directions, Attorney General for India KK Venugopal has submitted written guidelines for facilitating live streaming of proceedings in the Apex Court. Live streaming is to be introduced as a pilot project in Court No. 1, and will initially be limited to hearings of Constitution Bench matters. Additionally, it was suggested that transcribing facilities and an archive of the audio-visual recordings of hearings to be made accessible to the public. Senior Advocate Indira Jaising, originally filed a petition seeking the live streaming of Court proceedings in cases that are of constitutional and national importance having an impact on the public at large.

3. **The prospect of sports as a fundamental right**: The Supreme Court yesterday issued notice in a petition seeking that sports be recognized as a fundamental right under Article 21A of the Constitution. The Bench gave the government a four-week deadline to provide a reply to a petition filed by Kanishka Pandey of the NGO 'Sports: A Way of Life'. The Petitioner contends that the inculcation of sports in curriculum improves socio-cultural values and helps in character building.

4. **Right to retire is not supreme, says Supreme Court**: The Supreme Court while considering the Uttar Pradesh government's decision of rejecting the request for voluntary retirement of some senior doctors stated that "voluntary retirement" cannot be sought as a

right and the government can frame rules to deny pleas for quitting on a premature basis in public interest. Due to the shortage in the number of specialised doctors in government hospitals, looking at the public interest is justified since such retirement can be contrary to the health and right of treatment of the poor people. Hence, the Court stated that the right of retirement of the doctors is not supreme to the right of the poor people to access treatment and health services under Article 21.

5. **Pan India Reservation Policy to apply only to NCT of Delhi, not States:** An interesting constitutional question whether a person belonging to a Scheduled Caste in relation to a particular State would be entitled or not, to the benefits or concessions allowed to Scheduled Caste candidate in the matter of employment, in any other State, was answered in negative by the Supreme Court through the 5 judge bench. Both, the majority and the partly dissenting opinion reiterated the earlier law that the reservation benefits are state specific, thereby categorically overruling its earlier judgement in *Pushpa*; whereas the majority carved out in exception in case of National Capital Territory of Delhi by recognizing the applicability of PAN India reservation policy, in other words, SC/ST migrating to Delhi from different States or other UTs would enjoy reservation and benefits in Delhi. This view was contested by Banumathi J. in her partly dissenting opinion by holding that there can be no distinction between Delhi and other Union Territories.

6. **Persons with low vision not to be denied reservation in MBBS Admission:** In a landmark decision, resulting in paradigm shift in the sphere of disability rights, Supreme Court, gave an overriding effect to the provisions of Rights of Persons with Disability Act, 2016, over an exclusionary and discriminatory decision of an expert committee constituted by Indian Medical Council. The Committee had recommended for exclusion of low vision people from the admission of MBBS. After the decision of the Supreme Court, the number of low vision students stand a chance to join medical colleges.

7. **Leave to Appeal cannot be declined without assigning reasons:** The Supreme Court comprising of a Bench of Justices AM Sapre and UU Lalit held that a High Court would err

if it dismissed an application under Section 378(3) of the Code of Criminal Procedure for leave to appeal without according reasons for the same.

2) HIGH COURT

A. Calcutta High Court:

1. **Calcutta High Court on Dearness Allowance to State Government employees**: In accordance with the recommendations of the West Bengal's 5th Pay Commission, the Calcutta High Court ruled that Dearness Allowance (DA) is a "legally enforceable right" of employees serving under the Government of West Bengal. An appeal was filed by the Confederation of State Government Employees, West Bengal against an order of the West Bengal Administrative Tribunal.

B. Delhi High Court:

1. **Mirchur Case – Atrocities against the Scheduled Castes refuse to reduce**: In a 209-page judgment, the High Court dismissed the appeal filed by 13 convicts in the case, and held 20 more people guilty of the killing a Dalit man and his physically-challenged daughter, amongst other offences. The incident started with a "planned attack", whereby 18 houses of Balmikis (a Dalit community) were burnt in mob violence by members of the Jat community (majority community). The incident led to the forced displacement of over 250 Dalit families. The Court noted that the Mirchpur incident is a grim reminder of the reality of the state of Dalit community in India. The Court also noted that the Haryana government failed in the move to rehabilitate the displaced Dalit families in a separate township, and not in Mirchpur.

2. **Damages for Aadhar data leaks; Delhi High Court issues notice**: The Delhi High Court issued a notice to Unique Identification Authority of India (UIDAI) and the Central government in a petition seeking damages for Aadhaar data leaks filed by Prof. Shamnad Basheer. The respondents are granted six weeks' time to file their replies in the matter.

3. **The line of judgments in contempt proceedings and the need to maintain consistency:** The Delhi High Court held one guilty for contempt of court in a case of

trademark infringement of Louis Vuitton. The Court reiterated that any false statement made on oath, shakes the foundation of rule of law. The Court summarised the principles of contempt proceedings stating the importance of natural justice to be administered while proceedings in contempt against anyone, the classification of perjury as a ground of contempt of court etc.

C. Gujarat High Court:

1. **A new interpretation given to 'public order' under Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as Gujarat PAA Act)**: The Court was considering a petition filed against the detention under Section 2(c) of the Gujarat PAA Act read with Sections 454, 457, 380 and 114 IPC which allegedly led to a breach of public order. The Court stated that there is a distinction between 'violation of law' and 'breach of public order'. There was no material on record which pointed to a disturbance of social equilibrium. The Court stated that injury to a person cannot be construed as a violation of public order. This is a fresh leaf in the interpretation of public order doctrine in penal offences such as the Gujarat PAA Act.

D. Madras High Court:

1. **Euthanasia to a 9-year-old**: In the aftermath of the Supreme Court recognising the right to passive euthanasia, Cuddalore-based R Thirumeni has filed a plea before the High Court, praying that passive euthanasia be allowed for his nine-year-old son, T Paavendhan, who has been in a persistent vegetative state since birth. Paavendhan was diagnosed with Hypoxic Ischemic Encephalopathy (HIE) soon after his birth in November 2008. The plea was admitted by the High Court and the case is posted for further hearing on 10th of September 2018.

