WORKING THE METAPHOR: THE CONTRASTING USE OF "PITH AND SUBSTANCE" IN INDIAN AND AUSTRALIAN LAW*

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I Characterizing legislation

IN A case in 1943 concerning the legal term "assumption of risk",[1] Felix Frankurter J of the United States Supreme Court observed:

> The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

Such usages are readily understandable. Unlike academic lawyers engaged in the *analysis* of decided cases, judges actually have to *decide* them – and to do so in a way that appears to be grounded in legal objectivity. To present a decision as an application of a well-known legal phrase is a way of clothing it in legal authority; and the same apparently authoritative phrase can be called upon to justify many different decisions, in many different ways. I want to illustrate this phenomenon by tracing the usage of the phrase "pith and substance" in the constitutional law of three different countries: Canada, Australia and India.

What the three countries have in common is not only that their constitutional arrangements involve different versions of federalism – that is, a division of lawmaking powers between the federal or central government and those of the states or provinces – but that, back in the days of the British Empire, judicial decisions in all three countries were subject to a final appeal to the Privy Council sitting in London. And it is in the Privy Council decisions on the distribution of powers in Canada that the story begins.

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* This is the revised version of a paper presented to the Systemic Functional Linguistics Association at the Fifth International Congress on English Grammar, Hyderabad, 6-11 Jan 2008.

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1. *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 US 54 at 68 (1943).

Characterisation in Canada

The distribution of lawmaking powers in a federal system depends on a list of specific powers included in the Constitution, sometimes irreverently called a laundry list. The first great model of federalism, the United States Constitution, had only one list, and indeed quite a short one: Article I, section 8, listed eighteen areas where the federal Congress could legislate for the nation. The idea was that any powers *not* specifically granted to the federal legislature remained with the states.

By contrast, the Constitution of Canada, initially enacted as the British North America Act, 1867, had two lists: a list in section 91 of powers *exclusively* assigned to the Dominion Parliament, and a list in section 92 of powers *exclusively* assigned to the provinces. It is emphasised that both lists are exclusive: that is, the Dominion *cannot* legislate in a field assigned to the provinces, or *vice versa*. Yet inevitably, the brief descriptions of the legislative fields overlap; and inevitably, a statute will be passed which looks as if it belongs in a field exclusively assigned to the centre, but also looks as if it belongs in a field exclusively assigned to the provinces. If the legislation has been passed by a province, but it *really* belongs in a field on the Dominion list, it will be invalid; and equally if the Dominion Parliament turns out to have legislated in a field that *really* belongs to the provinces.

The field where a statute *really* belongs, is a loose term; but that idea, taken literally, was exactly what the Privy Council came up with as the solution. The statute must be analysed to identify the "*true nature and character* of the legislation … in order to ascertain the class of subject to which it *really* belongs".[2] It was this idea that Lord Watson captured in a metaphor when he said in 1899, again speaking for the Privy Council, that the object was to identify "the whole pith and substance of the enactments."[3]

The phrase is still used in Canada today, though the underlying essentialist idea that a complex piece of legislation has a single "true nature and character" does not withstand close scrutiny, and the phrase "pith and substance" has come to conceal an increasingly diverse range of criteria. In one case in 1990, for instance, the Supreme Court of Canada noted that there is "no magic in the phrase", and offered a list of paraphrases. As well as "the true meaning of the challenged legislation" or its "true nature and character", they included its "dominant or most important characteristic"; its "leading feature"; "an abstract of the statute's content"; and "the

2. *Russell* v. *The Queen*, (1882) 7 App Cas 829, at 839-40 (emphasis added).

3. *Union Colliery Company of British Columbia* v. *Bryden*, [1899] AC 580, at 587.

constitutional value represented by the challenged legislation".[4]

Characterisation in Australia

However you reinterpret the metaphor, the basic idea of trying to decide what is most significant about a statute makes sense in a context where the court has to choose between two alternative characterisations, one of which will uphold the statute as valid while the other will make it invalid. But when the High Court of Australia began to operate in 1903, it picked up the Privy Council metaphor and began to apply it to the new Australian Constitution, even though that Constitution had reverted to the American model of having only one list. Where the typical situation in Canada involved a provincial law, and the question was whether it encroached on a power assigned to the Dominion Parliament, the situation in Australia involves a federal statute, and the only question is whether it falls under a heading in the list of federal powers set out in section 51. But the early high court fell into the model of postulating *two* ways of characterising a federal statute, one located in the list of federal powers and one of them not, and choosing between them by the "pith and substance" test.

The most notorious example was *The King* v. *Barger*,[5] where the federal Excise Tariff Act, 1906 had imposed an excise duty on the manufacture of agricultural implements, but then added that the excise duty need not be paid so long as the goods were manufactured under "fair and reasonable" labour conditions. There were various ways of showing that labour conditions were "fair and reasonable"; the easiest way was to have them certified by the President of the Commonwealth Court of Conciliation and Arbitration. The power to impose an excise duty was obviously included in the federal power relating to "Taxation" (paragraph (ii) of section 51). But was this *really* a law with respect to taxation? Or was it *really* a law with respect to labour conditions in factories? To answer that question the court set out "to inquire what is the true nature and character of the Act", and concluded that its "substance" was "a regulation of the conditions of labour". Accordingly, the law was invalid.

If, then, the Act in question is not, in substance, an Act imposing duties of excise, what is it? One may think that it is an Act to regulate the conditions of manufacture of agricultural implements, and not an exercise of the power of taxation conferred by the Constitution.[6]

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4. *Whitbread* v. *Walley* [1990] 3 SCR 1273, (1990) 77 DLR (4th) 25 at 33. There the court held that liability for torts in tidal waters is governed by maritime law, and hence that the relevant legislation fell "in pith and substance" within dominion authority under s. 91(10) ("Navigation and Shipping").

5. (1908) 6 CLR 41.

6. (1908) 6 CLR at 73, 75, 77.

Now, the theoretical foundation for *Barger's* case was overthrown by the famous *Engineers'* case in 1920;[7] but both the language of "pith and substance", and the naïve idea that every statute could have a uniquely true "nature or character", continued to haunt Australian constitutional law for another three decades. Indeed, the phrase "pith and substance" occasionally found its way into other areas, for instance the question of whether a law, whether passed at the state or federal level, was invalid because it interfered with the freeom of interstate trade and commerce guaranteed by section 92 of the Constitution.[8] In that context "pith and substance" seemed to refer to the "purpose" or "object" of an Act: the idea was that so long as a statute had a legitimate purpose or object, its effect in restricting trade and commerce would not offend section 92. This usage persisted although Sir Isaac Isaacs, who had introduced it in 1915,[9] repudiated it nineteen months later[10] – insisting that its use in that context was "wholly inapplicable", since section 92 "is not a competition between federal and State powers", but "an exception from both".

In both usages – as an index to federal lawmaking power, and as a test of compatibility with freedom of interstate trade – "pith and substance" received its *coup de grâce* in the famous *Bank Nationalisation* case of 1948–49.[11] The case involved both kinds of problem. One question was whether the law providing for a government takeover of private banks was a law with respect to "Banking" (paragraph (xiii) of section 51); the other question was whether the takeover affected the freedom of the private banks to engage in interstate trade. On the first question the decisive pronouncement came from Latham CJ in the High Court. This was a judge who seemed still to believe that a law could have a uniquely "true" character, or at least that it still made sense to ask whether laws "in *reality and substance* are laws *upon* the subject matter".[12] Yet he flatly denied that the phrase "pith and substance" could help to answer that question, protesting that "[i]t lends itself to emphatic asseveration, but it provides but little illumination." He hinted obliquely at the physical referents lying behind the metaphor. "Pith", of course, refers to the cellular tissue at the core of

7. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, (1920) 28 CLR 129.

8. See, e.g., *Peanut Board* v. *Rockhampton Harbour Board*, (1933) 48 CLR 266 (Rich, Starke and McTiernan JJ).

9. *New South Wales* v. *Commonwealth (Wheat* case*)*, (1915) 20 CLR 54, at 98-99.

10. *Duncan* v. *Queensland*, (1916) 22 CLR 556, at 624.

11. *Bank of New South Wales* v. *Commonwealth*, (1948) 76 CLR 1 (High Court); *Commonwealth* v. *Bank of New South Wales*, [1950] AC 235 (Privy Council).

12. (1948) 76 CLR at 186 (emphasis added).

the stems and branches of plants; "substance" to what William Paley[13] called "animal substance, as flesh, bone, … cartilage, etc". Together, "pith" and "substance" cover the whole of the animal and vegetable kingdoms; but the significance of running them together in the legislative kingdom is still not clear. As Latham put it: "The difference, if any, between 'pith' and 'substance' is not explained." He also wondered if the metaphor "pith and substance" in constitutional law had been adapted from the metaphor "pith and marrow" used in patent law, and he quoted what Wills J had said about that metaphor in 1896:[14]

> "Pith" is a great deal less than the substance of the vegetable structure of which it is part, and "marrow" a great deal less than the substance of the animal structure of which it is part. Metaphors are very apt to mislead, as they are seldom close enough to the things to which they are applied.

When the case reached the Privy Council, Lord Porter endorsed this "just criticism"[15] of the phrase "pith and substance", and extended the criticism to the use of the phrase in relation to interstate trade. He observed that:[16]

> [S]uch phrases as "pith and substance" … may … serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce and intercourse among the States is, nevertheless, untouched by s 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit.

Now, judges in the Supreme Court of India have interpreted that passage in different ways – some[17] picking up the hint that "pith and substance" *might* be useful in assessing an interference with trade, others[18] reading

13. *Natural Theology* (1802) v. §3.65.

14. *Incandescent Gas Light Co.* v. *De Mare Incandescent Gas Light System Ltd.*, (1896) 13 RPC 301, at 332.

15. [1950] AC at 312.

16. *Id,* at 312-13.

17. See, e.g., S.R. Das CJ in *State of Bombay* v. *R.M.D. Chamarbaugwala*, AIR 1957 SC 699 at 716.

18. See, e.g., Gajendragadkar J (in the majority) in *Atiabari Tea Co. Ltd.* v. *State of Assam*, AIR 1961 SC 232, at 256; and Hidayatullah J (in dissent) in *Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406 at 1460.

the passage to mean that "pith and substance" is simply irrelevant, except in the context of potential conflict between fields of lawmaking power. But so far as Australia was concerned, Lord Porter's observation left the phrase with such a stigma that it has virtually dropped out of use. Without it, and therefore no longer constrained by the idea that any statute must have a uniquely "true" nature or character, the High Court has gone on to evolve an approach to the characterisation of federal statutes which is much more open and flexible, and which incidentally tends to have the result that federal statutes are almost always held valid.

It is helpful to think again about the issue that was posed back in *Barger's* case. Was it *really* a law about excise duties, or was it *really* a law about labour conditions in factories? The only sensible answer is, of course, that it was both. It could fairly be characterised as a law with respect to excise duties; it could also similarly be characterised as a law with respect to labour conditions. In the kind of situation that arises in Canada, where the validity of a law depends on a choice between competing descriptions in two lists of legislative powers, it may be necessary to choose between them; but under the Australian Constitution, where the only relevant descriptions are those in the list of federal powers, there is simply no such necessity. The current Australian doctrine is that so long as a law can fairly be characterised in a way that brings it within a field of power, it will be valid; and the fact that it could also be characterised in ways that do *not* reflect any field of power is simply irrelevant. The question is never "Is this the only uniquely true description?', but only "Is this a fair description?"

The essential permissiveness of this approach has been taken very far. As mentioned earlier one Canadian paraphrase of "pith and substance" is "the dominant or most important characteristic of the challenged law". But under the current Australian approach, the description that stamps legislation as valid need not reflect its "dominant or most important characteristic", so long as it is sufficiently relevant to justify it as a fair description. The point was made memorably by Sir Ninian Stephen in the 1950 *Actors Equity* case:[19] He emphasised that even a simple law forbidding a certain type of person to do a certain type of action can be described both as a law with respect to that type of person, and as a law with respect to that type of action; and often there will be other elements that may attract other descriptions as well. It follows that "a law may possess a number of quite disparate characters":

19. *Actors and Announcers Equity Association* v. *Fontana Films Pty Ltd.*, (1982) 150 CLR 169, at 192, 194. In that case a statutory provision aimed at trade unions, and prohibiting industrial action that would interfere with supplies to a corporation, was held to be valid as a law with respect to "corporations" (para (xx) of s. 51).

> Once it is recognized that a law may possess several distinct characters, it follows that the fact that only some elements in the description of a law fall within one or more of the grants of power in s 51 or elsewhere in the Constitution will be in no way fatal to its validity. So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid …
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> It follows that in testing validity the task is not to single out one predominant character of a law which, because it can be said to prevail over all others, leads to the attaching to the law of one description only as truly apt. It will be enough if the law fairly answers the description of a law "with respect to" one given subject matter appearing in s. 51, regardless of whether it may equally be described as a law with respect to other subject matters.

