

DOCTRINE OF PITH AND - 'THE' METAPHOR

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I. ABSTRACT

The paper majorly focuses on the doctrine of 'pith and substance' as applied in India. The major area of research in the paper is the analysis of the application of the doctrine as compared to other countries with a similar federal structure as of India and a thorough analysis of the application and evolution of the doctrine in India. The paper talks not only about how the doctrine is applied to the Indian context but also about the loopholes in the applicability of the same. The paper analyses major case laws in which the doctrine has been used. It also provides a link between the doctrine of 'pith and substance' with some other doctrines such as the doctrine of colorable legislation and the doctrine of incidental encroachment. It provides for the recommendations of the author suggesting better ways to apply the doctrine in the present-day scenario. The paper ends with three literature reviews that have been used for the purpose of research by the author.

Index Terms- *Pith and substance, form and substance, federal, repugnancy, competence, incidental encroachment, Constitution, comparative study, colorable legislation.*

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II. RESEARCH OBJECTIVE

The objectives of the research paper are-

- 1) To understand the difference in the applicability of the doctrine of 'pith and substance' in India and different countries with a similar constitutional set up- For this purpose, comparison has been made with applicability in Canada and in Australia.
- 2) Identify loopholes in the applicability of the doctrine in Indian context- For this purpose, a critical analysis of the case laws relating to the doctrine has been provided.

III. RESEARCH GAP

The research gap in most of the literatures provided on the topic is the lack of understanding in the difference of the applicability of the doctrine in different countries with a similar constitutional set up. Another gap is the lack of analysis of the misuse or misinterpretation of the doctrine and ways to set off such misuse.

IV. INTRODUCTION

Doctrine of 'pith and substance' is an age-old rule used in constitutional matters in India. The literal meaning of pith is the true nature or the essence of something and that of substance is an essential part or something. Thus, pith and substance together can be understood as an essential part of something in which its true essence lies. The doctrine of 'pith and substance' says that where the question is about determining the power of legislature to make a particular law under the three lists, what the court must look into is the substance of the same. Thus, the doctrine is used when the competence of the legislature is to be determined in relation to a particular enactment and what has to be looked into is the substance of the enactment. If it is found that the legislation is in substance on the matter assigned to the legislature then the enactment must be held to be valid completely. It may so happen that the enactment incidentally encroaches upon the matter beyond the competence of a particular legislature, but such encroachments do not render the whole enactment to be a nullity. The legislative matters that are given under different lists are bound to overlap at some point but that does not make the whole enactment null and void. Thus, it can be concluded that incidental encroachments are permissible while determining the competence of the legislatures as far as the subject matters in the three lists are concerned.

V. EVOLUTION OF THE DOCTRINE

The doctrine of pith and substance was recognized for the very first time in Canada. Canada does not only have a common constitutional arrangement with India but also the cases in Canada went up to the privy council for the final appeal.

Just like India has the center and state legislatures, Canada is divided as the Dominion and the Provinces. Although the first great model of federalism i.e. Australia had only one list and that too a short one, Canadian constitution makers went to add two lists in the Constitution of Canada. The constitution of Canada was initially enacted as the British North America Act, 1857. Section 69 clearly bifurcated the powers given to the dominion and that given to the provinces. Section 91 of the act described the powers given exclusively to the Dominion while section 92 of the act described the powers given exclusively to the Provinces. It was emphasized that none of the two act or encroach upon other's powers to make laws under the sections of the British North American Act, 1857. This meant that the dominion could not act upon the area of the provinces and vice versa.

Although, emphasis was laid for a clear distribution in the powers of the two yet inevitably the descriptions of the legislative fields provided in both the sections would often overlap. Thus, a statute when made looked as if it was acted encroaching upon the powers of the other. A provision made by one if really encroached upon the powers of the other, then it was invalid.