E. Punjab and Haryana High Court:

1. **Scope of application under Section 439 CrPC:** A single bench of Punjab and Haryana High Court granted bail under Section 439 of the CrPC. The accused was charged under Section 22 of the NDPS (Narcotics and Psychotropic Substances Act) for being in possession of psychotropic substances. His bail application was rejected by the Special Judge

and hence, the applicant applied to the High Court via Sec. 439 of Cr. PC. While considering this application, the Court observed that the detention of accused persons permitted under Section 37 of the NDPS Act seems to be unconstitutional for being in violation of the principle 'presumed innocent until proven guilty' since the section allows the Special Judge to come to a prima facie conclusion on innocence of the accused even before the trial commences. However, the Court held that such questions are beyond the scope of enquiry in a Section 439 application. The Court ensured that bail was granted to the accused on substantive grounds.

F. Uttaranchal High Court:

1. **Financial assistance to priests read into Article 25 and 26 of the Constitution:** In a PIL, the Uttaranchal High Court considered the issue whether financial assistance can be granted to the priests on account of the difficulties faced by them. The Court taking a holistic view, stated that financial deprivation will have long term impact on the lives of the priests and their families. The Court stated that since the priests assisted he citizens in realising their fundamental right to religion, all Hindu Priests, Maulwis, Granthis/Raagis and Christian Priests are entitled to financial assistance from State Governments to sustain themselves.

3) PARLIAMENT

1. **SC and ST Amendment Act 2018**: The review petition against the order passed by the Supreme Court in March, stating that a prior sanction is necessary for prosecution under SC & ST Prevention of Atrocities Act is pending in the Supreme Court. In the meantime, an amendment bill to the Act is passed by the parliament. By this amendment, a new provision, Section 18A was inserted into the SC/ST Act, which essentially reinstated the law as it stood prior to the Supreme Court's March ruling.

4) OTHER NEWS

1. **Arunachal Assembly passes three new bills**: the Arunachal Pradesh Assembly on August 29, 2018, passed a bill for the creation of three new districts namely Pakke-Kesang, Lepa

Rada and Shi Yomi in the state. The Arunachal Pradesh Re-Organisation of Districts (Amendment) Bill 2018 Bill was tabled for discussion in the house and was subsequently adopted by a voice vote. This brings the total number of districts in Arunachal to 22.

2. **Is the Womens' Reservation Bill forgotten?** The National Alliance of Women's Organisation has demanded condemnation for political parties which are turning a blind eye towards the Womens' Reservation Bill. At present, there is 12% representation of women in the parliaments. This bill is drafted to facilitate womens' political participation by means of reservation of 33 percent of all seats in the Lok Sabha and state legislative assemblies for women.

3. **The controversy surrounding the Manipur People's Protection Bill 2018**: The demand for protection of the indigenous identity has been growing in Manipur. On July 23, the BJP passed the Manipur People's Protection Bill. The Bill, which regulates the entry and exit of non-Manipuris into the state. The Bill defines "Manipuris" and "non-Manipuris" and seeks to regulate the entry and exit of the latter in order to protect the interests and identity of the former. It has sparked protests from people who have now been deemed "outsiders".

4. **Bench comprising of woman judges alone:** For the second time ever in its history, the Supreme Court will have a Bench comprising of woman judges alone. Justices R Banumathi and Indira Banerjee will be hearing cases in courtroom 12 on September 5 and September 6. The only previous occasion when this instance occurred was in 2013, when Justices Gyan Sudha Misra and Ranjana Prakash Desai sat together temporarily, due to the absence of another judge.
5. **New Judges appointed to Rajasthan and Uttaranchal High Court: Presidential assent was received for appointment of** Justice Sharad Kumar Sharma as the Additional Judge of Uttaranchal HC and Justice Ashok Kumar Gaur, Manoj Kumar Garg, Inderjeet Singh and Dr. Virendra Kumar Mathur as additional judges of the Rajsthan High Court.

6. **Litigants to pay costs towards the Kerala Relief Fund:** Several High Courts across the country have directed the litigants to pay costs towards the Chief Minister's Disaster Relief

Fund for the State of Kerala, in wake of the worst flooding experienced by the State in nearly a century.

7. **The Law Commission of India on The Uniform Civil Code:** In a consultation paper on 'Reform of Family Law', the Commission stated that a Uniform Civil Code is not required to reconcile conflicts in personal/family laws with the Indian Constitution. The Commission is focused on acknowledging the differences in personal laws and making laws gender neutral and non-discriminatory rather than uniformization.

8. **The Law Commission on simultaneous elections**: In a draft report, the Commission has addressed the issues of holding of simultaneous elections to the Lok Sabha and the State Assemblies. The Commission states that "holding of simultaneous elections would be ideal as well as desirable provided a workable formula is provided in the Constitution of India". Issues for further deliberation would be whether such simultaneous polls will affect the Basic Structure of Constitution, the concept of democracy and the federal structure and polity of India.

(B.) CURRENT CASES IN INDIA

- **. FEMALE GENITAL MUTILATION:**

The Supreme Court comprising of a Bench of Chief Justice of India Dipak Misra and Justices AM Khanwilkar and DY Chandrachud is hearing a PIL filed by advocate Sunita Tiwari to ban the practice of Female Genital Mutilation, which is prevalent among the Dawoodi Bohra community in India. While responding to the argument that it was an essential religious practice, the court held that the fact that it is being practised from tenth century is not "sufficient" to hold that this forms a part of the "essential religious practice". Furthermore, the Bench said that a practice also does not become constitutional merely because it is considered to be an essential religious practice. It further remarked that this practice leaves "permanent emotional and mental scar" on women and it may thus be held as violative of dignity of women.

Senior advocate A M Singhvi, appearing for a Dawoodi Bohra Muslim group, argued that the petition should be referred to a larger constitution bench as it pertained to Article 25, 26 and 29 of the Constitution of India. He asked for this reference by drawing a parallel with the Sabarimala Temple Case.