In short, by *abandoning* the term "pith and substance", the Australian High Court has achieved a level of flexibility and openness that results in a much more permissive approach to the characterisation of statutes for the purpose of grounding them in legislative power.[20]

Characterisation in India

One way of understanding the Australian cases prior to 1920 is that in those cases the early High Court was using the test of "pith and substance" to introduce an element of greater rigidity into a Constitution whose written text was extremely flexible. By contrast, the Supreme Court of India has used the same test to introduce an element of greater flexibility into a

20. The result, however analytically correct, may not always be politically desirable. In 2005 the government of Prime Minister John Howard, by legislation under the Orwellian title Workplace Relations Amendment (Work Choices) Act, dismantled a century-old regime of industrial relations enacted in reliance on the power granted by s. 51(xxxv) ("conciliation and arbitration for the prevention and settlement of industrial disputes …"), and substituted a harsh new regime enacted in reliance on s. 51(xx) (the "corporations" power). The word "employee" was defined to mean an individual "employed, or usually employed … by an employer", and the word "employer" was defined primarily by reference to the classes of corporation referred to in s. 51(xx). In *New South Wales* v. *Commonwealth (Work Choices* case*)* (2007) 229 CLR 1, a High Court majority accepted this as establishing a sufficient connection with "corporations". Had a "pith and substance" test been employed, such a result would have been impossible; and despite its acceptance by the court, the legislation – and the enacting government – were roundly rejected by the electorate at the ensuing federal election of 24.11.2007.

Constitution whose written text was extremely rigid. Where America and Australia had one list, and Canada had two, India has had three lists, first under the Government of India Act, 1935 and then under the 1949 Consitution: an exclusive list of federal powers, an exclusive list of state powers (or before independence province powers), and a concurrent list. Moreover, by section100 of the Government of India Act and article 246 of the Constitution,[21] the three lists are carefully arranged in a rigid hierarchy of super — and subordination: the powers in the federal list are exclusive *notwithstanding anything* in the other two lists; the concurrent powers can be exercised at either level *subject to* the federal list and *notwithstanding anything* in the state list; and the state powers are given only *subject to* the other two lists.

Under the Government of India Act there were several attempts to argue that this hierarchical arrangement left no room for a test of "pith and substance": the rigid definitions of exclusive fields, and the absolute supremacy of the federal list, meant that the provinces (as they then were) could not trespass upon the areas of exclusive federal power at all, not even by laws which in "pith and substance" were clearly within provincial power. In one of the last appeals to the Privy Council before Independence,[22] in a case involving the validity of the Bengal Money-Lenders Act, 1940, that argument was decisively rejected: so long as the provincial legislation was valid in "pith and substance", it did not matter if it had some "incidental" or "ancillary" effect on something in the federal list.[23] The contrary argument was that the rigid hierarchical arrangement ruled out any possibility of competition or overlap between entries on different lists; and if there could be no overlap, there was no need for "pith and substance". Speaking for the Privy Council, Lord Porter rejected that argument as simplifying the issue "unduly": "It is not possible to make so clean a cut between the powers of the various legislatures: they are bound to overlap from time to time."

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21. For the sake of convenience, the author is speaking of the entries in the three lists as "powers". But because it is Art. 246 that actually gives the *power* to legislate in respect of the various entries, the Supreme Court has held that the entries themselves are strictly not "powers", but only "fields" in which power can be exercised. See *Calcutta Gas Co*. v. *State of West Bengal*, AIR 1962 SC 1044.

22. *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna* (1947) LR 74 Ind App 23: AIR 1947 PC 60.

23. The result in that case was that the Bengal Money-Lenders Act, 1940 was valid because it related in "pith and substance" to "money lending and money lenders", even though it contained references to banking, corporations and promissory notes which appeared to trench upon entries in the federal list. (In particular, entry 28 in the federal list referred to "Cheques, bills of exchange, promissory notes and other like instruments").

Significantly, whereas the Australian High Court was ultimately to abandon the "pith and substance" test because it was too inflexible, the Privy Council insisted on retaining it in order to preserve flexibility. Lord Porter explained that the rigid alternative view would mean that "much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with." And he quoted what Sir Maurice Gwyer had said in the pre-independence federal court:[24] given the inevitability of overlap, the "pith and substance" test was needed because without it, "blind adherence to a strictly verbal interpretation would result in a large number of statutes being held invalid".

Significantly also, the Privy Council relied on what would nowadays be called a "proportionality" test: their Lordships emphasised that a relevant factor was "the extent of the invasion by the Provinces into subjects enumerated into the Federal List". They added that this did *not* mean that "the validity of an Act can be determined by discriminating between degrees of invasion"; the degree of invasion was relevant only because it might bear on "pith and substance" – in the sense that, if it went too far, that might show that its reliance on provincial power did not reflect its "true nature" or "true content". But the effect of this rider is unclear. Presumably it means that "degree of invasion" is a relevant factor in applying the test of "pith and substance", but the critical test is still "pith and substance", not "degree of invasion". On the other hand, in a later case decided by the Supreme Court in December 1950,[25] Patanjali Sastri J read this passage as denying that "degree of invasion" was a relevant factor at all – so that, as long as a state or provincial law is valid under the "pith and substance" test, it will still be valid even if it "encroaches practically on the whole of the federal field" marked out by an entry in list I.

The result in the 1950 case was a further demonstration of the flexibility of the "pith and substance" approach. It deserves to be explored in some detail. The case was one in which the validity of Bombay legislation still depended on the Government of India Act, 1935. Under that Act all three of the lists included a power to invest "all Courts except the Federal Court" with jurisdiction relating to "any of the matters in this list". That is to say, the central legislature could confer jurisdiction relating to the fields in list I; the provincial legislatures could do so in relation to the fields in list II; and either of them could do so in relation to the fields in list III. But when the Province of Bombay created a new city civil court and endowed it with jurisdiction in "all cases of a civil nature", those words "all

24. *Subramanyan Chettiar* v. *Muttuswami Goundan*, [1940] FCR 188 at 201: AIR 1941 FC 47.

25. *State of Bombay* v. *Narottamdas Jethabhai*, AIR 1951 SC 69 at 77.

cases" were broad enough to include matters from all three lists – so that, although the Bombay legislation was enacted in reliance on list II, it seemed also to be dealing with jurisdiction that lay exclusively within list I. The question was whether this apparent encroachment rendered the legislation invalid.

The majority in the Supreme Court sidestepped the problem by ascribing the validity of the legislation not to the specific provision in list II about investment of jurisdiction, but rather to a broad power to regulate "the administration of justice". The specific jurisdictional power relating to provincial matters was contained in entry 2 of list II, the broad power over "the administration of justice" was contained in entry 1. That entry also covered the "constitution and organization of all Courts, except the Federal Court"; and Mahajan J stressed that it was written in language "of the widest amplitude". Not only was "the administration of justice" wide enough to include provisions conferring jurisdiction, but the reference to the Constitution and organization of courts would be meaningless without it, since a court without jurisdiction "would be like a body without a soul".[26] Since the general power to confer jurisdiction on "all Courts except the Federal Court" was thus to be located in entry 1 of list II, the power in entry 2 to confer jurisdiction in relation to "any of the matters in this list" must be given a more limited meaning, confined to the possibility of creating a special jurisdiction in relation to a particular legislative area such as bankruptcy or admiralty; and that meant that the corresponding entries in lists I and III must also have that more limited meaning.

Fazl Ali and Mukherjea JJ agreed,[27] but with one revealing difference. When Mahajan J located the legislation within his expansive reading of the words "administration of justice", he treated this as an application of the doctrine of "pith and substance".[28] By contrast, Mukherjea J held that since this interpretation removed any possibility of conflict or overlap between

26. AIR 1951 SC at 83. This broad meaning of "administration of justice" has been reaffirmed in later cases, most recently (again in relation to the Bombay Civil Court) in *Jamshed N. Guzdar* v. *State of Maharashtra*, AIR 2005 SC 862. In 1976, by the 42nd Amendment, the words "Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court" were deleted from entry 3 in list II, and moved into a new entry 11A in the concurrent list. But according to *Jamshed N. Guzdar* (at 886), "[t]his only shows that topic 'Administration of Justice' can now be legislated both by the Union as well as the State Legislature"; and "[a]s long as there is no Union Legislation touching the same topic, and … no inconsistency between the Central legislation and State legislation on this topic", state legislation will still be valid.

27. See especially Fazl Ali J at 70-71.

28. See AIR 1951 SC at 82.

central and provincial powers, the "pith and substance" doctrine was simply irrelevant.[29] For what it is worth, this latter view seems logically more persuasive.

Patanjali Sastri and S.R. Das JJ reached the same result by a completely different approach. They rejected the idea that the general power relating to "administration of justice" could include the power to confer jurisdiction. Within the structure of list II itself, that general provision in entry 1 was immediately followed by the provision in entry 2 for conferral of jurisdiction; and if conferral of jurisdiction was already covered by entry 1, then entry 2 would be meaningless. Accordingly, they construed entry 1 in a way that *excluded* any provision for conferral of jurisdiction. On this view, as for Mukherjea J on the opposite view, "pith and substance" was simply irrelevant.[30]

Yet these two judges then added their own twist. Under entry 2 of list II, the Bombay legislature had power to confer jurisdiction relating to "any of the matters in this list"; and one of the "matters in this list" was the reference in entry 1 to "administration of justice" and "constitution and organization of courts". Thus, the Bombay legislature could create the city civil court in reliance on entry 1, and could then invest it with jurisdiction by relying on entry 2 *as applied to entry 1*. This reading, they thought, did provide a proper footing for the doctrine of "pith and substance" – since the vesting of jurisdiction in "all cases of a civil nature" did encroach on the jurisdictional powers in lists I and III, but so long as the "pith and substance" of the law related to entry 2 in list II, the encroachment on lists I and III did not matter. As Patanjali Sastri J put it,[31] so long as the Bombay legislature was "*really* legislating on a subject which was within the ambit of its legislative power", its legislation would be valid even if it "encroached on the forbidden field marked off by Entry 53 of List I", since in that event "the encroachment should be taken to be only incidental". It was in this context that he added that the same would follow even if the encroachment "extends to the whole of that field". On this approach, "pith and substance" enables the court to uphold the validity of state or provincial legislation even if it completely "covers the field" of an exclusive federal power.

29. AIR 1951 SC at 89.

30. Incidentally, these two judges also agreed with Mukherjea J that in analysing the relationship between two entries *in the same list* (in this case entries 1 and 2 of list II), "pith and substance" is simply irrelevant: see Patanjali Sastri J at 77, Mukherjea J at 88, Das J at 95.

31. AIR 1951 SC at 77.

Finally, Patanjali Sastri J quoted with approval a passage from the Canadian writer Augustus Lefroy[32] suggesting that what is really sought by the "pith and substance" inquiry is "the true aspect of the law", and adding that this word "aspect" refers to "the aspect or point of view of the legislator in legislating – the object, purpose and scope of the legislation". In this sense, Patanjali Sastri J had "little doubt" that the Bombay legislators were not consciously intending to legislate "with respect to any of the matters in List I"; they were directing their attention simply to "the legislative power conferred on them under Entry 2 read with Entry 1 of List II".

This last point is of major significance. It suggests that the "pith and substance" of legislation is determined not by reference to whether it "operates upon … [a specified] subject matter" or "answers [a specified] description", but rather by reference to its "purpose or object";[33] and so long as the legislative purpose conforms to a constitutionally permissible purpose, the resulting law will be valid. Moreover, in the case of state legislation, the law will be valid notwithstanding its effect on the supposedly exclusive powers of the Union Parliament, unless that effect is so significant as to indicate that its ostensible purpose is not after all, its actual purpose.

In 1989[34] this same passage from Augustus Lefroy, with its emphasis on the legislator's point of view, was put to particularly subtle use to support the validity of a union enactment, the Expenditure Tax Act, 1987. Since expenditure tax did not fall within any of the specific fields of taxation covered by the various entries in list I, it was said to be supported by the residual clause in entry 97, which includes a power to impose any tax not specifically mentioned elsewhere. The real issue was whether the tax did indeed fall within entry 97, or rather within entry 62 in list II: "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling." What was needed was a fine distinction between an "expenditure tax" and a "luxury tax".

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32. A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (1919) as previously quoted in *Bank of Commerce, Ltd. Khulna* v. *Amulya Krishna Basu*, [1944] FCR 126 at 139, AIR 1944 FC 18.

33. Cf Dixon J in *Stenhouse* v. *Coleman*, (1944) 69 CLR 457 at 471. This would suggest another significant contrast between the Indian and Australian approaches to the characterisation of statutes, since the point being made by Dixon J was that under the Australian Constitution the focus is almost always on "subject matter" or "description", and only exceptionally on "purpose".

34. *Federation of Hotel & Restaurant Association of India* v. *Union of India*, AIR 1990 SC 1637. Both Venkatachalia J (at 1648) and Ranganathan J (at 1662) quoted the passage from Lefroy.

It was here that Ranganathan J drew on Lefroy's analysis, as well as his own expertise in taxation law, to conclude that the legislative purposes of a central government "expenditure tax" and a state "luxury tax" were quite different. "Although both taxes may have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the legislature wishes to impose a curb … The object of an expenditure tax … is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure in unproductive or undesirable channels".[35]

This emphasis on legislative "purpose" or "object", either as the dominant factor in the ascertainment of "pith and substance", or at least as one significant factor,[36] has been evident in several cases – sometimes simply to decide which of two entries in the state list is the more appropriate basis,[37] but more usually to show that the "pith and substance" of the state legislation falls clearly within an entry in the state list, so that any possible overlap with entries in the union list does not affect its validity. Thus in 1970[38] the court upheld the validity of the Maharashtra Industrial Development Act, 1961 by showing that its "pith and substance" pertained to the state responsibility for "Industries" (entry 24 of list II), rather than to the central government's responsibilities under entries in the union list. It did so by focusing on "the purposes of the Act", and the "powers and functions" of the corporation which it established:

> The Corporation is established for the purpose of securing and assisting the rapid and orderly establishment and organisation of

35. AIR 1990 SC at 1664.

36. See *Bharat Hydro Power Corporation Ltd.* v. *State of Assam*, AIR 2004 SC 3173, where it was said that in ascertaining "pith and substance" "regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions".