The major question to be answered here is what was in real sense a field that belonged to either the province or the dominion as mentioned in section 91 and 92 of the Act. It was then that the Privy Council came up with a solution to the question (judicial decisions in Canada were subject to final appeal to the privy council back then). The Privy Council suggested that the 'true nature and character' of the legislation must be looked into while deciding upon the competence of the legislature. In 1899, Lord Watson captured the same into a metaphor while speaking for the privy council that the order was to identify the '*whole pith and substance of the enactment*.'¹ The phrase is used in Canada even today.

The doctrine has also been used in India time and again. Lord Porter in Prafulla Kumar Mukherjee v. Bank of Commerce Ltd. said that "what is pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found."² Thus, the doctrine though emerged in Canada but is also applicable to India due to the similarities between both the countries.

VI. DOCTRINE OF 'PITH AND SUBSTANCE' IN INDIA

India is a country with a very rigid text in the Constitution of the country. India has had three lists with a very clear demarcation of the subjects on which the central legislature can make laws since the very beginning. The demarcation was first made in the Government of India Act, 1835 and then in the Constitution of India 1949. Earlier under section 100 of the Government of India Act, 1835 and then under Article 246 of the Constitution of India the three lists were arranged in a rather rigid manner.

The powers given under the federal list are exclusively and notwithstanding anything in the other two lists while the powers given under the concurrent list can be exercised wither by the union or the states but are subject to the powers given under the federal list. The powers given in the state list on the other hand are subject to the powers given under the Federal list.

Although such an arrangement left almost no room for one of the legislatures to encroach upon the powers of the other, in an arrangement such as of India, incidental encroachment is bound to happen in certain cases when the laws are being made under one of the lists. When such an encroachment takes place, the doctrine of pith and substance comes into play and the courts are to decide whether the enactment is intra vires or ultra vires in nature. If the enactment happens to be intra vires, then the enactment is to be declared valid but if the enactment happens to be ultra vires that it is bound to be declared invalid.

Under the Government of India Act, 1935 although the argument was that, the demarcation in powers provided under Section 100 of the Act is so rigid that there is no possibility of overlap between the powers in the lists and therefore the doctrine of pith and substance need not be applied in any case and the provincial list is superior, the argument was condemned by Lord Porter speaking for the privy council.³

¹ Union Colliery company of British Columbia v. Bryden, [1899] AC 580, at 587

² Prafulla Kumar Mukherjee v. Bank of Commerce Ltd, AIR 1947 PC 60

³ Prafulla Kumar Mukherjee v. Bank of Commerce Ltd, AIR 1947 PC 60

VII.COMPARATIVE STUDY OF THE DOCTRINE WITH RESPECT TO CONSTITUTIONS OF OTHER COUNTRIES

While the doctrine of '*pith and substance*' is used in Australia to maintain a rigidity in their extremely flexible written constitution, in India the doctrine is used to provide flexibility to the very rigid written constitution. While Australia has only one list, Canada has two and India has three to apply the doctrine to. Thus, the application of the doctrine in the three countries differ even though there lies a similarity in the constitutional structure of the three countries.

Canada

The need for the application of doctrine was first felt in Canada. Due to the demarcation of the powers of the two legislatures made in section 91 and 92 of the British North America Act,1857 and the overlap that was happening between the two brought into picture the doctrine of 'pith and substance'. At that time the highest court of appeal was the Privy Council for the country.

In Russel v. The Queen⁴ the Privy Council held that "*the statute must be analyzed to find the true nature and character of the legislation.*" This view of the Privy Council was then taken by Lord Watson in Union Colliery company of British Columbia v. Bryden⁵ and the metaphor was captured. In this case the Privy Council held that the object was to identify the whole 'pith and substance' of the enactments.