- **ARRESTS IN THE BHIMA KOREGAON CASE:**

Academics Romila Thapar, Prabhat Patnaik, Devaki Jain and Satish Deshpande among others, filed a petition challenging the arrests and seeking an intervention of the Supreme Court to stay the arrests of five human rights lawyers and activists by the Maharashtra Police across the country. On the morning of 28th August, five activists Vernon Gonsalves and Arun Ferreira in Mumbai, Gautam Navlakha in New Delhi, Sudha Bharadwaj in Faridabad, and Varavara Rao in Hyderabad were arrested under the Unlawful Activities (Prevention) Act. The Pune police arrested them in connection with investigations into a public meeting organised before caste-related violence erupted at Bhima Koregaon near Pune on January 1. Their case is being prosecuted in the Pune Court. However, in the interest of freedom of speech and expression and liberty of those arrested, this petition was filed in the Supreme Court against the arrest of the eminent activists.

The petition stated that these arrests were arbitrary as they were made without the basis of any evidence. It further stated that these arrests pointed towards the fact that an emergency – like situation exists in our country. It was further contended that charging the activists under Unlawful Activities (Prevention) Act was a mala fide act and only done in order to intimidate the dissenting voices. In this regard, Justice Chandrachud vehemently stated that "dissent is the safety valve of a democracy; if it is crushed, the pressure will make it burst."

As an interim measure, the Court ordered that in case of arrest of Mr.Varavara Rao, Mr.Arun Ferreira and Mr.Vernon Gonsalves, they are to be kept under house arrest at their own home. Furthermore, the court ordered that the house arrest of Mr.Gautam Navalakha and Ms.Sudha Bharadwaj may be extended as per the terms of the order.

- **ARTICLE 35A:**

The Supreme Court comprising of a Bench of Chief Justice of India Dipak Misra and Justices AM Khanwilkar and DY Chandrachud deferred the hearing in the petition challenging the constitutional validity of Article 35A of the Constitution of India till the second week of January next year. Article 35A confers on the State legislature an unrestricted power to determine permanent residents of the state and grant them special rights and privileges in state public sector jobs, acquisition of property within the state, scholarships, public aid and other welfare programmes. The hearing was deferred in view of the impending eight-phased local body elections in Jammu & Kashmir. It was contended by the Attorney General KK Venugopal that if the petition is heard now, it would be difficult to contain the law and order situation in the state.

- **CONSTITUTIONAL VALIDITY OF JAMMU & KASHMIR CONSTITUTION:**

Five individuals through Advocate Vishnu Shankar Jain, have filed a petition in the Supreme Court challenging the validity of the Constitution of Jammu & Kashmir. The petitioners were aggrieved by the fact that the Constitution of Jammu & Kashmir barres them from becoming permanent residents of the State and also from acquiring acquire property in the State.

The petitioners contended that this was in violation of Right to Equality and Right to Freedom guaranteed under Articles 14 and 19 as citizens of Jammu & Kashmir could enjoy the right to

property outside the State of Jammu & Kashmir, however, the same right was accorded to the citizens of the rest of the country. The petitioners submitted that Constitution of Jammu & Kashmir must be rendered void to the extent that it restricts the rights of Indian citizens. They further based these arguments on the premise that the Constitution of Jammu & Kashmir was not enacted by a duly constituted Constituent Assembly.

- **WERE THE KERALA FLOODS MAN – MADE? HC REGISTERS A SUO MOTO PIL:**

Joseph NR, a resident of Chalakudy, addressed a letter to Justice V. Chitambaresh alleging criminal negligence on part of the authorities in managing the reservoir levels in the dam. Justice V. Chitambaresh caused the said letter to be placed before the Chief Justice Hrishikesh Roy for his consideration, who in turn instructed the Registry to register a suo moto writ petition. The letter stated that *"the Govt displayed blatant disregard for life and loss of property with their drastic and dearly criminal actions."* Through his letter, he sought that the court affix criminal liability on the authorities and also provide compensation for the loss caused by floods.

(C.) CASES ACROSS THE POND

Date	Case Name	Ratio Decidendi
9 May 2018	In the Matter of Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) concerning Senator Katy Gallagher[1] (High Court of Australia)	It is a case of non-citizen of Australia who contested election for senate and was declared to be disqualified by the High Court on the ground that she was not able to make out a case for invocation of the doctrine of irremediable impediment i.e. something that makes it impossible or not reasonable to renounce citizenship, as her application for renunciation of citizenship was pending before the competent authorities in United Kingdom. As the qualification for holding the Senate office in Australia is Australian citizenship, her election was declared to be invalid by the High Court. High Court refused to accept the argument on behalf of her that by initiating renunciation proceedings she had severed her connection as a citizen with UK.
14 May 2018	*Murphy v. National Collegiate Athletic Association* consolidated with *NJ Thoroughbred Horsemen v. NCAA*[2]	The case relates to constitutionality of federal law Professional and Amateur Sports Protection Act which bans sports betting, in the lieu of State Constitutional Amendment in State of New Jersey to the contrary.

[1] http://eresources.hcourt.gov.au/downloadPdf/2018/HCA/17
Also see http://www.hcourt.gov.au/cases/case_c32-2017
[2] http://www.scotusblog.com/case-files/cases/murphy-v-national-collegiate-athletic-association-2/

	(Supreme Court of United States of America)	The case involves the question of Constitutional "dual sovereignty" and "anti-commandeering" rule, when the state law repeals the federal law. The Court held the provisions prohibiting state authorization and licensing of sports gambling schemes as unconstitutional, thereby allowing legal wagering.
1 June 2018	*Gongqose v. Minister of Agriculture, Forestry*[3] (Supreme Court of Appeal, South Africa)	The case pertains to fishing rights of members of the Hobeni community who were arrested and charged with attempting to fish in a Dwesi-Cwebe Marine Protected Area, without permission, in contravention of penal provisions of Marine Living Resources Act 18 of 1998. The question raised was whether the customary right was a defense in criminal proceedings and court affirmatively answered it observing that "it is true that the right to culture cannot be exercised in a manner inconsistent with other rights, and that environmental protection and conservation mandated by s 24[4], self-evidently is a valid legislative concern. But that is not the end of the Constitution's protection of customary

[3] http://www.saflii.org/za/cases/ZASCA/2018/87.pdf
[4] Section 24 of the Constitution:
'Everyone has the right –
(a) to an environment that is not harmful to the health and well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecological a sustainable development and use of natural resources while promoting justifiable economic and social development.'

