

**CONSTRUCTION OF *SMRITIS* AND
USAGES**

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12.1 *Smritis* as authoritative sources and modern analogies

There are seven important principles of interpretation in Jaimini, I.iii,1 to 16, which are significant in regard to the inter-relationship between *Smritis* and usages. It needs to be mentioned that where there are more than one source of law recognised in a legal system, the question of conflict between them naturally arises. In many countries, a kind of hierarchy is established by formal enactments. Sometimes, these rules are enacted with reference to the time element - for example, the position in France, where the legal language has an expression "*conflict de lois dans le temps*" which covers the problem of the effect of statutes in time.¹ In Sweden, there is an elaborate set of rules in this regard under which a hierarchy of Swedish legal norms is established as under : (a) Constitution, (b) statutes, (c) "other regulations" issued by the Government on the basis of a Parliamentary authorisation, (d) "other regulations" issued by the subordinate authorities on the basis of authorisation given by the Government or by statute, and (e) "other regulations" issued by the municipalities within the statutory framework. (There are also rules regarding judicial decisions etc). In England, the fact that the legislature has taken the matter in hand will often act as a disincentive to judicial action (except where the statute is merely declaratory). Thus, in planning law, Lord Scarman refused to extend to that field principles drawn from the private law.²

12.2 Position in U.S

In regard to the United States, the following main principles deserve to be noted:-

- (a) The Constitution prevails over a statute. Courts may, of course, "read down" a statute, in order to (i) add to it a content required by the Constitution, or (ii) free it of a substantive content which is prohibited by the Constitution.³
- (b) A state statute in conflict with a federal statute is invalid, because of the "supremacy clause" of the Constitution.⁴
- (c) If there is a conflict between a statute and an administrative regulation, the former prevails.⁵
- (d) If a statute is in conflict with common law, the statute controls.⁶

1. Troper & Others, "Statutory Interpretation in France", in MacCormick & Summers (eds.), *Interpreting Statutes* (1991), pages 171, 194.
2. Pioneer Aggregates (U.K.) Ltd. v. Secretary of State for Environment, (1985) A.C. 132.
3. Ellis v. Brotherhood Rly., (1984) 466 U.S. 435.
4. McDermott v. Wisconsin, (1913), 228 U.S. 115, 132.
5. Davis, Administrative Law Treatise (1978), pages 62 to 69, paragraphs 17.13 and 17.14.
6. Dickerson, The Interpretation and Application of Statutes (1975), pages 206 to 208.

12.3 *Smriti as authoritative*

In the *Mimansa* system,¹ of the seven principles mentioned above, the first principle is that the *Smriti* is authoritative and binding.

12.4 *Sruti and Smriti: Conflict rules and modern comparisons*

The second principle of Jaimini is that in the event of a conflict between *Sruti* and *Smriti*, the *Sruti* prevails (*Sruti prabalyadhikarana*). Here, one can draw a comparison from the elaborate and specific provision contained in modern legal system, in certain countries, for example, in the Italian legal system.² Again, in Argentina, it is recognised that the higher rules prevail over the lower rules (*lex superior derogat legem inferiorem*).³ As regards Italy, one criterion is that stated in some of the articles of the (i) Constitution, (ii) the Code Civil, and (iii) the Code of Civil Procedure. The net result is as under:-

Constitutional laws prevail over ordinary ones (Articles 134, 136, Const.), and ordinary law prevails over regional ones (Article 117, Const.). Article 4 disp.prel.cod.civ. prescribes that a '*regolamento*: (a regulation issued by the Administration) cannot contain rules contrary to those enacted in a Statute, that is, a law issued by the Parliament. And Article 8 disp.prel.cod.civ. prescribes that a '*regolamento*: prevails over customary rules (*usi*), in the sense that customary rules are binding, only in so far as they are enshrined in a statute or in a regulation.

12.5 *Smriti text with origin in perverse motive*

The third principle of Jaimini is that a *Smriti* text, whose origin can be traced to a perverse motive, is not binding (*Dushtamulaka Smriti Apramanyadhikarana*). Modern rules of interpretation do not have any principle that can correspond to this *Mimansa* doctrine. Of course, there is a presumption in modern law that the legislature did not intend an absurd or manifestly unjust result.⁴ The classical British statement of the ordinary order of priorities in interpretation is the "golden rule". The rule as enunciated by Lord Blackburn⁵ is -

"...that we are to take the whole statute together, and construe it all together giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience, so great as to convince the Court that the intention could not have been to use them in their ordinary signification."

Besides this, administrative law doctrine of *mala fide* may also be noted.

1. Sarkar, page 227.
2. Torre & others, "Statutory Interpretation in Italy" in MacCormick & Summers (eds.), *Interpreting Statutes* (1991), pages 213, 234, 235.
3. Zuleta-Puceiro, "Statutory Interpretation in Argentina" in MacCormick & Summers, *Interpreting Statutes* (1991), pages 29, 56.
4. See *McMongale v. Westminster City Council*, (1990), 1 All E.R. 993, 997.
5. *River Wear Commissioners v. Adamson*, (1887) 2 Appeal Cases 743, 764, 765.

12.6 Usage according to *Mimansa* and modern position

The fourth rule of Jaimini is that a usage has the force of law, provided its origin is not traceable to a perverse motive (*Padartha prabalyadhikarana*). This principle, in its latter part, has a partial analogy in the modern doctrine under which a custom is recognised, provided it is not immoral or opposed to public policy. Besides this, the custom must not be in conflict with a statute. Bennion¹ states the position in these words:-

“The usage of a particular district cannot vary general law. *R. v. Saltren* (1784) Cald 444. A local custom in Southampton that a pound of butter should weigh eighteen ounces was ruled to be ineffective since it conflicted with the Act 14 Cha 2 c 26 (1662). *Noble v. Durell*, (1789) 3 T.R. 271. In the same way, an Act overrides rules derived from a royal charter or franchise, or prescription. *Mayor of Manchester v. Lyons*, (1882) 22 Ch. D. 287; *Abergavenny Improvement Commissioners v. Straker*, (1889) 42 Ch. D.83,89.

A recent English example of an Act overriding custom is the Costs of Leases Act, 1958. See *Cairnplace Ltd. v. CBL (Property Investment) Co. Ltd.*, (1984) 1 All E.R. 315.”

12.7 Conflicting usages

The fifth principle enunciated by Jaimini is that between two usages which are in conflict with each other, that usage is to be preferred which is in conformity with the *Shastra*. This principle is applicable as much to usages regarding the application of words, as to usages regarding matters of conduct.

12.8 Foreign Words: *Mimansa* and modern rule

The sixth principle of Jaimini is, that authorised matter in foreign words must be construed in the sense in which those words are used in the foreign language (*Mlechha prasiddha prasidhikarana*).

In this connection, one can refer, in the modern context, to the situation of a treaty in foreign language. The principles applicable were stated by Lord Wilberforce in *Fothergill v. Monarch Airlines Ltd.*, (1980) 2 All E.R. 696, at p. 700:-

“My Lords, as in *Buchanan (James) Co. Ltd., v. Babco Forwarding and Shipping (UK) Ltd.*, (1978) A.C. 141, I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it; this is particularly true of the French or Latin language, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such

1. Bennion, Statutory Interpretation (1984), page 98.

that a dictionary can reveal its significance; often of course it may substitute one doubt for another.”

12.9 Form

The seventh principle of Jaimini is concerned with form. According to this principle, a usage or *Smṛiti* must be reduced to the short, simple and general form of a *Vedic vidhi*.