The decisions saw a slight change when they shifted from the Privy Council to the Supreme Court of Canada and it was evident that though the Supreme Court agreed with the view of the Privy Council, took a slightly different way to interpret the same. In Canada the doctrine is still in use and the belief is that a piece of legislation can have a single true nature and character associated to it and thus the doctrine of 'pith and substance' comes to rescue to conceal an increasingly diverse range of criteria. In 1990, in the case of Whitbread v. Valley⁶ the Supreme Court of Canada held that there lies no magic in the metaphor. Thus, the Supreme Court was of the view that with the true nature and characteristic of the legislation, what has to be looked into is the '*dominant characteristic of the legislation*', '*true nature and character*' and the '*constitutional value represented by the challenged legislation.*'

Australia

Unlike India and Canada, the Australian constitution had only one list. Thus, there existed no chance of clash or encroachment of the powers. Yet, in 1903 when the Australian High Court became operative, it started to apply the doctrine to the new constitution of Australia which had only one list in it. While the major question in Canada while applying the doctrine was whether a law made by a legislature the provincial legislature encroached upon the powers of the dominion legislature to make laws on the said subject and vice versa, the question in Australia was whether a law made falls under the subject mentioned in section 51 of the constitution of the country. Thus, any law made had to be postulated in either of the two ways: first being the one mentioned in the constitution and the other not being mentioned in the same. the choice between the two gave rise to the application of the doctrine of 'pith and substance.'

How Australia went about to decide cases using the doctrine can be seen through a few examples. The first of the major judgments was King v. Barger⁷

In this case by the federal Excise Tariff Act,1906 an excise duty was imposed on all the manufacturers of agricultural implements, subject to '*fair and reasonable*' labour conditions. This meant that those who show that they provided for '*fair and reasonable*' labour conditions, which was an easy task would not have to pay the duty. The power to levy excise duty was included in the federal powers. The question in this case was whether the law actually related to the laws of taxation or to the labour laws which were not mentioned in section 51. The court looked into the 'pith and substance' of the law enacted and concluded that the law actually related to the labour laws and thus rendered the enactment to be invalid.

The next big case was Amalgamated Society of Engineers v. Adelaide Steamship co. ltd.⁸ in this case the court overthrew the theoretical concept of the Barger's case.

The doctrine kept on finding new ways into other areas in Australia. An appropriate example would be the question whether a law made could be rendered invalid if it interfered with freedom of interstate trade and commerce guaranteed by section 92 of the constitution. The idea of pith and substance in such a case came out to be that, as long as the statute

⁴ Russel v. The Queen, (1882) 7 App Case 829

⁵ Union Colliery company of British Columbia v. Bryden, [1899] AC 580, at 587

⁶ Whitbread v. Valley, [1990] 3 SCR 1273

⁷ King v. Barger, (1908) 6 CLR 41

⁸ Amalgamated Society of Engineers v. Adelaide Steamship co. ltd, [1920] 28 CLR 129

had a legitimate purpose it would not be hit by section 92 of the constitution and thus cannot be rendered invalid if the purpose of the enactment turns out to be legitimate.

In the case of Bank of New South Wales v. Commonwealth⁹ both the kinds of problems related to the doctrine were involved. One question was whether the government takeover of private banks be seen as a banking law and the other was whether it such takeover would affect the freedom of trade of private banks in the country. In this case, the Privy Council through lord Porter said that the metaphor can be used in cases where the decision is to be on the interference of the enactment with the trade and commerce but only when the same is untouched by Section 92 of the constitution and is regulatory in nature. In the present scenario since the enactment is not regulatory in nature therefore, since the enactment is hit by section 92 of the constitution therefore the doctrine does not help to solve the problem at all.

India

The application of the doctrine in India has more in common with Canada than with Australia. In Canada there exists two lists and thus the encroachment of the powers is to be looked according to the subjects provided in both the lists whereas in Australia, there exists only one list and what has to be seen is whether an enactment falls under the categories mentioned in that list. It is in these situations that the doctrine is used in these two countries. There is no question of encroachment on the powers of the other level of the legislature in case of Australia.