		rights. It also protects them from interference, other than through specific legislation contemplated in s 211(3)[5]…And the facts show that the exercise of the appellants' customary rights was not inconsistent with s 24 of the Constitution".
21 June 2018	*Graham Thomas Rowe v R*[6] (Supreme Court of New Zealand)	The case pertains to conviction, under Section 126 of the Crimes Act 1961 (indecent act with intent to insult or offend), of the Appellant (by jury trial) for crouching by van and taking photographs (not themselves indecent) of teenage girls in their swimwear, given absence of legitimate reason for photographing and that fact that Appellant was much older to the girls. The question posed before the court was whether the act constituted "indecent act". The Court considered the statutory context and overseas authority, the Court "while not deciding whether taking a photograph could ever amount to an indecent act, the Court found that it could not do so when the photographs themselves were not indecent and in the absence of any exhibitionistic type behaviour on the part of Mr Rowe[7]"

[5] Section 211(3) of the Constitution:
'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'
[6] http://www.courtsofnz.govt.nz/cases/graham-thomas-rowe-v-r/@@images/fileDecision?r=237.657137509
[7] http://www.courtsofnz.govt.nz/cases/graham-thomas-rowe-v-r/@@images/fileMediaNotes?r=108.767674412

30 July 2018	*R (on the application of AR) v Chief Constable of Greater Manchester Police*[8] (Supreme Court of United Kingdom)	The case pertains to legality, of Enhanced Criminal Record Certificate (ECRC) (under Section 113B of the Police Act) of a person acquitted of rape charges, under Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms, on grounds of breach of right to privacy and 'presumption of innocence'. The question posed before the Court was whether the information contained in ECRC was in breach of Article 6.2 or Article 8 and principle of proportionality. The Court dismissed the appeal, holding that it was reasonable and proportionate to provide the acquittal against the charges of rape, to secure the objective of protecting young and vulnerable persons[9]. The ECRC does not have the purpose of targeting the image of the Appellant it simply provides the factual and correct information. In Indian context, it is like obtaining verification about ones involvement or non-involvement in criminal activities.

[8] https://www.supremecourt.uk/cases/docs/uksc-2016-0144-judgment.pdf
[9] https://www.supremecourt.uk/cases/docs/uksc-2016-0144-press-summary.pdf

(D.) VITAL CONSTITUTIONAL QUESTIONS

ARTICLE 254: IS THE TEXT EXPLICIT?[10]

The object of this write-up is to examine the rationale which courts have adopted formulating restrictive interpretations of Article 254 of the Indian Constitution, when dealing with doctrine of repugnancy. I will first identify precedents, examine them, and then move on to interpretations accorded in these precedents.

Megh Raj v. *Allah Rakhia* :[11] To quote Lord Wright, speaking for the Judicial Committee, " Thus both parties rightly construed Section 107 of Government of India Act, 1935 (More or less exactly similar as Article 254) as having no application in a case where the province could show that it was acting wholly within it powers under the Provincial List and was not relying on any power conferred on it by the Concurrent List." It is to be noted that this bald statement was not reasoned whatsoever in the judgment. Yet, it was blindly accepted by B. K. Mukherjea J. in *Lakhi Narayan Das* v. *Province of Bihar*.[12]

A.S. Krishna v. *State of Bihar*[13]: The scope of the dictum advanced by Lord Wright was further extended by Venkatarama Ayyar J. by making reference to doctrine of pith and substance and laid down that state law and as well as the law it is alleged to be repugnant i.e. law made by the Parliament or the existing law, must be in respect of a matter enumerated in Concurrent List. This interpretation, again propounded with any justification was again approved by Subba Rao J. in *Deep Chand* v. *State of Uttar Pradesh*.[14]

While this was only the tip of the iceberg, a division bench of the Supreme Court in *Mess. Hoescht Pharmaceuticals* v. *State of Bihar*[15] observed: "The question of repugnancy under Article 254(1) between law made by the State legislature arises only in case both the legislations occupy the same field with

[10] This write-up is authored by Varad S. Kolhe, IV B.A.LL.B, ILS Law College, Pune.
[11] AIR 1947 PC 72, at pp. 73-74.
[12] AIR 1950 FC 49.
[13] AIR 1957 SC 297.
[14] AIR 1959 SC 648.
[15] AIR 1983 SC 1019.

respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy, become void."

A mere glance at the text of Article 254(1) will reveal the significance of this interpretation:

254(1): "If any provision of a law made by the Legislature of a State is repugnant to any provision of law made by Parliament which Parliament by the Legislature of a State is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail before or after the law made the Legislature of the State shall, to the extent of repugancy, be void."

In essence, it is undoubted that the court has made violent departures from the plain meaning of the text. It is seen that the Article 254 speaks of "law made by the Legislature of a State," but the Court's interpretation limits the scope of these words only to laws made by a State on matters enumerated in the Concurrent List, thus excluding from the scope of Article 254(1) laws made by a State on matters in List II i.e. the State List. Similarly, Article 254 speaks of "law made by Parliament which Parliament is competent to enact," but again the interpretation limits the scope of these words only to laws made by Parliament on matters enumerated in the Concurrent List, and thus excludes from the scope of Article 254 all other laws made by the Parliament including those on matters enumerated in List I, the Union List.

At this juncture, I first propose to rebut and dispose auxiliary justifications advanced by the Court for these departures, before transcending into the principal thesis outlined in the Court's verdict.

The Court argues that Clause (2) is an exception to Clause (1) and since Clause (2) makes reference only to laws in the Concurrent List, it controls the scope of Clause (1) too. This is exceedingly difficult to digest because the scope of an exception is invariably narrower than that of the main provision, because, the function and object of an exception is to retrieve a part of the subject matter from the operation of the main provision.

In addition, the court stretches credulity too far when it treats the words "with respect to one of the matters enumerated in the Concurrent List" as qualifying not only the expression "existing law" but also the expressions "law made by Parliament which Parliament is competent to enact" and 'law made by the legislature of a state." Even more, the words "law made by the Legislature of a State" constituting in grammar, the subject of the sentence cannot be saddled with the words qualifying a phrase in the predicate. For example, the sentence "If a short man is in love with a tall woman in an advanced stage of pregnancy"; it is too much insist that both the man as well as the woman are in advanced stage of pregnancy. Thus, the Hoescht opinion is a veritable bull in the china shop of te meticulously drawn text of Article 254(1).