37. See, for example, *Board of Trustees, Ayurdevic and Unani Tibia College, Delhi* v. *State of Delhi*, AIR 1962 SC 458, where Mudholkar J used "pith and substance" to conclude that the dissolution of the college board and the transfer of its powers to a new board should be assigned not (as the majority thought) to entry 32 in the state list (dealing with the "incorporation … and winding up of corporations" and with "unincorporated … societies"), but to entry 10 ("Trusts and Trustees") and entry 28 ("Charities and charitable institutions").

38. *Shri Ramtanu Co-Operative Housing Society Ltd.* v. *State of Maharashtra*, AIR 1970 SC 1771.

> industries in industrial areas and industrial estates in the State of Maharashtra … The pith and substance of the Act is establishment, growth and organisation of industries, acquisition of land in that behalf and carrying out the purposes of the Act by setting up the Corporation as one of the limbs or agencies of the Government. The powers and functions of the Corporation show in no uncertain terms that these are all in aid of the principal and predominant purpose of establishment, growth and establishment of industries. The Corporation is established for that purpose.

Again, in *Monogram Mills Ltd.* v. *State of Gujarat*,[39] the court upheld the validity of a legislative scheme requiring employers to establish a joint management council, including representatives of employees who would thereby be enabled to share the responsibilities of management. The appellant company had argued that the legislation related in pith and substance to entries in the union list – entries 43 and 44, relating to the "incorporation, regulation and winding up" of corporations, and entry 52, relating to industries for which the Parliament had declared that central control was "expedient in the public interest". But the court held rather, that having regard to the purpose of the legislation, it fell within entries 22 and 24 of the concurrent list, relating respectively to "Trade unions; industrial and labour disputes" and to various aspects of labour welfare:

> [The provisions] are intended in pith and substance to forestall and prevent industrial and labour disputes. They constitute also in essence a measure for the welfare of the labour.

It followed that "an incidental encroachment on matters which are the subject-matter of entries in list I would not affect the legislative competence of the State legislature".

In the 1977 *Ajit Mills* case[40] it was perfectly clear that the *Bombay* Sales Tax Act, 1959 fell within entry 54 in the state list ("Taxes on the sale or purchase of goods …"); the only question was whether the state had gone beyond what that entry permitted, by providing that sales tax collected illegally should be forfeited to the state. The forfeiture provisions were said to be a mere colourable device – a specious attempt to get additional revenue. The argument was rejected in a judgment delivered by Krishna Iyer J, who warned that: expressions like "colourable device" … have a tendency to mislead. Logomachy is a tricky legal trade; semantic nicety is

39. AIR 1976 SC 2177.

40. *R.S. Joshi, Sales Tax Officer, Gujarat* v. *Ajit Mills Ltd., Ahmedabad*, AIR 1977 SC 2279.

a slippery mariner's compass for courts.[41]

His reasoning depended essentially on a purposive understanding[42] of "pith and substance", drawing not only on the purposes of the legislation, but on those of the Constitution:

> The true key to constitutional construction is to view the equity of the statute and sense the social mission of the law … against the triune facets of justice[43] high-lighted in the Preamble to the Paramount Parchment (i.e. the Constitution), read with a spacious signification of the listed entries concerned.

State legislation

Earlier in the paper it was suggested that, more often than not, the practical effect of "pith and substance" is to save state legislation from a challenge to its validity: so long as the "pith and substance" of a law falls within an entry on the state list, its encroachment on an entry in the union list can simply be dismissed as irrelevant. It is seen that in 1947 the Privy Council saw this as its explicit purpose.[44]

Now, the greater flexibility attained in Australia by *abandoning* the test of "pith and substance" has generally tended to favour the validity of federal legislation, despite its impact on policy areas for which the primary responsibility might have seemed to lie with the states. By contrast, the flexibility attained in India by continued *adherence* to the test of "pith and subtance" has generally tended to favour the validity of state legislation,

41. AIR 1977 SC at 2285. He found it difficult to comprehend how some state high courts had reached the opposite view: "The puzzle is how minds trained to objectify law can reach fiercely opposing conclusions." He thought the explanation must lie in the judges' "attitudinal ambivalence and economic predilections".

42. *Id.* at 2286 he did, however, emphasise the difference between purpose and motive: "if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant."

43. I.e. the commitment in the Preamble of the Constitution to "justice, social, economic and political".

44. In the early cases decided on the basis of the Government of India Act, 1935, there may have been good reasons why the "pith and substance" doctrine should be used in this way. Although the Act laid down an elaborate list of exclusive federal powers, thus giving rise to the possibility that provincial legislation might impermissibly trespass upon those powers, the possibility had a curious degree of unreality because the federal legislature that would have exercised the federal powers was in fact never constituted. Of course, the bicameral legislature that had been established in 1919 continued to function; but its legislative output after 1935 was relatively small. Thus, without the "pith and substance" doctrine, much provincial legislation might have been struck down because of its encroachment on the notional domain of a federal legislature that did not exist.

despite its impact on policy areas assigned by list I to the exclusive responsibility of the centre. This is because, despite that impact, the court is able to attribute the "pith and substance" of the state legislation to an entry in list II. Sometimes the attribution is obvious; [45] sometimes it is more intriguing. The favourite is a case in 1959,[46] where the organisers of a Sammelan – a music festival – were prosecuted under the Ajmer (Sound Amplifiers Control) Act, 1952 for installing amplifiers in breach of the conditions imposed by their permit. (The amplifiers were more than six feet from the ground, and audible more than 30 yards away.) The organisers objected that in "pith and substance" the legislation fell within entry 31 in the union list, which refers to "wireless, broadcasting and other like forms of communication". The state replied that it fell within entry 6 in the state list ("public health and sanitation"). The court accepted that argument. As Hidaytullah J explained:[47]

> There can be little doubt that the growing nuisance of blaring loud-speakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the Entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter they fall within Entry 31 of the Union List. [But] the manufacture or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus, is one matter, [and] the control of the "use" of such apparatus … to the detriment of tranquillity, health and comfort of others is quite another … The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them …
>
> The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and [it] thus falls substantially (if not wholly) within the powers

45. For instance, in *Thakur Manmohan Deo* v. *State of Bihar*, AIR 1961 SC 189, it was argued that the Bihar Land Reforms Act, 1950 could not apply to ghatwali tenures because they were of a quasi-military nature, and any legislation affecting them must therefore fall under entries 1 and 2 of the union list (relating respectively to the defence of India and to the armed forces). At 195 the court found it "quite obvious that the Act has no connection whatsoever with the defence of India or the armed forces".

46. *State of Rajasthan* v. *Shri G. Chawla and Dr. Pohumal*, AIR 1959 SC 544.

47. AIR 1959 SC at 546-47.

conferred to preserve, regulate and promote them and does not so fall within the Entry in the Union List.

There could hardly be a clearer illustration of the principle that an enactment's "pith and substance" is determined not by reference to its "subject matter" (which in this case lay clearly within the entry in the union list), but by reference to its "purpose or object".[48]

In another case,[49] the High Court decision had actually favoured the central government, but the Supreme Court reversed that decision. The State of Tamil Nadu had established a licensing regime for video libraries, in part to ensure that the distribution of feature films on videotape did not involve an infringement of copyright. The Madras High Court held that the Act as a whole – the Tamil Nadu Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Act, 1984 – was valid because its pith and substance fell within entry 33 in list II, which includes a reference to "cinemas …, entertainments and amusements".[50] Despite this, the Madras High Court held that section 9(2) of the Act, the provision dealing specifically with copyright, was invalid, since "copyright" is a matter for the union parliament under entry 49 in list I. The high court paid lip service to the orthodox doctrine that a state enactment whose "pith and substance" is valid will be permitted to encroach incidentally on federal power, but held that what was involved here was more than "incidental" encroachment; it amounted to the addition of a new section to the Copyright Act, 1957.

The reasoning in the high court was, of course, entirely contrary to the principle that "pith and substance" is determined by looking at the Act as a whole, and that once that has been done it is not permissible to single out a particular section and accord it a different character simply because, looked at in isolation, it might trench on matters beyond the competence of the relevant legislature. Predictably, the Supreme Court reasserted that principle: the video library legislation was held to be valid in its entirety, including the copyright section. What is perhaps surprising is that the underlying judgment, that the pith and substance of the legislation related to "cinema", was apparently accepted without further question.

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48. Incidentally, the distinction between "manufacture" and "use" of wireless apparatus has an Australian precedent. In *Carbines* v. *Powell*, (1925) 36 CLR 88, Isaacs J held (again on the basis of underlying legislative purpose) that a licensing scheme for the "use" of wireless apparatus could not extend to its "manufacture".

49. *South Indian Film Chamber of Commerce, Madras* v. *Entertaining Enterprises, Madras*, 1995 SCC (2) 462.

50. The inclusion of "cinemas" is subject to the central government's power under entry 60, list I ("Sanctioning of cinematograph films for exhibition"); but this was not regarded as relevant.

Another perhaps more powerful example of the way in which "pith and substance" can be used to support the legislative capacity of the states can be found in the dissenting judgment of Subba Rao J in the *Gujarat University* case.[51] Under the 1949 Constitution the central government has exclusive power (under entries 63 to 65 of list I) relating to certain institutions thought to be of national importance – specified universities, and institutions in specified fields of professional or technical training. It also has exclusive responsibility (under entry 66 of list I) for "Co-ordination and determination of standards" in higher education. Subject to all of that, the states have a general responsibility for "Education including universities". In 1976 that responsibility was shifted[52] into entry 25 in the concurrent list; but at the time of the *Gujarat University* case in 1963, it was still in entry 11 of the state list.

The Gujarat University was enforcing a scheme for the gradual phasing out of English as a language of instruction. The question was whether the enabling provisions in the Gujarat University Act – as originally enacted by the Province of Bombay in 1949 and amended by the State of Gujarat in 1961 – had empowered the university to do that; and if so whether the legislature of the state or province could validly confer such a power.

The Supreme Court majority held that neither the original legislation nor its 1961 amendment had in fact authorised the university to prescribe the language of instruction; and even though under entry 11 the state might have power to do so, that power would be limited by the central government's overriding responsibility for "co-ordination and standards".

Subba Rao J dissented on both points. In his view the legislation had impliedly empowered the university to prescribe a sole medium of instruction, and the state's ability to confer such a power could not be restricted by any operation of entry 66, list I.

It was on this point concerning the relation between entry 66, list I and entry 11, list II that Subba Rao J invoked the doctrine of "pith and substance". He insisted that the "co ordination and determination of standards" did not necessarily include the medium of instruction, whereas the state power relating to "Education" necessarily did so:[53]

> There cannot be education except through a medium or media of instruction. Education can be imparted only through a medium. To separate them is to destroy the concept. It is inconceivable that

51. *Gujarat University, Ahmedabad* v. *Krishna Ranganath Mudholkar*, AIR 1963 SC 703.

52. By the 42nd Amendment, 1976.

53. AIR 1963 SC at 721.

> any reasonable body of constitution makers would entrust the subject of medium of instruction to Parliament and education dehors medium to a State: it is like cutting away the hand that feeds the mouth.

That being so, a state law prescribing a language of instruction would be valid in "pith and substance" even if it did incidentally affect the co-ordination of standards:

> The doctrine of pith and substance only means that if on an examination of a statute it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it may trench upon matters which are beyond its comprehension.

He protested in particular against the majority suggestion that a state law might be invalid merely because it affected something that the Parliament *might* do. He conceded thus:

> [I]f the impact of a State law on a Central subject is so heavy and devastating as to wipe out or appreciably abridge the Central field, then it may be a ground for holding that the State law is a colourable exercise of power and that in pith and substance it falls not under the State entry but under the Union entry.

That is, he accepted the old proposition that the degree of invasion of another field might affect the judicial finding as to a law's "pith and substance". But he denied that this concession gave any support to the majority view:[54]

> [N]o authority has gone so far as to hold that even if the pith and substance of an Act falls squarely within the ambit of a particular entry, it should be struck down on the speculative and anticipatory ground that it may come into conflict with a law made by a co-ordinate Legislature by virtue of another entry.