In India the situation is slightly different because of the existence of three lists, although there are similarities when compared to Canada as both the countries apply the doctrine to provide flexibility to their very well demarcated subjects in the lists. Whereas there lies a lot of difference when Australia is to be taken into consideration.

For example, India and Australia have very different views when it comes to ascertaining the interference of an enactment with the trade and commerce of the country. while in Australia, the privy council through Lord Porter held that the doctrine cannot be applied to enactments which are hit by section 93 of the Constitution of the country, in India the interpretation is done in different ways.

Firstly, in the case of State of Bombay v. R.M.D Chamarbaugwala¹⁰, the court was of the view that the doctrine might prove to be useful in assessing the interference of an enactment with the trade and commerce. Secondly, in cases such as Atiabari tea co. ltd. v. State of Assam¹¹, the court was of the view that the doctrine can only be applied where there is encroachment in the powers to make laws on the subjects provided under the three lists. If the question is not about the encroachment in the same, the doctrine is useless.

Another point of difference lies in the matters of the concurrent list in India. The major question that arises is that whether the doctrine of 'pith and substance' would apply to the matters relating to the concurrent list. The Supreme Court clarified its stand on the issue through the case of Vijay Kumar Sharma v. State of Karnataka¹². In this case the court held that the doctrine would apply even when the Parliament and State legislature legislate in the concurrent list but with respect to different entries. The court further held that if in case the substance of the laws made by both the legislatures is same only then Article 254(1) would apply which says that in case of any repugnancy in the laws made by the parliament and state legislatures in the concurrent list, then the law made by the parliament would prevail over the state legislature.

Thus, on a comparative study of the constitutions of three countries and the applicability of the doctrine as done in the three, it is clear that though there lies a similarity in the federal structure of the countries but the way they apply the doctrine to their respective areas is different from one another. On one hand where Australia applies it to provide rigidity to their constitution, India and Canada apply the same to provide flexibility to theirs. Also, the views taken by them on similar matters are different as is already seen.

⁹ Bank of New South Wales v. Commonwealth, (1915) 20 CLR 54

¹⁰ State of Bombay v. R.M.D Chamarbaugwala, AIR 1957 SC 699

¹¹ Atiabari tea co. ltd. v. State of Assam, AIR 1961 SC 232

¹² Vijay Kumar Sharma v. State of Karnataka, (1990) 2 SC 562

VIII. APPLICABILITY OF THE DOCTRINE IN CASES OF COMPETENCE AND REPUGNANCY AND THE CONCEPT OF INCIDENTAL ENCROACHMENT

As discussed earlier, the doctrine of pith and substance must be applied to the cases where there is an encroachment on the powers of the other legislature with respect to the power to make laws on the subjects provided under the three lists. If the said legislature does not possess the competence to make laws on a particular subject, there lies no need at all to look into the substance of the same, as the enactment would still be invalid. Time and again there have been several cases where the doctrine has been misinterpreted not only in the cases of competence but also in cases of repugnancy. The underlying rule to the doctrine is that, if the encroachment on the powers is ancillary or incidental, then the enactment would not be rendered invalid. This rule is known as the rule of ancillary or incidental encroachment.

One of the few big cases in this respect is Subramanyam Chettiar v Muttuswami Goudan¹³. In this case the state of Madras enacted the Debt Relief Act, 1938 which provided that the court may scale down the debt of the agriculturists that was owed to moneylenders. This provision was in conflict with Negotiable Instruments Act, 1881 which was a central legislation. The issue before the court was whether the enactment was repugnant and thus be declared invalid. The court in this case was of the view that when a piece of legislation is enacted, its encroachment on the area of the other is inevitable because the areas of the legislations may be so closely intertwined that a blind adherence to the lists would render many enactments void. Thus, the court held that the enactment was *intra vires* in nature and cannot be held to be invalid.