Further, the theoretical bedrock on which he Hoescht opinion rests is best articulated in the these words (derived from the verdict itself, "Article 254(1) has no application to case of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other hand. If such overlapping exists in any particular case, the State law will be ultra vires because of the non obstante clause in Article 246(1) read with the opening words "subject to" in Article 246(3). In such a case, the State will fail not because of repugnancy to the union law but due to want of legislative competence."

Thus, relying on application of doctrine of pith and substance enunciated by the Privy Council in the course of resolving constitutional disputes in the Canadian appeals adopted as suitable for India, first by Gwyer, C.J. in Subramanyan Chettiar v. Muttu Swami Gounden[16] (Madras Case) and then endorsed by Lord Porter in P.K. Mukherjee v. Bank of Commerce, Khulna[17] (Bengal Case), what the court intends to convey is that a State law on a matter enumerated in List II will survive or die exclusively on the basis whether or not it is intra vires the State legislature under Article 246(1). If it travels beyond the scope of Legislative authority permitted under Article 246, it will be void even though no repugnant legislation, either in the form of a law made by Parliament or existing, exists; and, alternatively, if it is found to be intra vires under Article 246, it will be a valid law, and it will not be void eve if its provisions are found to be inconsistent with those of a law made by Parliament or those of an existing law as stated in Article 254(1).

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[16] AIR 1941 FC 47.
[17] AIR 1947 PC 60.

However, I submit that the Supreme Court in Hoescht case has misconceived the nature and scope of the doctrine of pith and substance enunciated in the abovementioned authorities on the same. In the former of the two authorities, the validity of Madras Agricultural Relief Act, 1938 was challenged on the ground that it encroached on entry 28 of List I and also on the ground that it was repugnant to provisions of Negotiable Instruments Act, 1882 which was a law on Entry 28 of List I. In his judgment, no doubt, Gwyer C.J. referred to Canadian precedents and in particular to doctrine of pith and substance as appropriate for resolving disputes under the 1935 Act, however, he was dealing with a constitutional issue which he has very carefully and deliberately narrowed down on. Gwyer C.J. took the view that in the appeal before him no debt based on a promissory note was involved; because the promissory note initially executed had merged into a decree passed by the trial court in favour of the creditor as far back as in November 1934 i.e. much before the Madras Act came into force in 1938. Therefore, he decided that it was not necessary for him to decide whether the provisions of the Madras Act were void due to repugnancy with the Negotiable Instruments Act, 1882.

In the Bengal Case, it was the Bengal Moneylenders Act, 1940, whose validity was attacked. Similar to the Madras Case, here also the constitutional issue considered by the Judicial Committee was confined exclusively to the challenge that the impugned Act was ultra vires the Provincial Legislature because it invaded the Federal field of 'promissory notes.' Lord Porter makes no reference whatsoever to Negotiable Instruments Act, 1882 or Section 107 of the 1935 Act.

Thus, the Hoescht opinion is dominated by a blurring of concepts of overlapping of legislative fields, on one hand and repugnancy between two valid laws made by two competent legislatures on the other. It is because of this blurring that the Court was unable to appreciate the phenomenon of overlapping, as also the way the doctrine of pith and substance has dealt with the phenomenon.

The doctrine of pith and substance mitigates the rigour of a non obstante clause and permits a State law on a matter in List II survive in spite of the fact that it covers an area which can also be covered (due to overlapping of legislative fields) by a law made by Parliament. But the doctrine does not prevent Parliament either from legislating on the common area where the powers overlap and if

Parliament legislates on that area, we have two valid laws on the same matter which might be repugnant to each other. In that scenario, Article 254 decides which of the two is to survive.

The doctrine of pith and substance deals with a law, all by itself and examines whether it is within the competence of the Legislature which passed it: the doctrine of repugnance examines two valid laws to see whether they are capable of co-existing. Thus, the validity of law passed by a state must be judged at two stages.

Thus, Article 254 predicates a "law made by the State" and if the law is found to be ultra vires under Article 246 then there is "no law made by the State." It is only when the law made by the state is a valid law, being intra vires the Legislature of the State, that the question of application of Article 254 can arise.

In conclusion, to answer the question in title of the text, the test under Article 254 is in-fact, by all means, explicit.

(E.) INTERSECTION(S) OF PUBLIC LAW

UNITED STATES v. MICROSOFT CORPORATION: THE TERRITORIALITY CONUNDRUM[18]

The Warrant Which Sent Ripples Through Data Centres across the World

In December 2013, federal law enforcement agents applied to the United States District Court in Southern District of New York for a warrant requiring Microsoft to disclose all e-mails and other ancillary information with the account of one of its customers under Section 2703[19] of Stored Communications Act. After being demonstrated that the account was used for illegal drug trafficking, a Magistrate Judge issued the requested warrant. The warrant directed Microsoft to disclose to the government all contents and associated information with the account to the extent that the information was within Microsoft's custody, control or possession. However, after the service of the warrant, Microsoft determined that the account's e-mail contents were stored in a sole location: Microsoft's data-center in Dublin, Ireland. As a result, Microsoft refused compliance on grounds that since the data was stored on a server in Dublin, the warrant was delimited only to the territory of United States. Terming the warrant as government's importunate demand, Microsoft moved the Magistrate and subsequently the District Court to quash the warrant as it was a proliferation of an impermissible exercise of its warrant authority. However, Microsoft's motions were denied and it was in-fact after a few days, held in civil contempt for non-compliance with the warrant.

Turning the Tables: Second Circuit Court of Appeals

On appeal, the Court of Appeals for the second circuit reversed[20] the Magistrate's denial of motion to quash the warrant and vacated the civil contempt finding. It reasoned that compelling Microsoft to disclose electronic communications and data stored outside the United States would be an unauthorized extraterritorial application of Section 2703 of the Stored Communications Act.