He protested that the petitioner's arguments had involved an attempt to substitute for the permissiveness of the "pith and substance" test a different and more inflexible doctrine: namely, that where the ambit of union legislative power is "carved out" from the ambit of a state power (in the sense that entry 11 was "subject to" the specified entries in the union list), "there is no scope for overlapping and, therefore, there is no occasion for invoking the principle of pith and substance".[55] His answer was the same as the answer to the old argument based on the rigid hierarchy among the

54. *Ibid.*
55. AIR 1963 SC at 718.

three lists: no matter how elaborately they are differentiated, subjects will always overlap.[56] He concluded that, so long as a state law prescribing the language of instruction was in "pith and substance" related to education, it would remain valid even if it incidentally affected the co-ordination of standards. Conversely, a union law directed in "pith and substance" to co-ordination of standards would be valid despite "incidental encroachment on the medium of instruction".[57]

The later case of *Ajay Kumar Singh* v. *State of Bihar*[58] seems closer to the position of Subba Rao J than to that of the majority. This time the court was content to hold that admission policies for medical colleges fell within the general entry relating to education, now relocated in entry 25 of list III, while responsibility for "co-ordination and determination of standards" remained exclusively with the Parliament under entry 66 of list I;[59] "and that both can operate simultaneously without coming into conflict".[60]

The directive principles of state policy in part IV of the Constitution include the enjoinder in article 47 that "the State" shall "endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health". The enjoinder is directed even-handedly to government at every level; but a special responsibility appears to be laid upon the states by entry 8 in list II, which enables them to legislate with respect to "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors". In a series of cases involving alcohol, the "pith and substance" test has usually enabled the court to support the states in their exercise of this responsibility. In *A.S. Krishna* v. *State of Madras*,[61] for

56. Counsel had suggested that, in such a case of mutually exclusive powers, the state law would be invalid so long as it had a "direct impact" on the field assigned to the union; but *id*. at 718-20 Subba Rao J reviewed the Indian and Canadian cases to conclude that there was no such doctrine.

57. *Id*. 722 he added that such a law could not validly "displace" the medium of instruction, "for, in that event, the encroachment on the subject of education is not incidental but direct". Presumably what he meant by this was not to give credence to a separate doctrine of "direct impact", but only to acknowledge yet again that the degree of invasion of another field might be so significant as to affect the finding of "pith and substance".

58. 1994 SCC (4) 401.

59. The kind of legislation involved in "co-ordination and determination of standards" was tested in *Union of India* v. *Shah Goverdhan L. Kabra Teachers College*, AIR 2002 SC 3675 discussed at notes 170-171 below.

60. In paras 23-25 the court reached this conclusion by analogy with the reasoning in *Vijay Kumar Sharma* v. *State of Karnataka*, AIR 1990 SC 2072, discussed at notes 102-104 below.

61. AIR 1957 SC 297. See the discussion at notes 90-92 below.

example, the Madras Prohibition Act, 1937 was held to be valid on this basis; and in *State of Bombay* v. *F.N. Balsara*[62] it was held not only that the Bombay Prohibition Act, 1949 was valid, but that it could validly apply to sales of imported as well as local liquor – despite the fact that this trenched on the central government's power relating to imports and exports.[63]

The only notable exception is the *First Synthetics & Chemicals* case,[64] one of several cases involving the use of alcohol for industrial or manufacturing purposes rather than for human consumption. In addition to the powers of the states under entry 8 of list II, they also have power under entry 51 to impose excise duties on a range of commodities including "alcoholic liquors for human consumption"; but apart from those specific exceptions, the general power to levy excise duties is assigned to the central government by entry 84 of list I. In the *First Synthetics & Chemicals* case, the court reviewed taxes on industrial alcohol imposed by several states and described as "vend fees" or "transport fees". It was held that in "pith and substance" the fees were nothing more than a form of excise duties in disguise, and thus within the exclusive power of the central government. The court accepted[65] that the states have power to regulate the use of alcohol; but the question was whether "in the garb of regulation" the state could impose something that "in pith and substance" was a "fee or levy", unrelated to the costs of any regulatory scheme. That question was answered in the negative:

> These [fees] are not merely regulatory. These are much more than that. These seek to levy imposition in their pith and substance not as incidental or as merely disincentives but as attempts to raise revenue for states' purposes.[66]

In the *Second Synthetics & Chemicals* case,[67] the effect of this decision was significantly watered down. Again, the court emphasised the distinction between regulatory and taxation measures. But whereas in the earlier case the *regulatory* power of the state had been pitted against the *taxation*

62. AIR 1951 SC 318, esp at 322-23.

63. The court reached its conclusion in spite of decisions in other countries treating sale as an "inseparable concomitant" of importation (*Fergusson* v. *Stevenson* (1951) 84 CLR 421 at 435), or as part of importation so long as the goods remain in their original package (*Brown* v. *Maryland*, 25 US (12 Wheat) 419 (1827)).

64. *Synthetics & Chemicals Ltd.* v. *State of Uttar Pradesh*, AIR 1990 SC 1927.

65. AIR 1990 SC at 1949.

66. AIR 1990 SC at 1955.

67. *State of Uttar Pradesh* v. *Synthetics & Chemicals Ltd.*, 1991 SCR (3) 64, 1991 SCC (4) 139.

power of the centre, this time the *taxation* power of the state was pitted against the *regulatory* power of the centre. At issue was a purchase tax, imposed on the first purchase of alcohol in the state; and the court had no difficulty in holding that, in "pith and substance", it fell within the specific field of taxation entrusted to the states by entry 54 of list II ("Taxes on the sale and purchase of goods …"). This time the countervailing central power was that envisaged by entry 52 of list I ("Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest"), and realised by the Industries (Development and Regulation) Act, 1951 (the IDR Act), as applied to "Fermentation industries", including alcohol.

The effect of the IDR Act has been considered in many cases. For example, although the Act extends to sugar, the court has held that it did not prevent the State of Uttar Pradesh from imposing a tax on the purchase of sugar cane by sugar mills,[68] or from taking over private sugar mills and vesting them in a government enterprise.[69] Now, in the *Second Synthetics & Chemicals* case, the court insisted that "[t]he power of regulation and control is separate and distinct from the power of taxation"; and what that meant in this instance was that the states' specific power of levying sales and purchase taxes "is not cut down by the general legislative power vested in Parliament". The sales tax in this case was "undoubtedly an impost falling in pith and substance under Entry 54", and so long as it could not be challenged as merely "colourable", it remained "unimpeachable":[70]

> The control exercised by the Central Government by virtue of …the IDR Act is in a field far removed from the taxing power of the State under Entry 54 of List II. So long as the impugned legislation falls in pith and substance within the taxing field of the State, the control of the Central Government in exercise of its power under the IDR Act … cannot in any manner prevent the State from

68. *Ganga Sugar Co. Ltd.* v. *State of Uttar Pradesh*, AIR 1980 SC 286 at 293 Krishna Iyer J held that so long as the tax fell "in pith and substance" within entry 54 of list II, it must be valid. "What matters is not the name of the Act but its real nature, its pith and substance."

69. *Ishwari Khetan Sugar Mills (Pvt.) Ltd.* v. *State of Uttar Pradesh*, AIR 1980 SC 1955 at 1964-65 Desai J explained that "in pith and substance" the Act was one "for acquisition of scheduled undertakings and such acquisition by transfer of ownership of the scheduled undertakings to the Corporation would in no way come in conflict with any of the provisions of the IDR Act or would not trench upon any control exercised by the Union under the various provisions of the IDR Act … The IDR Act is not at all concerned with the ownership of industrial undertakings …, except to the extent of control over management of the undertaking by the owner."

70. 1991 SCR (3) at 90 (supported at 87-88 by the *Ganga Sugar* case).

> imposing taxes on the sale or purchase of goods … [T]he taxing power of the State under Entry 54 of List II cannot be cut down by the general legislative power of control of the Centre.

The *First Synthetics & Chemicals* case was distinguished again in *State of Andhra Pradesh* v. *McDowell & Co*.[71] In response to widespread agitation by the women of Andhra Pradesh, the state government had imposed a total prohibition of the sale and consumption of intoxicating liquors – first by ordinance in December 1994, and two months later by the Andhra Pradesh Prohibition Act, 1995. Five months later the Act was amended to extend the prohibition to manufacture, as well as sale and consumption. The Supreme Court held that in pith and substance the Act as amended fell wholly within entry 8 of list II, the one relating to "Intoxicating liquors" and their "production, manufacture, transport, purchase and sale". Once again it followed that the central government's assumption of control through the IDR Act was simply irrelevant: "once the impugned enactment is within the four corners of Entry 8 …, no central law whether made with reference to an entry in List-I or with reference to an entry in List-III can affect the validity of such State enactment".[72]

Finally, in the *Southern Pharmaceuticals* case,[73] the State of Kerala had asserted control over manufacture of any product containing intoxicating liquor. The petitioners, makers of medicinal and toilet preparations, protested that this encroached on their rights as licensees under central legislation: the Drugs and Cosmetics Act, 1940, and the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. But the real question was whether, conversely, the central government's excise duties legislation had encroached on the legislative power of the state; and the court held that it had not. The pith and substance of the central legislation pertained to entry 84, list I ("Duties of excise … including medicinal and toilet preparations containing alcohol"); the state law pertained to entry 8, list II ("Intoxicating liquors …"):

> In determining whether an enactment is a legislation "with respect to" a given power, what is relevant is not the consequences of the enactment on the subject matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject matter in question. The Central and the State Legislations operate on two different and distinct fields. The Central Rules, to some extent,

71. AIR 1996 SC 1627.

72. *Id.* at 1638.

73. AIR 1981 SC 1863 at 1873. Compare *State of Bihar* v. *Shree Baidyanath Ayurved Bhawan (Pvt.) Ltd.*, AIR 2005 SC 932.

> trench upon the field reserved to the State Legislature, but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparations containing alcohol.

Central legislation

Of course, as the *First Synthetics & Chemicals* case reminds us, the "pith and substance" argument does not always favour the states. In a 1959 case[74] involving the Central Excises and Salt Act, 1944, and therefore dependent on the allocation of legislative powers in the Government of India Act, 1935, a tobacco wholesaler who challenged the validity of orders made against him under the Act was punished by fines and by the confiscation and sale of his stock. He contended that once the excise provisions were used in this way to interfere with his trade in tobacco, they could no longer be supported by the power to levy excise duties (which undoubtedly fell within entry 45 on the 1935 federal list), but amounted to a regulation of "trade and commerce within the Province", and thus fell within entry 27 in the exclusive provincial list. Arguably they also fell within entry 29 on that list, relating in part to the "supply and distribution of goods". The argument received short shrift. In "pith and substance" the Act was clearly "a fiscal measure to levy and realise duty on tobacco", and even if the Rules made under the Act:[75]

> [M]ay have an indirect effect of depriving an owner of a bonded warehouse from the privilege of keeping such a warehouse … that does not mean that the object and purpose of the Act is not imposition, collection and realisation of duty of excise … [i]n its true nature and character the Act remains one that falls under item 45 of List I and the incidental trenching upon the provincial field of items 27 or 29 would not affect its constitutionality … [t]he extent of invasion of the provincial field may be a circumstance to determine the true pith and substance but once that question is determined the Act … would fall on the side of Central field and not that of the provincial field.

The central government had another victory in *Delhi Cloth & General Mills Co. Ltd* v. *Union of India*,[76] where limits on the deposit of money, imposed by section 58A of the Companies Act, 1956, were held to be valid even though they trenched on the field of "Money-lending and money-lenders". It was true that that field was covered by entry 30 on the state

74. *Chaturbhai M. Patel* v. *Union of India*, AIR 1960 SC 424.
75. AIR 1960 SC at 429.
76. AIR 1983 SC 937.

list; but the Companies Act as a whole was clearly "referable to Entry 43 and 44 in the Union List and the enactment viewed as a whole cannot be said to be legislation on money-lenders and money-lending".

Perhaps the most important case of this kind is *Kartar Singh* v. *State of Punjab*,[77] where with minor modifications[78] the court upheld the validity of what is commonly known as the TADA Act – the Terrorists and Disruptive Activities (Prevention) Act, 1985, as extended in 1987. The major issues were those involving the impact of the TADA Act on constitutional guarantees of fundamental rights; but the court also dismissed a preliminary argument relating to legislative competence. The argument was a version of the basic question raised by terrorism legislation everywhere. Should terrorist offences be dealt with by resort to the ordinary criminal law, expanded if necessary by the creation of additional criminal offences; or do they represent a new kind of threat, to be countered by a "war on terrorism" raising the same constitutional issues as more traditional wars?[79] On the former approach, the legislative response would fall within entry 1 in the concurrent list, relating to "Criminal law", or even entry 1 of the state list, relating to "Public Order". On the latter approach, the response would fall within entry 1 on the union list, relating to the defence of India. Applying the test of pith and substance, the court adopted the latter view.[80] The court explained thus:

> In order to ascertain the pith and substance of the impugned enactments, the preamble, Statement of Objects and Reasons, the legal significance and the intendment of the provisions of these Acts, their scope and the nexus with the object that these Acts seek to subserve must be objectively examined.

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77. 1994 SCC (3) 569.

78. The definition of "abet" was read as requiring "actual knowledge or reason to believe"; s 22 was struck down as infringing Art. 21 of the Constitution; and there were several prudential suggestions as to how the operation of the Act might be mitigated in practice.

79. See Aditya Swarup, "Terrorism and the Rule of Law: A Case Comment on *Kartar Singh* v. *State of Punjab*" *Social Science Research Network* 7-8 (2007); and compare the Australian decision in *Thomas* v. *Mowbray*, (2007) 237 ALR 194.

80. Rejecting the attempt to relate the legislation to the state responsibility for "public order", Sahai J explained: "Conceptually public order and terrorism are different not only in ideology and philosophy but also in cause or the *mens rea*, the manner of its commission and the effect or result of such activity. Public order is well understood and fully comprehended as a problem associated with law and order. Terrorism is a new crime far [more] serious in nature, … graver in impact, and highly dangerous in consequence. One pertains to law and order problem whereas the other may be political in nature [and] coupled with unjustifiable use of force threatening security and integrity of the State." *Supra* note 77 at 632.