In my opinion, in this case since the promissory notes matured much before the enactment came into play, the decision was right but in similar cases where the maturity date of promissory note might be after the enactment comes into play, the decision might prove be flawed. This is because the encroachment in my view is substantial since it encroached upon the right of money lenders to recover their money. Thus, the enactment not only encroached upon a central legislation but also on the rights of the money lenders.

The next being Prafulla Kumar Mukherjee v. Bank of Commerce¹⁴. In this case the issue was regarding the validity of the Bengal Money Lenders Act, 1940. The act provided for limiting the amount as well as the interest that a lender could recover on any loan. It was challenged on the ground of being *ultra vires* the Bengal legislature. While the High Court of Calcutta held that the act was *intra vires*, the federal court on appeal quashed the judgment saying that act was *ultra vires*. Finally, the case went to the Privy Council wherein the doctrine of 'pith and substance' was applied and it was held that the substance of the act is 'moneylending' which is well within the competence of the state legislature and falls under Entry 27 of List II of Government of India Act, 1935. Although the court believed that there was incidental encroachment on Entry 28 of List I which was about the promissory notes, but again the encroachment was only incidental and was not sufficient to render the whole act void.

In a later case i.e. State of Bombay v. Narottamdas Jethabhai¹⁵ J. Patanjali Shastri held that the degree of encroachment is no factor at all to decide on the validity of the legislation. While applying the doctrine of 'pith and substance' he went on to hold that as long as the substance of the legislation is legitimate and the legislation is valid under the 'pith and substance' test, the enactment will be valid even if it encroached fully on the fields of the other legislature.

In my opinion, if this is to be the case then there is no point of demarcating the fields on which the union or the state legislature may legislate in the first place. Both the legislatures may actually make laws in the other's area in the name of pith and substance and the whole purpose of having three lists in the constitution of India would be defeated.

The next on the list is State of Bombay v. F.N Balsara¹⁶. In this case the issue in this case was pertaining to the validity of the Bombay Prohibition Act, 1949. the issue was whether the enactment was falling under Entry 31 of the State list of Government of India Act, 1935 which was in correspondence to Entry 8 of the State list in the Constitution. The import and export of liquor was a subject under the union list while the production, sale etc. was the subject of the state list. The court while following the rule of incidental encroachment and applying the doctrine of 'pith and substance' held the enactment to be valid as it fell under the State list even though it incidentally encroached upon the union list.

¹³Subramanyam Chettiar v Muttuswami Goudan, (1941) 1 MLJ 267

¹⁴ Prafulla Kumar Mukherjee v. Bank of Commerce Ltd, AIR 1947 PC 60

¹⁵ State of Bombay v. Narottamdas Jethabhai, AIR 1951 SC 61

¹⁶ State of Bombay v. F.N Balsara, AIR 1951 SC 318

The next case being State of Rajasthan v. G. Chawla¹⁷. In this case the Rajasthan State made a law restricting the use of sound amplifiers. The respondent having violated the same was prosecuted. The act was regarded invalid by the judicial commissioner and thus the prosecution was quashed. The case went on an appeal to the Supreme Court, wherein the contention was that the act fell within Entry 31 of the Union List while the state argued that it fell under Entry 6 of the State List. The Supreme Court applied the doctrine and came to the conclusion that the impugned law in its substance fell within Entry 6 of the State List. It incidentally encroached upon the subject of broadcasting and communication which is a union subject. The law actually falls within the ambit of public health which is a State subject matter. Thus, the enactment cannot be held to be invalid even if it encroached upon the fields of the union legislature since the encroachment is only incidental and not substantial in nature.