[18] This write-up is authored by Varad S. Kolhe, IV B.A.LL.B, ILS Law College, Pune.
[19] https://www.law.cornell.edu/uscode/text/18/2703.
[20] http://www.scotusblog.com/wp-content/uploads/2017/07/17-2-opinion-below.pdf

Legislative Intent v. Statute's Focus: A Cliffhanger

The legal core of this obtuse question mandated the court to ascertain the legislative intent of 1986 Congress that enacted the Stored Communications Act. However, at the time when legislation was deliberated upon, this unusual fact pattern based on the notion of 'cloud' with several companies possessing data in nooks and corners of the world was highly unimaginable to the legislators, rather a piece of pure science fiction. Hence, in the absence of clarity on legislative intent, the court submerged itself into highlighting the focus of the statute by analyzing precedents.[21]

The parties were is stark disagreement with respect to the focus of the statute. While the government submitted that the focus is on 'disclosure', Microsoft contended that the focus is in-fact on where the emails are stored, making the warrant an extraterritorial application of the statute.

Underlying Idea of Data in Contemporary Times

Simply put, data is mobile, divisible and travels at the speed of light! To support the idea that there is an inherent sovereign interest in preserving the 0s and 1s stored on one's soil is far-fetched when looked in retrospect especially when viewed with scientific advancements traversed in recent times. More often than not, an individual is unaware about the location where his/her data is in-fact stored and a warrant from where information is sought may be a soil with no relation whatsoever with the investigation of a crime in another country.

CLOUD Act moots the Territoriality Case in U.S. Supreme Court

On March 23, 2018, Congress enacted and President signed into order the Clarifying Lawful Overseas Use of Data Act (CLOUD Act) as a part of the Consolidated Appropriations Act, 2018. The CLOUD Act amended Section 2701 of Stored Communications Act by adding a provision: "A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the

[21] See *Morrison v. Australian National Bank* and *RJR Nabisco v. European Community*.

United States."[22] Soon thereafter, the Government obtained, pursuant to the new law, a new Section 2703 warrant covering the information requested in the Section 2703 warrant at issue in the above mentioned territoriality case. Thus, the case became moot.

Principle of Comity

The CLOUD Act incorporates within its framework the principle of comity. The principle of comity insists on a comity analysis of prior to the enforcement of a warrant as discussed above, balancing the relative interests of the United States and Foreign governments as well as feasibility factors such as location and nationality of the target or exploration of accessing data through other means to avoid conflicts altogether.

Is India Ready? What if a similar factual scenario arises in India?

To leave this discussion open to our kind readers, we wonder and would like to ponder over what would have been the stance of the Indian Government if for suppose, Central Bureau of Investigation issued a similar warrant demanding information about a suspect located in Antigua Islands? Even more, what would be the approach of Indian courts to this legal question and how will our legal framework of Procedural Laws and Evidence appreciation fare when it collides with extraterritorial operation of a data access warrant, taking into consideration the principle of comity and nonetheless, sovereign interests and principle of territoriality.

[22] CLOUD Act §103(a)(1).

(F.) APPURTENANT SCHOLARSHIP

1. **Scalia's Teaching Methods and Message, in Scalia's Constitution, White A.J.**[23]

The chapter is an interesting take on the former justice U.S. Supreme Court Antonin Scalia[24]. The author throws light on his role as a judge, educator and public speaker and explores his teaching skills, with special focus on his 1986 lecture on the roots of constitutionalism and last public speech which percolated in his later decisions on education law.

2. **Campus Discourse and Democracy: Free Speech Principles Provide Sound Guidance even after Tumult of 2017, Catherine J. Ross.**[25]

The article presupposes the discussion on notion of free speech on the three highly publicised protests and rallies of 2017 in University of California, the Unite the Right rally in Charlottesville and Richard Spencer's talk at University of Florida. She also provides a discourse on balancing violent protests in the guise of freedom of expression and preservation of public safety, concluding with suggestions for what universities can do to maintain such a balance.

3. **International Policies for Third World Education: UNESCO, Literacy and Development, Philip W. Jones.**[26]

The book provides a timeline of education policies in Third World Countries and the role played by UNESCO, to achieve the goal of global literacy. The book outlines how the UNESCO educational programs have evolved in the post-war world.

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23 https://link.springer.com/chapter/10.1007/978-3-319-58931-2_8#citeas
24 https://www.washingtonpost.com/news/posteverything/wp/2018/02/13/antonin-scalias-disruption-of-the-supreme-courts-ways-is-here-to-stay/?noredirect=on&utm_term=.55f2da96dc91
25 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1659&context=jcl
26 https://www.taylorfrancis.com/books/9781351004978

4. Selected Works of S.P. Sathe, edited by Sathya Narayan.[27]

The book is a three volume collection of articles authored on varied subjects like public law, judicial power and processes and social justice by Prof. S.P.Sathe, an eminent jurist and former Principal of ILS Law College and former Director of Institute of Advanced Legal Studies (IALS).

5. The meaning of injury: a disability perspective, in Injury and Injustice: The Cultural Politics of Harm and Redress, Sagit Mor, edi. by Anne Bloom; David M. Engel; Michael McCann.[28]

In this thought provoking article, the author problematizes the individualised aspect of law of tort and calls for its reconfiguration to sync with disability rights. He calls for embracing the notion of social injury as an inherent part of the notion of legal injury.

