

## DOCTRINE OF PITH AND SUBSTANCE: CONSTITUTIONAL SCHEME AND APPLICABILITY IN INDIA

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### *Abstract*

*The research paper focuses on the study of the doctrine of pith and substance, its origin and meaning, and how this already established principle of interpretation has been incorporated under the Indian Constitution. With the help of a study of judicial decisions, the paper will also analyse how the Supreme Court applies the doctrine of pith and substance in India. In India, this doctrine is regarded as one of the important principles of interpretation. The Indian Constitution being a federal constitution with separation of powers, this paper will analyse the success of the doctrine of pith and substance in resolving the dispute between the centre and the state arising on account of the separation of powers between the two.*

**Keywords:** *Collective Investment Schemes, SEBI, Collective Investment Management Company, Securities Law.*

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## INTRODUCTION

The Indian Constitution is Federal Constitution and one of the essential features of a federalism is distribution of powers between the centre and the state. The Constitution of India performs a very important function of demarcating the centre and state functions from each other. Each the union and the state are endowed with the subject matters and functions on which they have duty and right to exercise their power in the field assigned to them. This is made possible by the Indian Constitution with the incorporation of Seventh Schedule<sup>1</sup>, it deals with the division of power between the centre and the state notified with subject matters provided in the three lists provided in the seventh schedule namely:

List I- Union List

List II- State List

List III- Concurrent list

The areas of subject matter are clearly divided between the centre and the state but despite this there are lot of problems which arises on the ground that one is encroaching in the sphere of another resulting in conflict between the centre and the state in relation to the law-making power on a particular subject matter. Few doctrines are used by the judiciary as principles of interpretation to resolve such conflicts and one of them being an age-old doctrine of Pith and Substance.

## ORIGIN AND MEANING

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<sup>1</sup> The Indian Constitution, art. 246

The Doctrine of Pith and Substance is a Canadian Doctrine. Canada also has federal structure of government with its power divided between the Parliament of Canada and its Provincial Legislatures. The Constitution of Canada that is Constitutional Act, 1867 which was previously known as The British North America Act, 1867 introduced two list under section 91 and 92 in which powers were assigned to the Dominion Parliament and the Provinces respectively. They both cannot legislate into the field of another but there was certain overlap between the subject matters in the list and inevitably it gave rise to the conflict between the Dominion Parliament and the Provincial Legislatures. To clear this doubt the Privy Council came up with the Pith and Substance Doctrine which stated that the statute must be analysed in accordance with its true nature and character. The case of *Cushing v. Dupuy*<sup>2</sup> laid the foundation for this doctrine with discussion of incidental or ancillary encroachment concept. In another case of *Russel v. The Queen*<sup>3</sup> the privy council stated that a statute must be analysed to identify the ‘true nature and character’ of the legislation in order to ascertain the class of subjection to where it really belongs. It was in the case of *Union Colliery Company of British Columbia v. Bryden* (1899) where the idea of ‘true nature and character’ was captured by Lord Watson in a metaphor where speaking for the Privy Council he said that the object was to identify “the whole pith and substance of the enactment”<sup>4</sup>. The phrase did originate in Canada but has its place in the Constitution of other countries as well such as India and Australia to settle the dispute which arises as a result of federal structure of government with separation of power between the

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<sup>2</sup> 1880 UKPC 22

<sup>3</sup> (1882) 7 App Cas 829

<sup>4</sup> Tony Blackshiled, “Working the Metaphor: The Contrasting use of “Pith and Substance” in Indian and Australian Law” 50 Journal of Indian Law Institute 518-568 (2008)

Union and the States.

The literal meaning of pith is 'an essence of something' or 'true nature of something' and the meaning of substance is 'matter' or it can be interpreted as 'most important and significant part'. In legal sense it means to analyse the true nature, character or the significant part of a legislation in case of conflict.