The next case being Gujrat University v. Krishna Ranganath Madholkar¹⁸. In this case the medium of instruction at university level was provided under the Union list but there was no provision by the center for the medium. The Gujrat University enforced a scheme for gradual phasing out of English as a medium of Education. The question was that whether the university was empowered to do so. The majority in the Supreme Court held that neither by the original legislation nor by subsequent amendment, the Gujrat University is empowered to prescribe the language of instruction. J. Subba Rao dissented by saying the if the 'pith and substance' of the enactment is looked into then it would be clear that it fell under the power of State relating to education as there can be no education without the medium of transfer of knowledge. 'Co-ordination and determination of standards' under the union list does not necessarily involve the medium of education but 'education' necessarily involves the medium attached.

Through these cases it very clear that not only in the cases of repugnancy but also in the cases of competence, the doctrine of 'pith and substance' is applied. Once the court is convinced that Article 254 is applicable, the question that further lies is whether the doctrine of 'pith and substance' is applicable and whether the doctrine can help to resolve such a repugnancy. In the repugnancy what has to be looked into next is the degree of encroachment. If the encroachment is incidental then the enactment is to be held valid but if the encroachment turns out to be substantial then the enactment must be rendered invalid. If not so the whole purpose of having three lists in the constitution would be defeated. Thus, the doctrine is applied accordingly in the cases of competence as well as repugnancy.

IX. THE DOCTRINE OF 'FORM AND SUBSTANCE'

The doctrine of pith and substance essentially means what is the essence or core of the law. An equally common expression as that of 'pith and substance' is 'form and substance'. Essentially what is seen in such cases is the practical operation of a statute rather than that of the language of the same.

In the doctrine of 'pith and substance' both pith and substance are used as synonyms to one another but, in the doctrine of 'form of substance' it is not so. There is a distinction between 'form' and 'substance' as reflected through case laws. The form of judicial decision often involves the use of the doctrine of 'pith and substance' to decide whether a particular enactment falls under the subject provided under a particular list. Whereas, the substance of the decision will involve a close examination of the practical aspect and effects of the enactment.

There are umpteen examples of cases where the courts have applied the doctrine of 'form and substance'. The first one being Thakur Amar Singhji v. State of Rajasthan¹⁹. In this case the question was the validity of a land reform in the state of Rajasthan. The real question that lied was whether the what the reform did to Jagidari lands be regarded as an 'acquisition' or 'resumption'. Here the Supreme Court of India, while ignoring the language of the reform so enacted looked into the practical application of the enactment. While analyzing the actual legal operation, the Supreme Court came to a conclusion that it is more accurately 'acquisition' than 'resumption'.

The most common cases where 'form and substance' is applied are the cases involving taxation laws. A good example would be Indian Aluminium Co. v State of Kerela²⁰. In this case the question before the court the court was that whether two entries [Entry 27 relating to supply of goods and Entry 53 relating to taxation on consumption and sale of electricity] in the state list form a surcharge on electricity. The act described 'surcharge' as a duty on supply. Here again the doctrine of 'pith and substance' was applied but by looking at practical aspect of the enactment ascertaining the nature of the tax while keeping in mind the legal operation. The language of the enactment was again disregarded.

¹⁷ State of Rajasthan v. G. Chawla, AIR 1959 SC 544

¹⁸ Gujrat University v. Krishna Ranganath Madholkar, AIR 1963 SC 703

¹⁹ Thakur Amar Singhji v. State of Rajasthan, AIR 1955 SC 504

²⁰ Indian Aluminium Co. v State of Kerela, AIR 1996 SC 1431

X. THE DOCTRINE OF COLORABLE LEGISLATION

We have seen until now, how the doctrine of 'pith and substance' actually works. On similar lines works the doctrine of colorable legislation. This doctrine is a tool to decide cases majorly relating to legislative competence. The doctrine highlights the fact that 'what cannot be done directly, cannot be done indirectly'. "*The idea conveyed by the expression is that although a legislature in passing a statute purports to act within the limits of its power, yet in substance and in reality, it transgresses those powers, the transgression being veiled by what appears on proper examination to be a mere pretense or disguise.*"²¹ Thus, the doctrine is very closely related to the doctrine of 'pith and substance'. The doctrine finds its roots in the maxim "*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*".