[27] https://india.oup.com/product/selected-works-of-sp-sathe-3-volume-box-set-9780195694154?
[28] https://www.cambridge.org/core/books/injury-and-injustice/meaning-of-injury/E4EA2BF52511929941C32F9D8FB7CDAA

(G.) PUBLIC LAW ON OTHER BLOGS

1) https://barandbench.com/abuse-liberty-oath-protect-justice-chelameswar-interview/
2) https://indconlawphil.wordpress.com/2018/08/11/guest-post-constitutional-silences-textual-impasses-and-structuralism-a-comparative-analysis-of-the-nct-delhi-and-miller-judgments/
3) https://lawandotherthings.com/2018/08/catch-22-the-treacherous-territory-of-the-article-35a-kashmir-quandary/
4) https://lawandotherthings.com/2018/09/ghost-provisions-who-will-exorcise-them-out/
5) https://lawandotherthings.com/2018/08/music-and-legal-aid-an-unexplored-tryst/
6) http://theproofofguilt.blogspot.com/2018/08/impartiality-in-investigations-three.html
7) https://www.livelaw.in/landmark-judgments-awaited-in-the-last-working-month-of-cji-misra/
8) https://blog.scconline.com/post/2018/08/04/pro-bono-work-a-case-for-its-integration-into-legal-services-in-india/
9) https://www.livelaw.in/cji-misra-recommends-justice-ranjan-gogoi-as-the-next-chief-justice-of-india/
10) https://www.livelaw.in/in-india-there-is-a-culture-of-seeking-adjournments-as-a-norm-than-an-exception-president-kovind/

(H.) TEACHERS' QUOTES

1. **Justin Trudeau**

   "A good teacher isn't someone who gives the answers out to their kids but is understanding of needs and challenges and gives tools to help other people succeed." [29]

2. **Sarvepalli Radhakrishnan**

   "The true teachers are those who help us think for ourselves."

3. **Will Durant**

   "Education is a progressive discovery of our own ignorance."

4. **State of U.P. v. Shiv Kumar Pathak, (2014) 15 SCC 606: 2014 SCC Online SC 1023 at page 609**

   "The teacher shall serve the purpose of oasis in the field of education."

5. **Krishna Iyer and HR Khanna, CIT v. R.M. Chidambaram Pillai, (1977) 1 SCC 431: 1977 SCC(Tax) 188 at page 440.**

   "When this court, as the apex adjudicator declaring the law for the country and invested with constitutional credentials under Article 141, clarifies a confused juridical situation, its substantial role is of legal mentor of the nation."

[29] https://yourstory.com/2017/09/the-one-who-teaches-is-the-giver-of-eyes-80-proverbs-and-quotes-on-teachers-day/

(I.) PUZZLE[30]

T	F	K	S	D	I	L	I	H	T	I	A	M
D	O	X	H	R	O	B	R	I	T	A	I	N
K	R	P	P	A	I	M	E	G	G	M	P	B
M	T	B	U	O	R	K	I	I	O	D	B	W
Q	Y	W	R	T	S	A	R	C	G	N	K	M
L	S	N	A	A	T	T	K	I	I	H	E	Q
N	E	T	A	L	M	U	O	S	S	L	T	Z
Q	C	S	N	C	F	B	S	F	I	H	E	T
W	O	Y	C	Y	I	O	E	W	F	N	N	N
R	N	Z	E	H	T	R	E	D	A	I	G	A
M	D	N	Y	D	E	Y	E	L	K	M	C	H
G	O	R	J	N	Z	A	L	M	U	A	Y	E
M	P	B	R	V	M	L	T	N	A	R	R	D

I. THERE IS NOTHING TO BE ASHAMED OF IN BORROWING. IT INVOLVES NO PLAGIARISM. NOBODY HOLDS ANY PATENT RIGHTS IN THE FUNDAMENTAL IDEAS OF A CONSTITUTION. WHO SAID THIS?

II. THE CONCEPT OF PREROGATIVE WRITS HAVE BEEN ADOPTED FROM......COUNTRY'S CONSTITUTION.

III. THE WORD UNITY AND INTEGRITY HAS BEEN ADDED TO THE PREAMBLE UNDER WHICH AMENDMENT?

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[30] **This puzzle has been made by Prachi Acharya, Vth BA. LLB and Pranay Jaiswal, IIIrd BA. LLB, ILS Law College, Pune.**

IV. Which case for the first time laid down the principle of "Right to Privacy" being an inherent right of an individual?

V. The principle of "Due of Process of law" is adopted from……Constitution / American.

VI. It literally means "to revert to the State". This event happens in default of heirs or devisees.

VII. Which Schedule of the Indian Constitution enlists official languages?

VIII. Which principle is against arbitrariness and unreasonableness.

IX. Proclamation for Emergency under Article 357 will automatically cease after…..month if not approved by Parliament in the meantime.

X. Intention of a person to make a place (country) permanent home is his……

XI. Committee which submitted draft bill on data Protection.

XII. Judgment in which Justice D.Y. Chandrachud overruled the decision of Justice Y.V. Chandrachud.

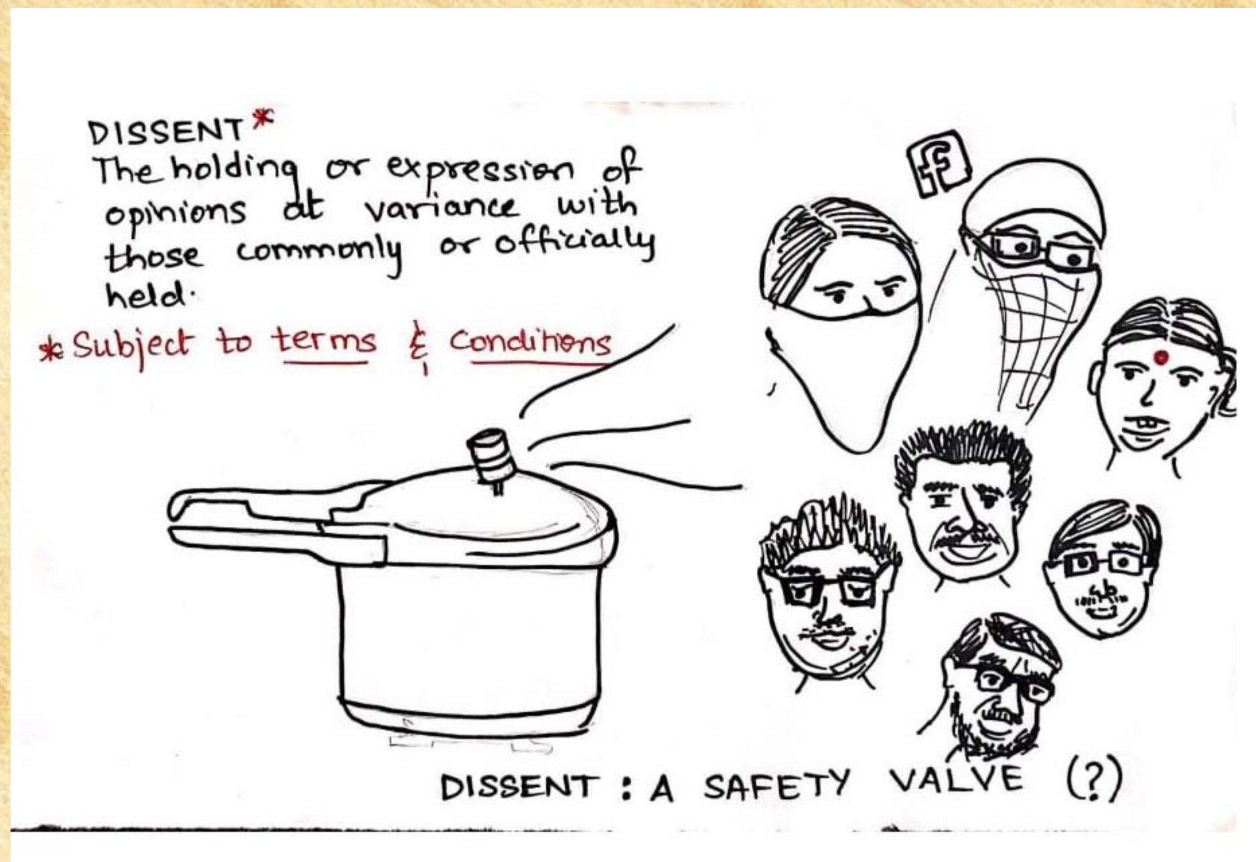
XIII. The first time a bill to amend …… Act was withheld by the President and the bill was received back by the Government without President's assent even after passed by both the Houses of the Parliament