But this was not all. This objective examination was to be conducted in "the background of the totality of the series of events due to the unleashing of terrorism, waves after waves, leading to the series of bomb blasts causing extensive damage to the properties, killing of hundreds of people, the blood-curdling incidents during which the blood of the sons of the soil had been spilled over the soil of their motherland itself, the ruthless massacre of the defenseless and innocent people."

II Beyond Characterisation

Metaphoric transference

In its first invocation in relation to Canada,[81] the metaphor of "pith and substance" was used to resolve a competition between two heads of legislative power, each advanced as the most appropriate touchstone by which to determine the characterisation of a contested statute. The British North America Act, 1867 had specified one list of legislative powers assigned exclusively to the Dominion of Canada (section 91) and another list of powers assigned exclusively to the provinces (section 92). The typical situation was that each list contained a head of power to which the contested legislation might plausibly be assigned. The problem was therefore one of determining which of the competing characterisations was the more appropriate – in other words, which of them more accurately reflected the "pith and substance" of the contested statute.

It has been earlier observed that the main context for judicial resort to "the doctrine of pith and substance" is essentially similar under the Constitution of India. Usually the competing characterisations arise from an entry in the list of powers assigned exclusively to the union (seventh schedule, list I) and an entry in the list of powers assigned exclusively to the states (seventh schedule, list II). Occasionally the competition may be between an entry in list I or list II and an entry in the "concurrent list" (seventh schedule, list III). The Indian use of the metaphor has emphasised not only that the "pith and substance" of a statute is sufficient to assign it to one or the other of the competing entries, but also (in a striking departure from the corresponding Canadian doctrine)[82] that once the validity of the statute has thus been determined, the statute will be valid in its entirety – notwithstanding even substantial encroachment on the area of the other

81. *Union Colliery Company of British Columbia* v. *Bryden*, [1899] AC 580 at 587.

82. See *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 SCR 641, (1989) 58 DLR (4th) 255.

entry, and notwithstanding that, *ex hypothesi*, the enacting legislature is rigidly excluded from legislative power in that other area. It is largely because of this corollary, attached by the Supreme Court of India to the concept of "pith and substance", in India, the doctrine has served to introduce an element of flexibility into the apparent rigidity of the constitutional provisions.

Although "pith and substance" has also been used in jurisdictions whose constitutional arrangements do *not* involve competing lists of enumerated legislative powers, its use in those jurisdictions has always involved a choice between competing characterisations of legislation, one of which would be clearly forbidden to the enacting legislature. For Australia, before the supposed need for such choices was swept away by the *Engineers* case,[83] the posultated choice was between a power specifically granted to the commonwealth by section 51 of the Constitution, and a hypothetical power supposedly reserved to the states by an implied conception of "reserved State powers".[84] For Northern Ireland, where in *Gallagher* v. *Lynn*[85] the Privy Council applied a "pith and substance" test to legislation prohibiting the sale of milk without a licence, the choice was between section 4(1) of the Government of Ireland Act, 1920, which conferred a general power on the Parliaments of Southern and Northern Ireland "to make laws for peace, order and good government of Southern Ireland and Northern Ireland [respectively]", and section 4(7), which excluded laws in respect of "[t]rade with any place out of the part of Ireland within their jurisdiction". (Their Lordships held that the law was valid because its "pith and substance" was the protection of health within the province.)

In short, in all these examples, the function of the "pith and substance" test is to assign a contested statute either to a category of legislative power which will support its validity, or to an alternative category which will lead to its being struck down as invalid.

In India, however, the phrase "pith and substance" has displayed a certain migratory tendency, moving away from the standard type of case just described into other constitutional contexts. Whether or not a "pith and substance" test has any legitimate role to play in these other contexts has sometimes been vigorously debated, and the answer is not always clear.

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83. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.,* (1920) 28 CLR 129.

84. The phrase had been adopted from decisions on the United States Constitution, where the tenth amendment refers specifically to "powers … reserved to the States". The Australian Constitution contains no such provision; the nearest equivalent, s 107, says only that (speaking generally) state legislative powers shall "continue".

85. [1937] AC 863 at 870.

The remainder of this paper will review these other uses of "pith and substance", and attempt to assess their validity.

Repugnancy

A particularly difficult cluster of questions surrounds article 254(1) of the Constitution, which seeks to resolve problems of "repugnancy" between a law made by a state, and a law enacted or operating at the central level. (The expression "enacted or operating" has been used so as to include what article 254(1) calls "existing law" – that is, a law made before Independence but preserved in force by article 372 of the Constitution.) In cases to which article 254(1) applies, it provides that the law enacted or operating at the centre "shall prevail" and the State law "shall, to the extent of the repugnancy, be void".

The first problem is to identify the cases to which this provision applies; and to this question the Supreme Court has given what seems to an outsider, at least at first sight, an extraordinarily narrow answer. The problem depends on the grammatical puzzle presented by the opening clauses of article 254(1). The issue of "repugnancy" is said to arise

> If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List …

Three kinds of provision are referred to here:

- a provision of a law made by the legislature of a state;
- a provision of a law made by Parliament which Parliament is competent to enact;
- a provision of any existing law.

The grammatical puzzle is this. To which of these three provisions should one attach the adjectival phrase "with respect to one of the matters enumerated in the Concurrent List"?

Does it attach only to the kind of provision last mentioned – namely, "any provision of any existing law"? Grammatically that would be the most natural reading, and the comma after "competent to enact" suggests that this reading is correct. On that reading article 254(1) would apply where a state law is repugnant *either* to any union legislation whatsoever (regardless of whether it is enacted under list I or under list III), *or* to "any provision of any existing law with respect to one of the matters enumerated in the concurrent list".

Or does the adjectival phrase attach to *the last two* categories of provision mentioned, so that article 254(1) will only apply where a state law (regardless of whether it is enacted under list II or under list III) is repugnant either to union legislation enacted under list III, or to an "existing law" relating to a matter referred to in list III?

Or does the adjectival phrase attach to *all three* classes of provision referred to, so that article 254(1) will only apply when the state law, *and* the Union law or existing law to which the state law is repugnant, are *all* referable to an entry in list III? This last view, restricting article 254(1) to its narrowest possible operation, is the one that has prevailed. (Alternatively, this reading might follow if the phrase about the concurrent list were treated not as an adjectival phrase at all, but rather as an adverbial phrase modifying the expression "is repugnant".)

Admittedly, the grammar is ambiguous. The earlier provision in section 107 of the Government of India Act, 1935, though expressed in almost identical terms, had been rendered even more ambiguous by the absence of punctuation; and it was in relation to that earlier 1935 version that the narrow interpretation first emerged.[86] But the willingness of the Supreme Court to adhere to that interpretation after Independence (despite some initial hesitation),[87] reflects a clear judicial policy choice.[88] One reason for such a choice is that article 254(2), which provides a saving for "repugnant" state laws that receive presidential assent, is clearly confined to matters arising under the concurrent list; and it would therefore be anomalous if article 254(1) were not so confined. Another reason is that if article 254(1) were read as applying more widely, its operation would become confused with that of the rigid hierarchy among the lists, as imposed by article 246. It is said that such a confusion should be avoided because that rigid hierarchical ordering of lawmaking *powers*, rather than the possibility of conflict between particular *laws*, should be regarded as the dominant scheme of the Constitution.

Yet one cannot help feeling that another reason, at odds with this insistence on rigidity, is to limit "repugnancy", as another threat to the validity of state legislation, to its smallest possible scope. Indeed, on one view, its remaining scope is even narrower than the above discussion would suggest: its relevance is confined not only to cases where both the conflicting laws are relate to entries on the concurrent list, but to cases

86. See e.g. *Lakhi Narayan Das* v. *Province of Bihar*, AIR 1950 FC 59.

87. See e.g. *Ch. Tika Ramji* v. *State of Uttar Pradesh*, AIR 1956 SC 676, where the point was expressly left open.

88. See especially *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar*, AIR 1983 SC 1019 at 1035, 1041, 1042-43.

where both of them relate to *the very same* entry on the concurrent list.[89]

Now, whether this narrow interpretation is satisfied by reliance on two different entries on the concurrent list, or is limited to reliance on the very same entry, it clearly poses a threshold test for which the "pith and substance" test is directly legitimate or relevant; and this threshold test will be used to determine whether article 254(1) is relevant at all. Typically, when this threshold question arises, one or both of the potentially conflicting enactments will be open to alternative characterisations, such that one will give rise to the "repugnancy" issue and one will not. An example is *A.S. Krishna* v. *State of Madras*,[90] where an attempt was made to argue that evidentiary and procedural provisions in the Madras Prohibition Act, 1937 were repugnant to the Indian Evidence Act, 1872 and the Criminal Procedure Code of 1898 (both relevant as "existing laws"). Given the above interpretation, the repugnancy issue could only be raised if the relevant state provisions were enacted under the entries in the concurrent list relating to criminal procedure and evidence, rather than under the entry in the provincial list relating to intoxicating liquors. The Supreme Court rejected this first step in the argument, by relying on the "pith and substance" rule. Clearly the Madras Prohibition Act, viewed "as a whole",[91] was a law in respect of intoxicating liquors; and essentially the court insisted that the Act *must* be viewed as a whole. It was not permissible to treat it "as a mere collection of sections, then disintegrate it into parts", and proceed to accord a different character to those parts which "might incidentally trench" on matters which, taken singly, might lie beyond the competence of the relevant legislature.[92] That, said the court, is precisely what the doctrine of "pith and substance" forbids.

In another case,[93] a Kerala law enabling the state to take temporary control of supplies of "essential articles", as made applicable to electricity by an order in 1968, was said to be inconsistent with the Electricity Act, 1910 and the Electricity (Supply) Act, 1948.[94] But the issue of "repugnancy" could not be raised unless both of these Acts, as well as the state act, could

89. See e.g. *Vijay Kumar Sharma* v. *State of Karnataka*, AIR 1990 SC 2072, where one suggestion is that Art. 254(1) is simply irrelevant because the conflicting laws relate respectively to entry 35 and entry 42 of list III. But see also the discussion at notes 102-104 below.

90. AIR 1957 SC 297.

91. *Id.* at 300.

92. *Id.* at 303.

93. *Kerala State Electricity Board* v. *Indian Aluminium Co. Ltd.*, AIR 1976 SC 1031.

94. Again, both of these were relevant as "existing laws" (i.e., existing prior to Independence).

be assigned to the concurrent list. The court held that the 1910 and 1948 Acts could indeed be so assigned,[95] but that the state Act could not. Its purpose was the control of "essential articles", and the order applying it to electricity did not alter that purpose:[96]

> It is not a legislation with respect to electricity and therefore does not fall under Entry 38 of List III. Electricity being beyond doubt an essential article may be declared to be an essential article under the Act. In that case the power exercised is not in relation to electricity qua electricity but electricity as an essential article. The Act therefore in pith and substance is with respect to trade and commerce and production, supply and distribution.

Accordingly, the Act fell within entries 26 and 27 in the state list ("trade and commerce within the State …" and "Production, supply and distribution of goods …");[97] and it followed that the repugnancy issue simply did not arise.

Yet, once the Supreme Court is satisfied (whether by reference to "pith and substance" or otherwise) that article 254(1) is applicable, then the further question of whether a "pith and substance" test can be used to resolve the question of repugnancy itself has been far more controversial. In the *M.S. Farooqi* case[98] in 1972, and more firmly in the *Hoechst Pharmaceuticals* case[99] in 1972, the court ruled that resort to "pith and substance" at that stage is simply irrelevant. Yet, despite this, the language

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95. Their pith and substance was clearly within entry 38 of the concurrent list ("Electricity"); was clearly *not* within Entry 44 of the Union List ("Incorporation, regulation and winding up of companies …"); and was also *not* within entry 43 (relating to similar powers in respect of "trading corporations") – since their "main purpose" was "the rationalisation of the production and supply of electricity", and the incorporation of the Electricity Boards was merely "incidental" to that purpose: AIR 1976 SC at 1042, 1044.

96. *Id.* at 1045.

97. Both those entries are expressed to be "subject to" entry 33 in the concurrent List, but the operation of that entry is dependent on an assumption of control by Parliament under entry 52 of the union list.

98. *State of Jammu and Kashmir* v. *M.S. Farooqi*, AIR 1972 SC 1738, where state anti-corruption legislation, as applied to a member of the All India Police Service, was held to be repugnant to the All India Services Act, 1951. The state argued that the law was "in pith and substance" addressed to its own public servants, and dealt "only incidentally" with members of the All India Services. But the court held that, whatever its pith and substance, the state law was repugnant to the union law, and hence the argument was simply irrelevant.