## **DOCTRINE OF PITH AND SUBSTANCE UNDER INDIAN CONSTITUTION AND ITS APPLICABILITY**

India has a quasi-federal form of government and as stated above one of the essential features of federal form of system is Distribution of powers between the centre and the state. This distribution of power between the centre and the state is done on basis of some factors prevailing in one's country like local and political background. In America the subject of common interest is entrusted to the Central Government and the rest to the Sovereign States hence the American Constitution enumerates the power of the central government and leaves the residuary power to the states. Australia followed the same pattern of America. Canadians were conscious of unfortunate happening in USA culminating in Civil War of 1891 and they were aware of the shortcomings of the weak centre and hence they opted for strong centre.<sup>5</sup> India has also federal system with strong Centre. Where Australia has only one list Canada has two lists, India added one more list to it that is the Concurrent List. These three lists were already enumerated in The Government of India Act, 1935, as Federal, Provincial and Concurrent and this method was adopted by the present Constitution of India which

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<sup>5</sup> Dr. J.N. Pandey, Constitutional Law of India (Central Law Agency, Allahabad 56<sup>th</sup> edn, 2019)

divided the power between the Union and the States on subject matters mentioned in the Union List, the state list and the Concurrent list.

This demarcation is laid down under Article 246 of the Indian Constitution stating the subject-matter of laws made by Parliament and by the legislatures of the States. The article refers to the three lists in the Seventh Schedule.

The Union list consists of 97 subjects and the subject matter mentioned in the list are of national importance like foreign affairs, union duties, taxes, banking currency, union duties etc. The State List consists of 66 subjects matters of local importance such as public order, police, local government, public health, agriculture, sanitisation etc. The Concurrent List has 47 subjects, in this list both centre and the state can make laws. However, in case of conflict over subject matter mentioned in the Concurrent List, the Central law will prevail as we follow federal system with a strong Centre. The Concurrent list was added to avoid rigidity between the Union and the State List.

A special provision<sup>6</sup> was also inserted by the Constitution's (One Hundred and first Amendment) Act 2016 with respect to goods and service tax as the subject matter.

Though the three list covers all the important subject matter but there may be such matters which are not mentioned in State List or Concurrent List. This residuary power to make laws on such subject matter lies with the Parliament under Article 248 of the Constitution. Entry 97 in the Union List also lays down that Parliament has exclusive power to make law with respect to any matter which are not mentioned in the Concurrent list or the

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<sup>6</sup> Article 246A

State List. The Indian Constitution through its provisions clearly state that it leans towards federal structure with strong centre just like the Canadian.

The above Constitutional provisions divided the power between the Centre and the State, but the problem arises when there is overlap and conflict between laws made on same subject matter by the Parliament or the State, this is where the role of Supreme Court enters to resolve the conflict through the principles of interpretation and Pith and Substance is one of them.

### **APPLICABILITY**

The Union and the State Legislature are supreme in their own sphere to make laws but if a law is passed which encroaches upon the sphere of another then to resolve the matter the court applies the Doctrine of Pith and Substance where the court interprets if the pith and substance of the law i.e., the true object of the legislation. The Doctrine was applied by the Privy Council in the case of *Prafulla Kumar Mukherjee v. Bank of Khulna*.<sup>7</sup>

In Bengal, Bengal Money Lender's Act, 1940 was passed by the State which set a limit on amount of money above which no money lender can collect the money from the borrowers<sup>8</sup>. Interest of the loan was limited and therefore this Act was challenged by the Moneylenders. It was challenged on the ground that law on Money lending and Money lenders effected the promissory notes and banking which is subject matter reserved for Federal

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<sup>7</sup> AIR 1947 PC 60

<sup>8</sup> Bengal Money Lender's Act, 1940 Section 30 provided 'Notwithstanding anything contained in any law for the time being in force, or in any agreement, no borrower shall be liable to pay after the commencement of this Act more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest.

Legislature (Union) under entry 28 and 38 of List I and therefore the law is void on account of being ultra vires as it encroaches to the subject matter of the Union.

The Privy Council decision delivered by five judges Coram comprising of Lord Wright, Lord Poeter, Loerd Uthwatt, Sir Madhvan Nair and Sir John Beaumont JJ. As follows:<sup>9</sup>

The Bengal Money Lenders Act is not void either in whole or in part as being ultra vires the provincial legislature. It is valid because it deals in pith and substance with money lending. Whether it be urged that the Act trenches upon the federal list by making regulations for banking or promissory notes, it is still an answer that neither of that matter is its substance. It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also upon a subject in another list and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared in valid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that list. The extent of invasion into another list is no doubt an important matter to be considered, not because the validity of the Act can be determined by discriminating between degrees of invasion, but for the purpose of determining the pith and substance of the impugned Act. The provisions of a provincial legislation may advance so far into

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<sup>9</sup> 1947 SCC Online PC 6

federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, as it trespassed more or less, but if the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not moneylending but promissory notes or banking. Once that question is determined, the Act falls on one or other side of the line and can be seen as valid or invalid according to its true content.”