The doctrine is used in the cases of Article 246 which demarcates subjects on which the parliament can make laws as List I, in which the state legislatures can make laws as List II and in which both can make laws as List III. It is used to determine if the legislature has the power to make laws on a particular subject matter.

The doctrine is very well explained in the case of K.C. Gajapati Narayan Deo and Ors. V. State of Orissa²². The court in this held that, when the subjects are well demarcated on which the legislatures can make laws, questions do arise regarding whether the legislature in a case even has the competence to make laws with respect to a particular subject matter. The transgression may sometimes be indirect in nature and it to such cases that the doctrine of '*colorable legislation*' is applied. And thereafter defining the doctrine quoted the case of Ashok Kumar v. Union of India.²³

In the case of Dwarkadas Shrinivas v. Sholapur Spg. & wvg. co. ltd.²⁴. In this case the Supreme Court held that in cases where the prohibition is constitutional in nature and binds the legislature, the legislature cannot use indirect methods to disobey such restrictions. Therefore, in such cases, what has to be looked into is the true character and nature of the legislation (*'pith and substance'*)

XI. CONCLUSION

The doctrine of '*pith and substance*' is an age-old doctrine used in the constitutional matters in India. The literal meaning of the doctrine is the true nature and essence of anything. The doctrine is mostly used in the cases when the court has to determine whether the legislature had the power to make laws on a particular subject matter as the subject matters on which the parliament and the state legislatures can make laws are clearly demarcated under the three lists in the Constitution of India. What is worth noting here is that the subject matters given under the three lists are not to be construed as powers of the legislatures but merely entries on which they could legislate. The power of the legislature is given by Article 246 of the constitution of India.

The Doctrine first emerged in Canada and since the highest court of appeal in Canada and India was the Privy Council at that time, the doctrine came to be applied in India as well. The doctrine has different applicability in the countries with a similar federal structure such as Canada, Australia and India. Although the structure is similar but still there lie certain differences. Where Australia has only list, Canada has two and India has three. Therefore, the applicability of the doctrine in the three countries differ. On one hand, in Australia the doctrine is applied to provide rigidity to their very flexible constitution, in India and Canada, the doctrine is used to provide flexibility to their very rigid constitution.

The doctrine is mostly applied to the cases of repugnancy where the state or the central legislature encroaches upon the powers of the other to make laws on a particular subject matter. In such a case what has to be looked into is the degree of encroachment. If the encroachment is substantial, the enactment is to be declared invalid but, if the encroachment is incidental, the enactment must not be declared invalid. This rule is known as the rule of incidental encroachment. It is believed that in cases of incidental encroachments, the enactment must not be rendered void because in a system like that of India, such encroachments are bound to happen and if all such enactments are rendered void then there will be a large number of invalid enactments. Thus, the leading principles are:

- 1) Making a clear-cut distinction between the powers provided to the state and union legislatures is not possible and the overlap between the two is bound to happen. Thus, what needs to be considered is the pith and substance i.e. the true nature of an enactment.

²¹ Ashok Kumar v. Union of India, (1991) 3 SCC 498

²² K.C. Gajapati Narayana Deo and Ors. v. The State of Orissa, AIR 1953 SC 375.

²³ Ashok Kumar v. Union of India, (1991) 3 SCC 498

²⁴ Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. co. ltd, AIR 1954 SC 119

- 2) To determine the pith and substance of an enactment, the degree of invasion of the powers of one legislature over the powers of the other is essential to be determined.
- 3) When there is a conflict between the three lists. List I will always have a priority over the other two lists and list III will have a priority over List II. In case of repugnancy of laws made by both the legislatures under List III, the law made by the Union legislature would prevail.

The doctrine also has close associational links with the doctrine of '*form and substance*' and the doctrine of '*colorable legislation*'.