99. *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar*, AIR 1983 SC 1019. A state surcharge on the turnover of certain dealers was challenged on the ground that the price fixation of essential commodities was "an occupied field", covered by central government orders under the Essential Commodities Act, 1955. Sen J insisted that the

of "pith and substance" continues to crop up in such cases,[100] as well as on the related question of whether one statute is invalid because another has "occupied the field". [101]

In *Vijay Kumar Sharma* v. *State of Karnataka*,[102] for example, the issue was whether a Karnataka law passed in 1976, and providing for contract carriage businesses to be taken over by the state government, had been overridden by the Parliament's enactment of the Motor Vehicles Act, 1988. The majority held that there was no repugnancy: the two laws dealt with different subject matters, and occupied different fields. Sawant J, in the leading majority judgment, could see no reason why the issue of repugnancy should not be decided by using the test of "pith and substance". Indeed, he thought it "illogical" not to do so:[103]

> If it is open to resolve the conflict between two entries in different Lists … by examining the dominant purpose and therefore the pith and substance of the two legislations, there is no reason why the repugnancy between the provisions of the two legislations under

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"true principle applicable" was pith and substance, not repugnancy; the surcharge was valid because in pith and substance it fell within entry 54 in the State List ("Taxes on the sale or purchase of goods …") . His judgment includes a major restatement (at 1033-037, 1040) of the whole "pith and substance" doctrine.

100. Sometimes, of course, what might be seen as an issue of repugnancy can legitimately be resolved by using the "pith and substance" of competing *statutes* to draw a line between legislative *powers*. Thus, in *Krishna Bhimrao Deshpande* v. *Land Tribunal, Dharwad*, AIR 1993 SC 883, a state law granting occupancy rights to agricultural tenants was upheld despite its possible conflict with central legislation imposing a ceiling on urban land, since (at 891) this was said to be "a distinct and independent subject … [i]t cannot be said that the pith and substance of the law governing the conferment of ownership of land on the tenant is a law regulating the imposition of ceiling on land holding. Equally it cannot be said that the pith and substance of the law imposing the ceiling on land holding covers the subject of conferring ownership of land on the tenant. These are two distinct powers and therefore the law making competence can be in two different legislative bodies."

101. See, e.g., *I.T.C. Ltd.* v. *State of Karnataka*, 1985 SCR Supp (1) 145. At 165, Varadarajan J held that because the Parliament had "covered the field", the "pith and substance" test had no application. At 169, Fazal Ali J saw it as relevant, but only where the state law "falls entirely" within an entry in list II. At 111, Sabyasachi Mukharji J appeared to regard the "pith and substance" rules as a subset of rules relating to "repugnancy".

102. AIR 1990 SC 2072.

103. AIR 1990 SC at 2085-86. He acknowledged earlier comments to the contrary (in *Meghraj* v. *Allahrakhiya*, AIR 1942 FC 27, affirmed by the Privy Council, AIR 1947 PC 60), but found them inconclusive. He did not, however, refer to *Hoechst Pharmaceuticals*. Ranganath Misra J (at 2079) did refer to *Hoechst Pharmaceuticals*, but not on this point; he reached the same result as Sawant J without relying on "pith and substance".

> different entries in the same list, *viz.* the Concurrent List, should not be resolved by scrutinizing the same by the same touchstone … In both cases the cause of conflict is the apparent identity of the subject matters. The tests for resolving it therefore cannot be different.

Ramaswamy J, who held in dissent that there *was* a repugnancy, dissented on this question also. He insisted that the "pith and substance" test could have:[104]

> [N]o application when the matter in question is covered by an entry or entries in the Concurrent List and has occupied the same field both in the Union and the State law … The question of incidental or ancillary encroachment or to trench into forbidden field does not arise. The determination of its "true nature and character" also is immaterial.

Ramswamy J was, of course, right. As recently as 2004 the Supreme Court appeared to have accepted an argument "that in pith and substance the State Act is not repugnant to the Central Acts as the two sets of Acts operate in different fields".[105] The case involved a decision by the State of Assam to take over the construction of a hydro-electric project, while providing for compensation to the company formerly involved. The company argued that legislation to implementing that decision wasa invalid, on the ground that it was repugnant to the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. The Supreme Court found no such repugnancy because "the true nature and character of the impugned State Act is to acquire the undertaking and pay compensation", while the Central Acts " made general provisions with regard to supply and use of electrical energy". On analysis, however, the implication that "pith and substance" can resolve a repugnancy issue is misleading. The judgment *says* that because of the "pith and substance" of the state Act there is no repugnancy; but what is actually being held is that the Act falls in "pith and substance" outside the scope of the concurrent list, so that no issue of repugnancy arises.

Rights and freedoms

It also seems now to be settled that the test of "pith and substance" has no role to play in assessing the impact of legislation on constitutional

104. AIR 1990 SC at 2110. Both judges spoke of "pith and substance" as a purposive test: see Sawant J at 2086, 2087, and Ramaswamy J at 2109-110.

105. *Bharat Hydro Power Corporation Ltd.* v. *State of Assam*, AIR 2004 SC 3173.

rights and freedoms. A brief initial exchange on this question[106] in relation to article 301 of the Constitution – which guarantees freedom of "trade, commerce and intercourse throughout the territory of India" – was followed in the 1970s by more heated debate in relation to statutes alleged to infringe the fundamental rights guaranteed by part III of the Constitution. What was happening was that the court was moving away from a narrow and legalistic approach to part III, as initially laid down in May 1950 in *A.K. Gopalan* v. *State of Madras*,[107] to a much more dynamic approach. *Gopalan* had assumed that in any case where fundamental rights were invoked, the court should begin by examining the impugned legislation to determine *which* of the fundamental rights was involved. The assumption was that the various articles in part III were separate and self-contained, rather like the separate entries in lists I, II, and III – so that, once it was seen which right was in issue, any other rights were irrelevant. It was Bhagwati J, in *Maneka Gandhi* v. *Union of India*,[108] who first suggested that this approach in *Gopalan* was analogous to the "pith and substance" approach to the entries in lists I, II and III.

Before this, there had been a preliminary skirmish in *Bennett Coleman & Co.* v. *Union of India*[109] – where the argument for the government had tried to assimilate "pith and substance" to the American doctrine that "a sufficiently important governmental interest" can justify "incidental limitations" on freedom of speech.[110] In response to that argument the court had held that notions of "pith and substance" and "incidental effect" are "irrelevant to the question of infringement of fundamental rights": their proper role is confined to "questions of legislative competence", where the issue is whether legislation "falls under one Entry while incidentally encroaching upon another Entry".[111] Only Mathew J, in his dissenting judgment, invoked the ambiguous passage from Lord Porter's advice in the Australian *Bank Nationalization* case[112] to argue that "pith and substance"

106. The relevance of "pith and substance" was assumed by S.R. Das CJ in *State of Bombay* v. *R.M.D. Chamarbaugwala*, AIR 1957 SC 699, but denied by the majority judgment of Gajendragadkar J in *Atiabari Tea Co. Ltd.* v. *State of Assam*, AIR 1961 SC 232 at 256, and again denied by the dissenting judgment of Hidayatullah J in *Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406, at 1460. But see *Khoday Distilleries* v. *State of Karnataka*, 1995 SCC (1) 574, para 24.

107. AIR 1950 SC 27.

108. AIR 1978 SC 597.

109. AIR 1973 SC 106.

110. *United States* v. *O'Brien*, 391 US 367 at 376-77 (1968).

111. AIR 1973 SC at 119, 120.

112. As quoted in part I at *supra* note 16.

might be relevant in deciding whether the interference with freedom of speech was "essentially regulatory in character".[113]

More importantly, the analysis in *A.K. Gopalan* had already been heavily criticised in *R.C. Cooper* v. *Union of India*[114] – the Indian *Bank Nationalisation* case – where the court insisted that cases involving fundamental rights must be governed "not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights". The majority judgments in *R.C. Cooper* did not refer directly to "pith and substance";[115] but they did enable Bhagwati J to conclude in *Maneka Gandhi* that the rejected doctrine focusing on the "object and form" of state action was "in substance and reality nothing else than the test of pith and substance", transposed from its proper sphere of operation in relation to "conflict of legislative powers … with reference to legislative Lists", and used instead as a test for infringement of fundamental rights.[116] This transposed "pith and substance" test was said to have worked by asking the question:[117]

> [W]hat is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right.

The fact that Mathew J had referred to "pith and substance" in his dissenting judgment in *Bennett Coleman* was seen as confirming that the *Gopalan* approach was simply a version of "pith and substance". As for the majority judgment in *Bennett Coleman*, Bhagwati J thought that the "pith and substance theory" had there been "negatived in the clearest terms".[118] In saying this he relied in particular on the following passage from *Bennett Coleman*:[119]

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113. AIR 1973 SC 136.

114. AIR 1970 SC 564.

115. Only the dissenting judgment of A.N. Ray J did so, and then only for the orthodox purpose of holding that since the impugned law fell in pith and substance within the entries relating to banking in the union list (entry 45), and to acquisition of property in the concurrent list (entry 42), its validity could not be affected by any incidental encroachment on "trade and commerce within the State" (entry 26 of List II).

116. AIR 1978 SC 633.

117. *Id.* at 633-34.

118. *Id.* at 634-35.

119. AIR 1973 SC 119.

> Mr. Palkhivala said that the tests of pith and substance of the subject matter and of direct and incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach.

Yet Kailasam J, effectively dissenting in *Maneka Gandhi*, saw this identical passage (which he wrongly ascribed to *R.C. Cooper*) as making it "clear that the test of pith and substance of the subject-matter and of direct and incidental effect of legislation is relevant in considering the question of infringement of fundamental right". Insofar as "pith and substance" was rejected in *Bennett Coleman*, he thought this was only because, since the impact on freedom of expression was "direct", there was no need to apply the doctrine of pith and substance".[120] He therefore continued to insist that the issue in *Maneka Gandhi* (which involved the impounding of a passport) was simply an issue about personal liberty under article 21. So long as the procedural requirements of article 21 were satisfied:[121]

> If incidentally the Act infringes on the rights of a citizen under Art. 19(1) the Act cannot be found to be invalid. The pith and substance rule will have to be applied and unless the rights are directly affected, the challenge will fail.

In short, he applied exactly the test which Bhagwati J thought was excluded.

In *Bachan Singh* v. *State of Punjab*,[122] which in spite of earlier doubts[123] reaffirmed the constitutional validity of capital punishment, the majority judgment delivered by Sarkaria J emphatically reaffirmed that *R.C. Cooper* and *Maneka Gandhi* had *not* done away with the approach in *A.K. Gopalan's* case, which he now described as "the 'test of direct and indirect effect, sometimes described as form and object test' or 'pith and substance rule'".[124] Instead, Sarkaria J offered what he called "a comprehensive test", essentially combining the *Gopalan* approach (expressed in terms of "pith and substance") with the *R.C. Cooper* approach in terms of "direct operation".[125] In a passionate dissent almost three years later,[126] Bhagwati J felt "constrained" to express his "respectful dissent":[127]

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120. AIR 1978 SC 684.
121. *Id.* at 685.
122. AIR 1980 SC 898.
123. See A.R. Blackshield, "Capital Punishment in India" 21 *JILI* 137 (1979).
124. AIR 1980 SC 912.
125. *Id.* at 915.
126. *Bachan Singh* v. *State of Punjab*, AIR 1982 SC 1325.
127. AIR 1982 SC at 1389, 1391.

> I cannot look with equanimity on this attempt to resuscitate the obsolete "form and object test" or "pith and substance rule" which was evolved in *A.K. Gopalan's* case and which for a considerable number of years dwarfed the growth and development of fundamental rights and cut down their operational amplitude …
>
> It is sufficient for me to state that the "object and form test" or the "pith and substance rule" has been completely discarded by the decisions in *R.C. Cooper's* case and *Maneka Gandhi's* case and it is now settled law that in order to locate the fundamental right violated by a statute, the court must consider what is the direct and inevitable consequence of the statute. The impugned statute may in its direct and inevitable effect invade more than one fundamental right and merely because it satisfies the requirement of one fundamental right, it is not freed from the obligation to meet the challenge of another applicable fundamental right.

On this issue, as on the dynamic approach to fundamental rights in general, the view of Bhagwati J now appears to command general acceptance.

Form and substance

The expression "pith and substance" uses its two component terms as a doublet,[128] essentially conjoining what are in effect alternative synonyms for the "essence" or "core" of a law. The equally common expression "form and substance" uses its two components as opposites, usually with the implication that an emphasis on "form" is dysfunctionally artificial and legalistic, so that attention to "substance" should be preferred.[129] In India the expression "pith and substance" has sometimes been used to express just this contrast – that is, to denote an attention to considerations of substance rather than form.

Frequently what is involved in such cases is attention to the practical operation of a statute rather than to its language. For example, when the validity of a land reform statute in Rajasthan appeared to depend on whether what it did to jagidari lands was an "acquisition" (which would be valid) or

128. Such doublets (e.g. "will and testament") occur very frequently in English legal usage, often reflecting their common law origins by combining an Ango-Saxon word ("will") with one of French or Latin origin ("testament"). The coupling of Anglo-Saxon "pith" with Latin "substance" is itself an example.

129. See, e.g., Sir Anthony Mason, "Form and Substance", in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* 282-84 (2001); P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (1991).

a "resumption" (which was the language used in the operative provisions of the legislation and also in its title), the Supreme Court ignored the language of the statute and analysed its actual legal operation to conclude that it was more accurately described as "acquisition" rather than "resumption".[130]

Here it would be worthwhile to suggest that many cases involving the validity of taxation also fall into this category. Indeed, such cases involve the distinction between "form" and "substance" in a double sense. In the first sense, the *form* of judicial decision will often involve using a "pith and substance" approach for the central orthodox purpose of deciding whether the taxing *statute* falls within an entry on the state list, or one on the union list; but the *substance* of the decision will involve a close analysis of the actual incidents and effects *of the tax*. In the second sense, this close attention *to the tax* will depend on its practical operation and effect as a matter of economic reality, not of mere legal form.