Hence the Privy Council held that the pith and substance of the Bengal Money Lenders Act is moneylending and the fact that money lending affects the promissory notes as they are taken as security for loan in a money-lending transaction does not affect the applicability of the Act as true nature and substance of the transaction is money-lending and promissory notes is the instrument for securing the loan.

In another important case of *State of Bombay v. F.N. Balsara*<sup>10</sup> the constitutional validity of The Bombay Prohibition Act, 1949 was challenged. The Act was applicable to foreign liquors which prohibited sale and possession of liquors in the State because it encroaches upon the power of the Dominion to make laws on import and export. The issue before the court was that whether the State Act encroached upon the Central subject.

In the Judgement delivered by Justice Fazl Ali it was stated that it is a well settled principle that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore it is necessary to inquire in each case what is the pith and substance of the Act Impugned.<sup>11</sup> It was further stated that if the true nature and character of the legislation or its pith and substance is not import and export of intoxicating

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<sup>10</sup> AIR 1951 SC 318

<sup>11</sup> AIR 1951 SC 318



liquor but its sale and possession then it is not feasible to declare the Act to be invalid. In the present case if the prohibition on purchase, use, possession, transport etc. will affect its import then also this interference is only incidental in nature and therefore it cannot affect the competence of the Provincial Legislature to enact the law in question.

In the case of *K.T. Plantation Pvt Ltd v. State of Karnataka*<sup>12</sup>, the constitutional validity of Roerich and Devika rani Roerich Estate (Acquisition and Transfer) Act, 1996 passed preserving the paintings, artefacts and other valuables and also for setting up Art-Gallery-cum Museum in public interest and the legal validity of section 110 of Karnataka Land Reform Act, 1961 and content of Article 300-A of the Constitution were involved. The issues inter alia before the Supreme Court were:

- Whether the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1966 was protected by Article 31 C of the Constitution of India and
- Whether the Acquisition Act was violative of Article 300 A as the Article is not by itself a source of legislative power but such power of State Legislature being traceable only to Entry 42 of List III of 7<sup>th</sup> schedule Acquisition and Requisition of Property” which excludes expropriation and confiscation of property.

The Supreme Court held that the Land used for Linaloe cultivation being governed by the provisions of Land Reforms Act was protected under Article 31-B of the Constitution for its inclusion in the IX Schedule.

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<sup>12</sup> AIR 2011 SC 3430

The Acquisition Act was held to fall under Entry 18, List II as the dominant intention of the legislature was to preserve and protect Roerich's Estate covered by the provisions of Land Reforms Act on the withdrawal of exemption in respect of land used for Linaloe cultivation. The Act incidentally fell under Entry 42 of List III as well for the acquisition of paintings, artefacts and other valuables belonging to Roerichs. The Act was different from the Land Acquisition Act, 1894 which fell exclusively under Entry 42, List III enacted for the acquisition of land for public purpose, for companies and for determining the amount of compensation to be made on account of such acquisition. Therefore, no assent of the President was required under Article 254(2) to sustain the impugned Act which fell under Article 31-A (1) (a) for which the assent of the President was obtained. The Act was therefore not invalid for repugnancy. A Provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provisions of the other legislation but such partial coverage of the same area in a different context and to achieve a different purpose does not bring about repugnancy intended to be covered by Article 254(2). The Acquisition Act being an estate under Article 31 A (2) was protected from challenge under Article 14 and 19 of the Constitution.