XII. RECOMMENDATION

The doctrine of '*pith and substance*' though is majorly helpful in dealing with the cases of constitutional repugnancy, in my opinion the doctrine must be used in collaboration with the doctrine of 'form and substance as the latter provides for not only the language of the legislation but also the practical application of the enactment. Both the doctrines must more often be used together by the courts rather than applying the two differently. This would help the courts to understand the very intent of the legislature behind the enactment of a particular law and would also provide for the problems when the enactment is practically applied to the country.

XIII. LITERATURE REVIEW

- 1) Working the metaphor: The contrasting use of '*pith and substance*' in the Australian and Indian Law²⁵-

This is a research paper which majorly talks of the difference between the applicability of the doctrine of '*pith and substance*' in the Australian as well as the Indian context. The paper majorly focuses upon the doctrine of incidental encroachment in India. It presents the ideas of the Supreme Court behind using the doctrine and the rule of incidental encroachment in a very lucid manner.

The major issue with the paper is the research gap while comparing the applicability of the doctrine in the Canadian, Australian and Indian context. It has plainly put forth the scenario between the three countries without properly comparing the three. The application of the doctrine in the three countries must have been properly compared and the correct idea of the application as per the author must have been put forth.

- 2) The Legislative relations between the Union Parliament and the State legislatures under the Indian Constitution²⁶-

This is a research paper which focuses majorly on the legislative relations between the two legislatures in the country. What the paper clearly puts forth are the problems that the country has a quasi-federal structure such as that of India. It explains in an extremely brilliant manner the working of a quasi-federal structure.

The major issue with the paper is that the interpretation of the case laws. The paper interprets the case laws in a manner which is not very easy to understand and thus creates a confusion in the mind of the readers. Also, more than interpretation the paper reiterated the judgments. The research gap that the paper possess is the comparison of the relations of the legislatures in India with that of other countries to provide the better understanding of the same.

- 3) Mahendra Pal Singh: V.N Shukla's Constitution of India²⁷

This is a book which almost focuses on the whole of Constitution of India. A part of the book talks about the doctrine of 'pith and substance' and focuses on the issue of repugnancy. The book provides the reader with a clear understanding of the doctrine along with proper case laws and the interpretation of those case laws as well.

The major problem according to me is the sequence in which the case laws are presented in the book. The case laws are not presented in a chronological order and thus, leaves the reader in a doubt as to what the correct standing of the court

²⁵ Blackshield, T. (n.d.). 1) Working the metaphor: The contrasting use of 'pith and substance' in the Australian and Indian Law.

[online] The Indian Law Institute (2008) Available at-

http://14.139.60.114:8080/jspui/bitstream/123456789/12822/1/013_Working%20the%20Metaphor_The%20Contrasting%20use%20of%20Pith%20and%20Substances%20in%20Indian%20and%20Australian%20Law%20.pdf [Accessed 18 Aug. 2019].

²⁶ Selvakumaran S. The Legislative Relations between the Union Parliament and the State Legislatures under the Indian Constitution. Sri Lanka J. Int'l L. 207 (1999) - Available at Hein Online [Accessed 18 Aug. 2019]

²⁷ Mahendra P. Singh, *V.N Shukla's Constitution of India*. (2008)

is in the present matter. Also, the only touches upon the doctrine as used in Canada and does not provide the reader with the detailed analysis of the same leaving the detail with half knowledge

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- 5) Union Colliery company of British Columbia v. Bryden, [1899] AC 580, at 587
- 6) Whitbread v. Valley, [1990] 3 SCR 1273
- 7) King v. Barger, (1908) 6 CLR 41
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- 10) Atiabari tea co. ltd. v. State of Assam, AIR 1961 SC 232
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- 12) Subramanyam Chettiar v Muttuswami Goudan, (1941) 1 MLJ 267
- 13) Prafulla Kumar Mukherjee v. Bank of Commerce Ltd, AIR 1947 PC 60
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