A good example is the *Indian Aluminium* case,[131] where the court had to decide which of two entries in the state list formed the basis for a surcharge on electricity: Entry 27, relating in part to the "supply and distribution of goods", or entry 53 ("Taxes on the consumption or sale of electricity"). Although both the title of the Act and its operative provisions had described the surcharge as a duty on "supply" (thus attracting entry 27), the court held that it was "in pith and substance … a tax on sale or consumption of electrical energy", and thus within entry 53. Here again, though the focus was on the fields of legislative power, the use of "pith and substance" was really directed to ascertaining the nature of the tax – and to doing so by reference to its actual incidence and legal operation, regardless of the language used to impose it.

The same appears to be true of several other cases involving taxes. In one case[132] a tax on urban land imposed under entry 49 in the state list ("Taxes on lands and buildings") was held to entail not even an incidental encroachment on the central government's levying of "taxes on … capital" under entry 86 in the union list, because "[t]he basis of taxation under the two entries is quite distinct". A capital tax is imposed on the "net wealth" of the individual taxpayer, not on any particular components or assets; it "bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee". By contrast, a tax on lands and buildings is imposed on those units directly, regardless of "interest or ownership".[133] Conversely, a tax in the States of Haryana and Maharashtra

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

131. *Indian Aluminium Co*. v. *State of Kerala*, AIR 1996 SC 1431.

132. *Assistant Commissioner of Urban Land Tax, Madras* v. *Buckingham & Carnatic Co. Ltd*., AIR 1970 SC 169.

133. AIR 1970 SC 175.

was held to be invalid[134] because, though purporting to be a simple purchase tax (and thus within entry 54 of list II), it was actually a tax on manufactured goods despatched to a place of business outside the state (and therefore within entry 92B of list I, as inserted by the 46th Amendment in 1982). And in yet another case, [135] involving a charge of two rupees for bringing a car into a drive-in theatre, a tax on that charge was held to be a "tax on entertainments", and therefore within the power of the state under entry 62 of list II, even though it was described in the Act as "payment for admission of a motor vehicle".

A number of cases have been concerned with the characterisation of the kind of tax described in India as a "cess". For those of us from outside India, that is an unfamiliar word. It was used historically in Scotland and Ireland to identify a variety of special taxes, usually related to land, with the proceeds usually directed to creating a fund for some particular government purpose. [136] Apparently the word was short for "assessment". But it seems to be only in India that the word is still in use. Often what in India are referred to as "cess taxes" are elsewhere referred to as "rates".

A common question is whether a particular "cess" should be classified as a tax or a fee. The difference was explained by Gajendragadkar J in the *Hingir-Rampur Coal* case:[137]

> Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are

134. *Goodyear India Ltd.* v. *State of Haryana*, AIR 1990 SC 781. Again the court insisted (at 797, 805) "that the nomenclature of the Act is not conclusive", quoting Lord Simonds in *Governor-General in Council* v. *Province of Madras*, (1945) LR 72 Ind App 91, AIR 1945 PC 98: "it is not the name of the tax, but its real nature, 'its pith and substance', … which must determine into what category it falls". See also *Pandit Ram Narain* v. *State of Uttar Pradesh*, AIR 1957 SC 18 and *Sainik Motors, Jodhpur* v. *State of Rajasthan*, AIR 1961 SC 1480 at 1484.

135. *State of Karnataka* v. *Drive-in Enterprises*, AIR 2001 SC 1328. Again the court held (at 1333) that the language did not matter, since "[i]n pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance the levy under heading 'admission of vehicle' is a levy on entertainment and not on admission of vehicle."

136. See *Guruswamy & Co.* v. *State of Mysore*, AIR 1967 SC 1512 at 1525.

137. *Hingir-Rampur Coal Co. Ltd.* v. *State of Orissa*, AIR 1961 SC 459 at 464. A similar distinction is drawn in Australia: see, e.g., *Air Caledonie International* v. *Commonwealth*, (1988) 165 CLR 462; *Airservices Australia* v. *Canadian Airlines International Ltd.*, (1999) 202 CLR 133.

> rendered to a specific area or to a specific class of person or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee.

At issue in the *Hingir-Rampur* case was the cess imposed under the Orissa Mining Areas Development Fund Act, 1952. The fund was used to provide infrastructure (water, electrcity and the like) "for the better development of any area in the State of Orissa wherein any mine is situated", or to provide for the welfare of workers or residents in any such area. It was financed by a cess imposed on mine owners and calculated by reference to the valuation of minerals at the pit mouth. The majority, in a judgment delivered by Gajendragadkar J, held that this was a fee; in dissent Wanchoo J held that it was a duty of excise, and therefore a tax. According to the majority:[138]

> [T]he cess is levied … to enable the State Government to render specific services … by developing the notified mineral area. There is an element of quid pro quo in the scheme, the cess collected is constituted into a specific fund and it has not become a part of the consolidated [revenue] fund, its application is regulated by a statute and is confined to its purposes, and there is a definite co-relation between the impost and the purpose of the Act which is to render service to the notified area.

That being so, "the mere fact that … the rate of the levy [was determined] by reference to the minerals produced by the mines would not by itself make the levy a duty of excise".[139] By contrast, for Wanchoo J, "if in its pith and substance it is not essentially different from a tax it cannot be converted into a fee" by crediting the proceeds to a special fund "and attaching some services to be rendered through that fund":[140]

> [T]he very mode of the levy of the cess is nothing other than the levy of a duty of excise and therefore the principle of quantification for purposes of a fee cannot be extended to such an extent as to convert what is in pith and substance a tax into a fee on that basis.

Once again, the essential issue was not one of resolving a conflict between entries in the legislative lists, but rather one of analysing the attributes of the exaction to see whether it was more accurately classified as an excise or a fee for services.

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138. AIR 1961 SC at 467-68.
139. *Id.* at 469.
140. AIR 1961 SC at 476, 477.

There was, however, another issue which did involve a competition between entries in the legislative lists. The State of Orissa supported its legislation by relying on Entry 23 in List II:

> 23. Regulation of mines and mineral development, subject to the provisions of List I with respect to regulation and development under the control of the Union.

The petitioners based their argument rather on Entries 52 and 54 in List I:

> 52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
>
> 54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

But whether the two entries in list I would operate to preclude the state from relying on entry 23 in list II was dependent on whether Parliament had made the relevant declaration of expediency; and the court could find no such declaration. The nearest approach was the IDR Act,[141] which, as well as "Fermentation industries" and sugar, also extended to coal; but the majority used "pith and substance" to hold that there was no competition between the Orissa legislation and the IDR Act, since they occupied different fields:[142]

> [I]n pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly with the control of all industries including of course the industry of coal … [Its] real purpose and object … is to increase the efficiency or productivity in the scheduled industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically … [Its] objects include the promotion of scientific and industrial research, of improvements in design and quality, and the provision for the training of technicians and labour in such industry or group of industries. It would thus be seen that the object of the Act is to regulate the scheduled industries with a

141. That is the Industries (Development and Regulation) Act, 1951, discussed in part 1 at notes 68-70.

142. AIR 1961 SC 473.

> view to improvement and development of the service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by … this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act.

As in many of the cases considered earlier,[143] the rubric was that of "pith and substance" but the real emphasis was on legislative purpose.

In several other cases on cess, what looms in the background is the power of the central government to assume control of "industries" under entry 52, or of "mines and mineral development" under entry 54. Sometimes the focus is on the IDR Act, sometimes on the Mines and Minerals (Regulation and Development) Act, 1957 ("the MMRD Act"). But, of course, the question cannot arise unless it is possible to find an entry in list II to which the "pith and substance" of the state legislation can be assigned, and that is not always possible. In *India Cement Ltd.* v. *State of Tamil Nadu*[144] the state had imposed a cess tax on the royalties payable under a mining lease. It sought to defend the tax by relying on entry 45 in list II ("Land revenue, including the assessment and collection of revenue …"), and in 1964 had sought to bolster this argument by amending its legislation to include an elaborate definition of "Land revenue", framed in such a way as to include the cess tax on royalties. But the Supreme Court was not convinced by this strategy. It held that in entry 45 the words "Land revenue" had a specific meaning derived from the exactions made in previous centuries of Indian history by Rajput and Moghul rulers; and in any event here the tax was not on the land, but on the royalties, which at most could be regarded as a form on income from land.[145] For similar reasons, it was also not covered by entry 49 ("Taxes on land and buildings"), because here the tax was not on the land, but on income arising from land. Finally, the tax could not be valid under entry 50 ("Taxes on mineral rights"), because that entry is expressed to be "subject to any limitations imposed by Parliament by law relating to mineral development". Here the tax on the royalty would effectively add to the amount of the royalty, and by section 9 of the MMRD Act the central government had effectively claimed an

143. At *supra* notes 32-42 above.

144. AIR 1990 SC 85.

145. Incidentally, and probably through a typing error, a misprint in the judgment (AIR 1990 SC at 96) appeared to assert "that royalty is a tax". This led to much debate on whether a royalty could indeed be classed as a tax, whether in that event a tax on a royalty would be a tax on a tax, and whether a tax on a tax was possible. The issue was finally clarified in *State of West Bengal* v. *Kesoram Industries Ltd*., AIR 2005 SC 1646 at 1680-84.

exclusive power "to enhance or reduce the rate … [of] royalty" – so that, even if a tax on royalties could be characterised as a tax on mineral rights, the state would have no power to impose it.

A differently-constituted bench reached a similar result in *Orissa Cement Ltd* v. *State of Orissa*,[146] again involving a cess tax on royalties for mining operations. Again the crucial issues related to entries 49 and 50. As to entry 49, the court again held that a tax on royalties cannot be characterised as a tax on land. "Pith and substance" was used to answer the question: "[W]hat is it that is really being taxed by the Legislature?"[147] In other words, in this case too, "pith and substance" was used not so much to characterise *the statute* by reference to the relevant entry, but rather to determine the precise nature *of the tax*, and to do so by reference to considerations of substance rather than of form:[148]

> [T]he true and real impact of the cess is only on the royalties … It is not the form or the statutory machinery that matters; one has to look at the real substance and the true impact of the levy.

As to "Taxes on mineral rights" under entry 50, the court again held that resort to that entry was precluded by the MMRD Act. This time, however, the court emphasised that the precise scope of the central government's assumption of control under entry 52 or 54 must be carefully scrutinised, to ensure that state legislative power is "eroded" only to that precise extent. Control by the union "does not divest the State Legislature of the competence to make laws the pith and substance of which fall within the entries in List II."[149]

In *State of Bihar* v. *Indian Aluminium Company*[150] the issue was revisited in a different form. A tax called the Bihar Restoration and Improvement of Degraded Forest Land Tax was imposed on occupiers using forest land for non-forest purposes, and in particular on "every occupier responsible for creating void/voids by indulging in any developmental activities including mining". The word "void" was defined to mean:

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146. AIR 1991 SC 1676. The effect of the two decisions was partly negated by the Cess and Other Minerals (Validation) Act, 1992, though ultimately its only effect was a retrospective bar to recovery of taxes already paid.

147. AIR 1991 SC 1699.

148. AIR 1991 SC at 1696, following *Buxa Dooars Tea Co*. v. *State of West Bengal*, AIR 1989 SC 2015, where a cess imposed "in respect of tea estates" was held to be "in fact", or to have "the essential substance" of, a levy on despatches of tea, and thus to infringe the freedom of trade and commerce under Art. 301.

149. *Supra* note 47 at 1701, applying *Ishwari Khetan Sugar Mills* v. *State of Uttar Pradesh*, AIR 1980 SC 1955.

150. AIR 1997 SC 3592.

> [A]ny area of left over forest land from where soil, any mineral or rock or ore or anything being fastened with the earth has been removed for non-forest purpose, transported or dumped at a place other than the place from where the same was taken.

Despite its environmental credentials, the tax was attacked as yet another attempt to impose a state tax on mining, and the Supreme Court essentially agreed:[151]

> In the instant case the tax is, in effect, being levied not on land but on the absence of land. The levy is on the void which has been created. The forest land which is being used is not subjected to tax … The tax is levied in effect on the activity of the removal or excavation of land. In other words the tax is squarely on the activity of mining because it is under the mining lease that mechanized and non-mechanized excavation as well as underground excavation takes place … Levy in other words is on the activity of removal of earth and not on the land itself and is, therefore, outside the ambit of Entry 49 of List II …
>
> It is with reference to the extent of the empty space or the void which has been created as a result of the mining activity that the tax is levied. Tax, in effect, is levied on the absence of land and not on land itself. At the most this may be regarded as a tax in respect of land but it is certainly not a tax on land.

Finally, it is to be noted that in 2004,[152] the court considered the validity under entry 49 of a wide range of taxes (including a road cess, a public works cess, and an education cess), as imposed on specific categories of land (including, in particular, coal-bearing land and tea estates). All of these taxes were held to be valid under entry 49 as "Taxes on lands". In particular, the court approved of earlier decisions permitting the classification of "lands" for taxation purposes into separate categories such as "coal-bearing lands" or "tea estates". [153]

In the course of an exhaustive review and restatement of the earlier cases, Lahoti J made frequent reference to the doctrine of "pith and substance". Those cases which had failed to mention the doctrine were

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151. *Id.* at 3599, 3600.