### **INCIDENTAL OR ANCILLARY ENCROACHMENT**

Incidental or Ancillary encroachment is the essential aspect taken into account whenever the Doctrine of Pith and Substance is applied by the court. It can also be referred as Doctrine of Ancillary or Incidental encroachment which is not separate but a part of Doctrine of Pith and Substance. Even though the subject matters on which Union and the State can make law are demarcated but still as proved through above cases while

making a legislation it can incidentally and indirectly encroach into the matter of other. This is an unavoidable situation and because of this encroachment the Doctrine of Pith and Substance is applied. The degree and extent of encroachment has nothing to do with the case. The privy council applied a “proportionality” test, where it was stated that the relevant factor for determining such encroachment shall be the extent of the invasion by the provinces into subjects enumerated in the Federal List further, they also made clear that degree of invasion was relevant only because it might bear on pith and substance<sup>13</sup>. Summarily degree of invasion was the relevant factor in applying the test of Pith and Substance. However later in another case decided by the Supreme Court Patanjali Shastri J denied that degree of invasion was relevant factor at all. If the legislation has passed the test of Doctrine of Pith and Substance, it will be valid even if it encroaches on the whole of the subject matter of Union List.<sup>14</sup>

## RECENT JUDGEMENTS

In a recent case the Supreme Court held that Securitization and Reconstruction of Financial Assets and Enforcement of Security Act 2002 is applicable to cooperative banks.<sup>15</sup> The issue present case was related to the scope of the legislative field covered by Entry 45 of List I.

Banking and Entry 32 of List II of the Seventh Schedule. The main question was the applicability of Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI ACT) to the co-operative banks. The Constitutional Bench held that the Doctrine

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<sup>13</sup> Subramanyam Chettiar v. Muttuswami Goundan AIR 1941 FC 47

<sup>14</sup> State of Bombay v. Narottam Jethabhai, AIR 1951 SC 69

<sup>15</sup> Pandurang Ganpati Chaugule v. Vishwasrao Patil Muegud Sahakari Bank Limited, (2020) 9 SCC 215

of Pith and Substance will also be applied in the present case. The bench mentioned one to many cases in relation to Doctrine of Pith and Substance. It concluded that since banking in Pith and Substance is covered under Entry 45 of List I, incidental trenching upon the field reserved for State under Entry 32 List II cannot invalidate a legislation. Taking note of the Doctrine of Pith and Substance the court held that *the co-operative banks under the State Legislation and multi-State co-operative banks are 'banks' under section 2(1)(c) of Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The recovery is an essential part of banking; as such the recovery procedure prescribed under section 13 of the SARFAESI Act, a legislation relatable to Entry 45 List I of Seventh Schedule to the Constitution of India, is applicable.*<sup>16</sup>

In another recent and important case of *Jayant Verma & Ors. v. Union of India & Ors*<sup>17</sup>, section 21A<sup>18</sup> of the Banking Regulation Act, 1949, which prohibits courts from re-opening any transaction between a bank and its debtor on the ground of excessive rate of interest, has been held to be not applicable to agricultural debts in States where State Debt Relief Acts are in force. The judgement by Justices R. F. Nariman densely discusses the principles of interpretation of legislative entries, legislative competence, and harmonization of entries. The court applied the Doctrine of Pith and Substance and held that Section 21A fell within the scope of Entry 45 of List I. As the judgement discussed about the principles of interpretation, they reiterated that one of the principles of interpretation is that legislative entries should receive widest possible interpretation and keeping this in consideration it was held that entry relating to banking covered provisions protecting loan transactions from judicial intervention.

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<sup>16</sup> Ibid.

<sup>17</sup> AIR 2018 SC 1079

<sup>18</sup> (2018) 4 SCC 743

## CONCLUSION

In the federal structure of government where there is separation of powers, conflicts are bound to arise. Even if the subject matters on which the Union and State can legislate are divided by the Constitution, there can be encroachments into the subject matter of another. With the help of the discussion of the judgements above, it is clear that even if the state made a law on its subject matter, it incidentally encroached on and touched the subject matters that come under the purview of the Union, so it is clear that such kinds of conflicts are unavoidable. The Doctrine of Pith and Substance is a well-established doctrine from the time of its origin in Canada and India, and this principle of interpretation has also been well established. Whenever a law's validity is challenged on account that it encroaches upon the matters mentioned in the Union List, it cannot be declared invalid on this ground because the Doctrine of Pith and Substance tests the true nature and character of the law as a whole. The extent of encroachment is also not an important factor in this doctrine, because if the extent and degree of encroachment were considered important parts of the doctrine, then most of the legislation declared by the state will be invalid, and the point and substance of the legislation will have little to do with it. As a result, the doctrine is critical in assisting the Indian judiciary in maintaining harmony between the centre-state relationship and rationale.