XIV. 92nd Amendment added Bodo, Dogri …….. and Santali Language as official in 2003.

XV. The …… Bill has to be First introduced only in Lok Sabha.

The solution to this puzzle will be uploaded on centreforpubliclaw@wordpress.com. Stay Tuned.

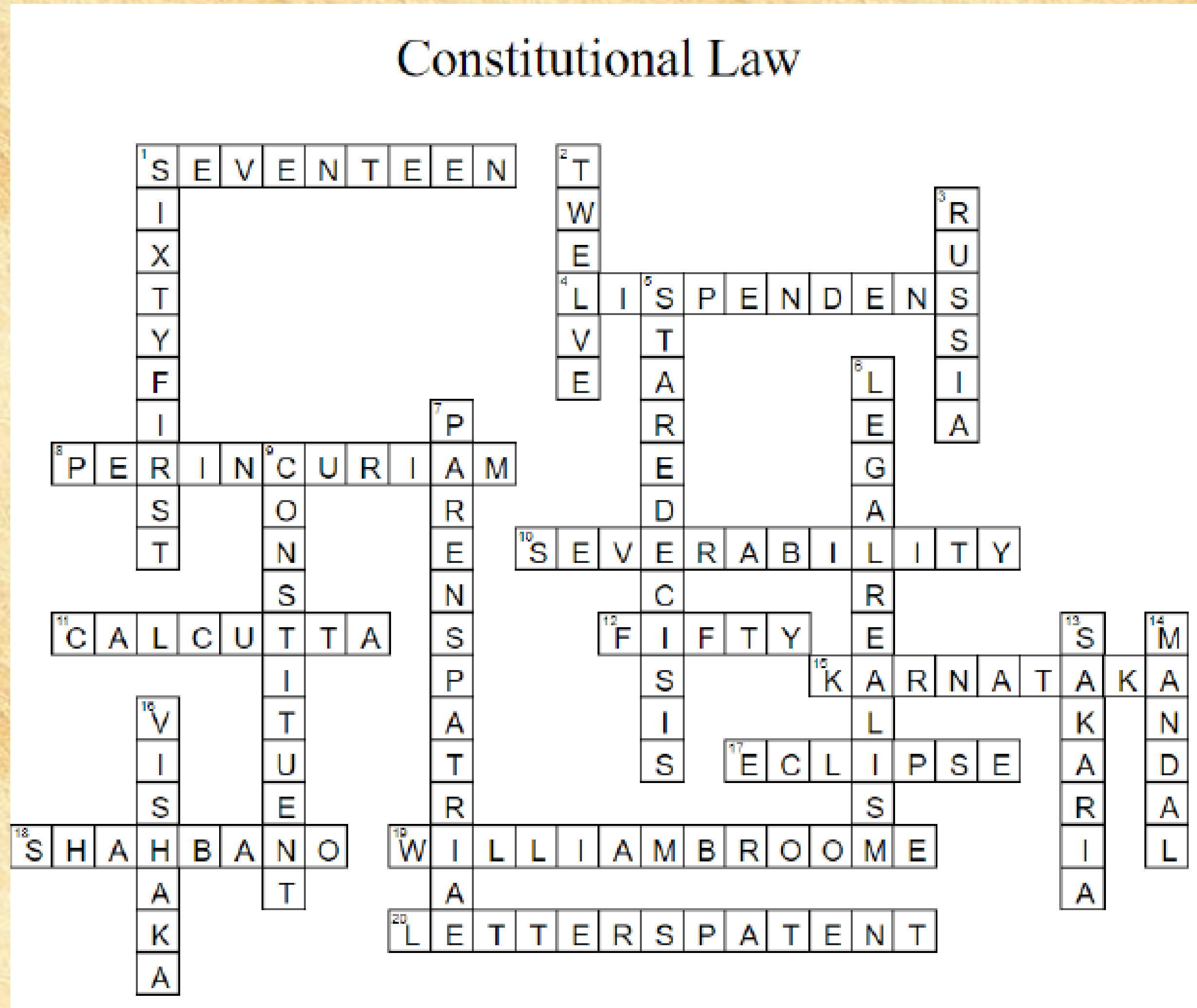
(J.) CARTOON[31]



[31] This cartoon is by Rudhdi Walawalkar, IIIrd BA. LLB, ILS Law College, Pune.

(J.) SOLUTION TO THE CROSSWORD

THE SOLUTION TO THE CROSSWORD PUBLISHED IN VOL. 2 OF THE BULLETIN IS AS FOLLOWS:



PUBLIC LAW BULLETIN

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