152. *State of West Bengal* v. *Kesoram Industries Ltd*., AIR 2005 SC 1646.

153. *Id.* at 1676-77, 1699. In particular, the court approved *Goodricke Group Ltd*. v. *State of West Bengal*, 1995 Suppl (1) SCC 707, which in *State of Bihar* v. *Indian Aluminium Company* had been distinguished. In *Goodricke*, education cess and rural employment cess were upheld as taxes on "land" although "tea estates" were taxed as a separate category, with the rate of tax determined by reference to the quantity of tea despatched.

criticised on that account,[154] and at least one of them[155] was overruled. In Lahoti J's own comprehensive restatements of the applicable principles, he continued to affirm the importance of the "pith and substance" test in cases of "conflict", "overlapping" or "clash" between entries in list I and list II; or "to find out whether between two Entries assigned to two different legislatures the particular subject of the legislation falls within the ambit of the one or the other".[156] Yet his own reasoning seemed rather to depend on a series of structural devices designed to avoid any "overlapping" or "clash", and thus to remove any need for resort to the "pith and substance" test at all. For instance, he insisted that before any question of "pith and substance" arises, "[t]he Entries in List I and List II must be so construed as to avoid any conflict".[157] He argued that there is a sharp and systematic division between those entries in the lists that deal with "general subjects of legislation" and those that deal with taxation: between these two categories there is no overlapping, and the "general" subjects" cannot be construed as containing an "ancillary" tax power.[158] Moreover, in the allocation to lists I and II of the entries relating to taxation (as distinct from those relating to "general subjects of legislation"):[159]

> The Constitution effects a complete separation of the taxing power of the union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States* …
>
> As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law.

He also insisted that in relation to tax legislation there is a special need for the judiciary to "adopt a pragmatic approach" of "judicial self-restraint if not judicial deference";[160] that the "measure" by which a tax is computed cannot be decisive of its "essential character", though "it may

154. *Id.* at 1696-97.

155. *State of Orissa* v. *Mahanadi Coalfields Ltd.*, AIR 1995 SC 1868.

156. *Supra* note 152 at 1674, 1685, 1700.

157. *Id.* at 1700.

158. *Id.* at 1673, 1692-93. He also drew a related distinction (at 1680, 1693-96) between "power to regulate and control" and "power to tax", so that an assumption of the former kind of power on behalf of the centre ought not to exclude the exercise of the latter kind of power by the states. Cf *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar*, AIR 1983 SC 1019 at 1043-44.

159. *Supra* note 152 at 1673, 1700 (emphasis in original).

160. *Id.* at 1674.

throw light on [its] general character";[161] and that the declarations envisaged by entries 52 and 54 of list I, by which the central government assumes control of "industries" or "mines and mineral development", must be strictly construed so that the degree of control is circumscribed both by the terms of the declaration, and by the terms of entries 52 and 54 themselves.[162] Accordingly, central legislation like the IDR Act or the MMRD Act:[163]

> [W]ould not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration … In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible.

And although he acknowledged the centripetal nature of Indian federalism, he even suggested that the courts might react against the tendency of the centre to consume "the lion's share of revenue" by leaning in favour of the states where their revenue powers were in issue.[164]

The dissenting judgment of Sinha J rejected most of these strategies.[165] In particular, he rejected the idea that interpretation should "lean in favour of the States".[166] And while he, too, found a place in his exposition for the doctrine of "pith and substance", his conception of it seemed rather idiosyncratic. For example, he apparently thought it applicable not to the case where a single statute appears to attract alternative characterisations, but rather to a conflict between two statutes, one from a state and one from

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161. *Id.* at 1675. See *Associated Cement Companies Ltd.* v. *State of Andhra Pradesh*, AIR 2006 SC 928.

162. That is, the declaration must be for the "control of industries" in entry 52 and "for regulation of mines or for mineral development" in entry 54; and assumption of central control must be "expedient in the public interest".

163. *Supra* note 152 at 1701. Note that among the various entries in list II relating to taxation, only entry 50 ("Taxes on mineral rights") contains the words "subject to".

164. *Id.* at 1678-79.

165. For example, the judge thought (at 1759) that *Goodricke Group Ltd.* v. *State of West Bengal* should be overruled. As to the idea that "general subjects of legislation" will not normally include a power to tax, see his comments at 1733; as to the distinction between the "nature" of a tax and the "measure" by which it is computed, see his comments at 1759.

166. *Supra* note 152 at 1726. Indeed, he thought that, given the "importance of coal and tea" and their "immediate and direct bearing on the economic development of the country", entries 52 and 54 must be construed broadly.

the Parliament.[167] As we have seen, the more orthodox view is that this situation should be tested by reference to repugnancy, rather than pith and substance. Again, the orthodox view would be that in order to determine whether an enactment falls within a particular entry, it is the "pith and substance" *of the enactment* that has to be determined. By contrast, Sinha J spoke as if it is "the true nature and character *of the legislative competence*"[168] that the "pith and substance" test is used to determine. In another passage he contrasted the situation where an entry in list II is "subject to" an entry in list I, with the situation where "there is no apparent conflict between an entry in list II and one in list I";[169] but in each situation his interest was apparently focused on a conflict between two pieces of legislation, one from a state and one from the Parliament. In the former case he thought that the question would be whether the central Act had "covered the field"; in the latter case,

> [I]f it is possible to determine that the parameters of the State Legislation and the Central Legislation are distinct and different, a broader meaning to one Entry or the other may be given having regard to the "pith and substance" doctrine.

But precisely what this means is unclear: on the orthodox view, if the parameters are "clear and distinct" so that no question of conflict or overlap arises, there would be no occasion for "pith and substance" to have any operation at all.

Finally, having held that the central government had "taken over the complete control of the entire field" of tea and coal, so that "the State must be held to be denuded of its power to levy any tax on coal or tea", Sinha J added that in that situation, "even if the doctrine of pith and substance is applied, it may not be possible to hold that the State legislature has only incidentally encroached upon the legislative field occupied by the Parliament". Yet surely what would be impossible in such a situation such a holding would be any application of the "pith and substance" doctrine at all. Perhaps Sinha J's judgment only goes to show that what may be meant by "pith and substance" is infinitely malleable.

Characterisation revisited

Finally, there may sometimes be cases where the characterisation of

167. For example, at 1725 the judge spoke of the question "whether both the Acts can stand together or not", and of "whether both the legislations covering the field can stand together".

168. *Supra* note 152 at 1725 (emphasis added).

169. *Id.* at 1730.

impugned legislation does not depend on a choice between entries in lists of areas of legislative power, but does depend on a choice so directly analogous that resort to a "pith and substance" test is clearly legitimate. For example, it has been seen that under entry 66 of list I, the union Parliament has exclusive responsibility for "co-ordination and determination of standards in institutions of higher education". The kind of provision that might fall within this description was tested in 2002[170] in relation to the National Council for Teacher Education Act, 1993. Section 17 of the Act provided for recognised teachers' colleges to have their recognition withdrawn, and sub-section (4) provided that, in that event:

> [T]he qualification in teacher education obtained pursuant to such course … or after undertaking a course or training in such institution, shall not be treated as a valid qualification for purposes of employment under the Central Government, any State Government or University, or in any school, college or other educational body aided by the Central Government or any State Government.

It was argued that the "pith and substance" of this provision related to employment, and particularly to employment by a state government, a matter which under article 309 of the Constitution is one for "the appropriate legislature". But the court had no difficulty in seeing the provision as an integral part of legislation whose pith and substance was "co-ordination and determination of standards".

Now, the choice here was not between an entry in the union list and an entry in the state list, but between (on the one hand) an entry in the Union List (namely entry 66), and (on the other hand) the general principle spelled out in article 309 that recruitment and conditions of employment in the public service "of the Union or of any State" may be regulated by "the appropriate Legislature". The difference from the usual situation of choice between entries in different legislative lists was such that the court felt it necessary to stipulate[171] that "[t]he doctrine of 'pith and substance' has to be applied not only in case of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made". Yet it would have been more accurate to say that this *was* a case "of conflict between the powers of two legislatures" – the power of the union under entry 66 of list I, and the power accruing to each of the States by virtue of article 309.

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170. *Union of India* v. *Shah Goverdhan L. Kabra Teachers College*, AIR 2002 SC 3675.

171. *Id.* at 3678.

Another example, historically of far more importance, is *Sajjan Singh* v. *State of Rajasthan*.[172] In that case the "pith and substance" doctrine was used not to assign state legislation to one or another of the lists in the seventh schedule, but rather to determine whether the 17th amendment to the Constitution fell within one or another branch of article 368 – which allows amendments to the Constitution simply by Act of Parliament, subject to a special majority.[173] For certain specified parts of the Constitution, a proviso to article 368 imposes an additional requirement: the amendment must be ratified by at least half of the state legislatures. The provisions attracting this additional safeguard may be described as "entrenched". They include chapter IV of part V, which deals in particular with the Supreme Court; and chapter V of part VI, which deals with the high courts in the states. Included in this latter chapter is article 226, which gives the high courts an extensive power to issue constitutional writs[174] "for the enforcement of any of the rights conferred by part III and for any other purpose". But the fundamental rights conferred by part III are not themselves among the "entrenched" provisions.

Now, most of the early amendments to the Constitution, including the 17th amendment in 1964, were concerned to ensure the validity of agrarian reform legislation. To this end they repeatedly amended the fundamental rights, especially the right to property.[175] They were passed by the two-thirds majority required by the main part of article 368, but did not involve the state ratifications required by the proviso. Yet, by changing the fundamental rights, they significantly altered the basis for high court jurisdiction under article 226. Did this mean that they should have been ratified by the states? In *Sajjan Singh* Gajendragadkar CJ invoked "pith and substance" to hold that no ratification was needed. The "pith and substance" of the amendments was the protection of "agrarian and social welfare legislation"; they were introduced "solely with the object of removing any possible obstacle in the fulfilment of the socioeconomic policy in which the party in power believes". The impact on the high courts' jurisdiction

172. AIR 1965 SC 845.

173. Two-thirds of those present and voting in each House, which must also be a simple majority of the total membership of that House.

174. That is, "writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them". In English usage these were traditionally referred to as "prerogative writs", since they were issued by superior courts in the name of the King, as a notional exercise of the royal prerogative. In Australia they are now referred to as "constitutional writs": *Re Refugee Tribunal; Ex parte Aala*, (2000) 204 CLR 82 at 92-93, 133-34.

175. Originally included in Art. 31, but eventually (by the 44th Amendment, 1978) omitted altogether.

was both "incidental" and "insignificant".[176]

It happened that shortly after this decision the author made a second visit to India, and was full of praise for the tone of the Chief Justice's reasoning. He cannot do better than to repeat what he then wrote:[177]

> Obviously, a solution so worded might have been the merest legalism. But the Chief Justice … made it clear that it was not … [He introduced] a series of flexible terms … in which the scope for judicial responsiveness to the real needs of the situation before the Court in each case was made unmistakable. Thus he was concerned to exclude the possibility "that even *substantial* modification of the fundamental rights which *may* make a *very serious and substantial* inroad on the powers of the High Courts under Article 226 can be made without invoking the proviso". Wherever the "*direct effect*" of a part III amendment is "to make a *substantial* inroad" on article 226, "it would *become necessary to consider* whether" the proviso is attracted or not. And even where the effect of a part III amendment upon article 226 "is *indirect*, *incidental*, or otherwise of an *insignificant* order," his actual holding is only a cautious "it *may be*" that the proviso will not apply. Future courts are here provided with an admirably flexible instrument for the disposition of all such cases as justice and social contructiveness require.

This, then, is an uncontroversial case. Despite its distinctive textual basis, it falls essentially into the category of cases where "pith and substance" is used to resolve a choice between alternative characterisations, and thereby to determine validity. And, as in the more typical cases considered in part I of this paper, the "pith and substance" approach introduces a welcome element of flexibility into what might otherwise have been a legalistic and mechanical exercise. As the author has also noted years ago in the course of his response to *Sajjan Singh*, his criticism of judicial resort to the language of "pith and substance":[178]

> [G]oes only to the self-deceptive habit of assuming that the phrase "pith and substance"is a kind of magical touchstone yielding automatic precise answers for a virtually infinite range of constitutional problems. If on the other hand the phrase is merely

176. AIR 1965 SC 853.

177. A.R. Blackshield, "'Fundamental Rights' and the Institutional Viability of the Indian Supreme Court" 8 *JILI* 139 at 151 (1966). The italics were the author's.

178. Id. at 150. The phrases in quotation marks are from the judgment of Gajendragadkar CJ in *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845, at 855.

> a convenient shorthand expression for the idea that statutes scrutinized for constitutionality should be read in a non-stringent and non-legalistic way, in an impressionistic or "prudential" attempt to capture their underlying "spirit" or "drive" or "purpose", this is harmless and may even be a useful reminder of the "dynamic" fluctuations in the "shape and appearance" of the judicial task… Yet, of course, "pith and substance" thus understood makes easy mechanical answers less attainable, rather than more so.

Particularly in those cases where the "pith and substance" of legislation is ascertained by reference to legislative purpose, the Supreme Court of India has shown that what may sometimes be a dead metaphor can also be a dynamic tool.